



Lalo & 227 others v Kahia Transporters Limited; Cabinet Secretary, Ministry of Lands & Physical Planning & 5 others (Affected Party) (Civil Appeal (Application) E078 of 2022) [2022] KECA 1375 (KLR) (16 December 2022) (Ruling)

Neutral citation: [2022] KECA 1375 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) E078 OF 2022
SG KAIRU, JW LESSIT & GV ODUNGA, JJA
DECEMBER 16, 2022**

BETWEEN

LALO LUGWE LALO & 227 OTHERS APPLICANT

AND

KAHIA TRANSPORTERS LIMITED RESPONDENT

AND

**CABINET SECRETARY, MINISTRY OF LANDS & PHYSICAL
PLANNING AFFECTED PARTY**

CHIEF LAND REGISTRAR AFFECTED PARTY

LAND REGISTRAR, KWALE AFFECTED PARTY

DIRECTOR OF LAND ADJUDICATION & SETTLEMENT . AFFECTED PARTY

DIRECTOR OF SURVEY KENYA AFFECTED PARTY

NDEGWA MENZA KATEMBO & 1,157 OTHERS AFFECTED PARTY

(An application for stay of proceedings in ELC Petition No. 2 of 2022 (formerly Mombasa ELC Petition No. 11 of 2022) pending the hearing and determination of this application and of this appeal)

RULING

1. In an application dated March 17, 2022 presented before the Environment and Land Court at Mombasa, the applicants/appellants applied to be joined as interested parties in ELC Petition No. 11 of 2022. In the same application, the applicants applied to have orders that had been issued by that court on March 15, 2022 to be suspended or stayed and for the same to be declared null and void for having



- been procured fraudulently on account of having allegedly been based on a forged lease and certificate of title. Also sought in the same application was a prayer that the application by the respondent (the petitioner before the ELC) dated March 15, 2022 be heard by the ELC in Kwale which was apparently dealing with a petition relating to the same property.
2. In a rather lengthy ruling delivered on July 18, 2022, the ELC (L. Naikuni, J.) made the following orders: it declared that it has jurisdiction to hear and determine the broad issues in the petition which are not on the land adjudication process of Maji ya Chumvi Adjudication Section; it declined to set aside, vary or review orders it had granted on March 15, 2022 as the application for review lacked merit; it ordered the applicants to be joined as parties in the petition; it directed the petitioner to amend the main petition and to serve the applicants with all the pleadings in the petition within 14 days; it ordered the matter to be heard by adduction of viva voce evidence on the 6th of October 2022 with leave to parties to file and serve relevant documents they intended to rely on during the hearing within 21 days.
 3. The applicants are aggrieved by that ruling and have instituted this appeal within which they have moved the Court by motion presently before us dated August 31, 2022 invoking Rule 5(2)(b) of the [Court of Appeal Rule](#) to have the proceedings before the ELC stayed pending the determination of their appeal.
 4. We heard learned counsel on the application on the 2nd of November 2022. Mr. Kinyua Kamunde appeared for the applicants. Mr. Mogaka appeared for the respondent. Mrs. Waswa appeared for the 1st to 5th affected parties. While Mr. Asige appeared for the 6th affected party made up of 1158 persons.
 5. In a bid to demonstrate that the applicants' appeal is arguable, Mr. Kinyua Kamundi for the applicants urged that the learned Judge made errors, among which are that: the Judge erred in terming the applicants as strangers and in failing to have regard to earlier orders of the court made on April 4, 2022 by which the applicants had been enjoined in the petition; the Judge failed to appreciate that the applicants' rights to fair trial and access to justice was not dependent on joinder; that having declared that the court had no jurisdiction over adjudication process in Maji ya Chumvi Adjudication Section, the Judge erred in holding that the prayer to set aside the ex parte orders given on March 15, 2022 lacked merit; and that orders having been made to transfer the petition to the ELC at Kwale, the Judge erred in fixing the petition for hearing.
 6. Mr. Mogaka for the respondent was joined by Mr. Asige for the 6th affected party in submitting that the appeal is not arguable. Reference was made to a replying affidavit sworn by Osman Ahmed Kahia, a director of the respondent and to the respondent's written submissions. It was submitted that no sufficient cause has been shown why proceedings in the ELC should be stayed; and that there will be no prejudice in those proceedings going on. The case of *Kenya Commercial Bank Ltd v Benjob Amalgamated Ltd & another*, Civil application No 50 of 2001 was cited.
 7. When the time came for Mrs. Waswa to address the court, she had dropped off from the platform. Mr Kamundi held her brief and indicated that she was supporting the application.
 8. The principles on which the court exercises its discretion in applications of this nature are established and well summarized in [Stanley Kangethe Kinyanjui v Tony Ketter and 5 others](#) [2013] eKLR. Having considered the rival arguments, and bearing in mind that an arguable appeal is not one that will necessarily succeed but one that is worth of the court's consideration, and mindful also that a single arguable point suffices, we are persuaded, having regard to the grounds of appeal articulated by Mr Kamundi as set out above, that the appeal is not frivolous. It is arguable.
 9. As to whether the appeal will be rendered nugatory, we bear in mind, as stated by the court in [Lucy Njoki Waithaka v Tribunal Appointed to Investigate the Conduct of the Hon Lady Justice Lucy Njoki](#)



Waitbaka and another [2020] eKLR, that stay of proceedings is a serious, grave and fundamental judicial action which interferes with the right of any party to conduct litigation. The court in that case adopted with approval pronouncement by Ringera, J in *Global Tours & Travels Limited*; Nairobi Winding Up Cause No 43 of 2000 where the Judge stated that:

“...whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal in the sense of whether or not the intended appeal will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

10. In the present case, in addition to the statement by the applicants in the application that the “appeal will be rendered nugatory should the learned judge continue to exercise jurisdiction he has already found he does not have”, counsel for the applicants submitted that the Judge is forcing the applicants to participate in the petition; that there are only five plots alleged to encroach on the respondent’s plot yet there are over 400 plots whose owners are being forced to participate in the proceedings. Apart from the consideration that it is the applicants who moved the ELC to be joined in the petition, it seems to us that the matters raised are matters for consideration on merits before the ELC. Furthermore, it has not been shown what prejudice the applicants will suffer if the proceedings before the ELC are not stayed which cannot be made good by an order of costs should the appeal ultimately succeed. We are not satisfied that the applicants have demonstrated that the appeal will be rendered nugatory unless the order of stay of proceedings of the ELC is granted.

11. Consequently, the application dated August 31, 2022

DATED AND DELIVERED AT MOMBASA THIS 16TH DAY OF DECEMBER 2022

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G.V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

