



**IN THE COURT OF APPEAL**

**AT MALINDI**

**(CORAM: OUKO (P), KARANJA & GATEMBU, J.J.A)**

**CIVIL APPLICATION NO. 98 OF 2019**

**BETWEEN**

**MERRY BEACH LIMITED.....APPLICANT**

**AND**

**EXEMPLER DEVELOPMENT LIMITED.....1ST RESPONDENT**

**FRANSESCO.....2ND RESPONDENT**

**SILVESTRI MARCO.....3RD RESPONDENT**

**SAMMY MLANDA.....4TH RESPONDENT**

**MLANDA CONSTRUCTION LIMITED.....5TH RESPONDENT**

**GIUSEPPINA CINQUE.....6TH RESPONDENT**

**WILSON MWAMBIRE MWADUNA.....7TH RESPONDENT**

*(An application against the ruling and orders of the Environment and Land Court*

*at Malindi (Olola, J.) dated 16th October, 2019*

*in*

*ELC Petition No. 5 of 2011)*

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**RULING OF THE COURT**

1. Before this Court is an application pronounced to be brought under **Rule 5(2)(b)** of this Court’s Rules seeking in the main an order as follows:-

“... ”

**3. THAT upon inter-parte hearing, the orders issued on the 16th day of October, 2019 and all proceedings in Malindi HCC No. 52 of 2007 be stayed pending the hearing and determination of the appeal herein.”**

2. The orders sought, as shown above are rather ambiguous. However, a close perusal of the application in its entirety as appears on record reveals a Notice of appeal citing that the applicant herein is dissatisfied with the ruling and orders of the Environment and Land Court (ELC) (Olola, J.) dated 16th October, 2019 and wishes to appeal to this Court against the same.

3. In essence, it could be presumed that the applicant is seeking to stay execution of the said ruling and order. Nonetheless, from the grounds

on the face of the application and the supporting affidavit, it would appear that the applicant is seeking stay of proceedings. We do not have the benefit of referring to the said order to confirm what it was all about. Nor are we able to tell the nature of the proceedings we are being asked to stay.

4. Certainly, this Court has unfettered discretion under **Rule 5(2)(b)** to grant an order of stay. The principles guiding its exercise of such discretion are now old hat. That is, that the applicant has an arguable appeal, and secondly that the appeal will be rendered nugatory if an injunction and stay of proceedings are not granted. (See: **Stanley Kangethe Kinyanjui v. Tony Ketter & 5 others [2013] eKLR**).

5. Even without going into the substance of the instant application, it is already clear that inspite of the applicant having filed a Notice of appeal, thus invoking this Court's jurisdiction, the application is intrinsically fatally defective as the applicant has not laid out any basis for this Court to determine whether it is deserving of orders for stay. It is only from the impugned decision that this Court can determine; whether the applicant was aggrieved, the subject matter of the appeal and the need to preserve the same, and whether the intended appeal raises arguable points.

6. We may also point out that the proceedings we are being asked to stay took place in 2017 and it is doubtful whether the prayers sought are still relevant. Going by the material placed before us, the only option we have is to dismiss this application for lack of merit, which we hereby do with no order as to costs.

**DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF APRIL, 2021.**

**W. OUKO, (P)**

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**JUDGE OF APPEAL**

**W. KARANJA**

.....

**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**