



**IN THE COURT OF APPEAL**

**AT MALINDI**

**CIVIL APPLICATION NO. E24 OF 2021**

**(CORAM: OKWENGU, GATEMBU & J. MOHAMMED, J.J.A)**

**BETWEEN**

**PETER KAZUNGU KALAMA.....1<sup>ST</sup> APPLICANT**

**ALBERT KALAMA NZARO.....2<sup>ND</sup> APPLICANT**

**AND**

**JUSTINE KAZUNGU**

(Suing on his own behalf and on behalf of the Estate of

**BAYA MWANYULE JEFA alias BAYA YAA).....1<sup>ST</sup> RESPONDENT**

**THE LAND REGISTRAR KILIFI.....2<sup>ND</sup> RESPONDENT**

*(Being an application for stay of execution of the Judgment and Decree arising from Environment and Land Court at Malindi (J. O. Olola, J.) delivered on 29th January, 2021*

*in*

*ELC No. 206 of 2014)*

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**RULING OF THE COURT**

[1] On 29th January, 2021 the Environment and Land Court (ELC) (**Olola, J**) delivered a judgment in which he allowed the claim for Justine Kazungu suing on his behalf and on behalf of **Baya Mwanyule Jefa alias Baya Yaa** (1st respondent). The substantive orders issued in the judgment included: a permanent injunction restraining **Albert Kalama Nzaro (Albert)**, and **Peter Kazungu Kalama (Peter)**, their servants, agents or employees from selling, taking possession or in any manner dealing with Plot No. 146/Kilifi/Kadzonzo/Madzimbani (**suit property**); and an order that Albert delivers to the 1st respondent and the Land Registrar (2nd respondent), the title deed for the suit property issued on 8th August, 2013, for the Land Registrar to cancel the title. The learned Judge also dismissed a counter claim that had been lodged by Peter, in which he sought an order for vacant possession and damages against the 1st respondent, claiming that the deceased had trespassed on the suit property.

[2] Albert and Peter who were dissatisfied with the judgment lodged a notice of appeal on 15th February, 2021. By a notice of motion dated 9th March, 2021, brought under section 3A & 3B of the Appellate Jurisdiction Act, and Rules 5(2)(b) of the Court of Appeal Rules, Albert and Peter have moved this Court for an order staying execution of the judgment delivered on 29th January, 2021 as well as further proceedings in **Malindi ELC No. 206 of 2014**, pending the hearing and determination of their intended appeal.

[3] The application was supported by an affidavit sworn by Peter, in which he maintains that they have an arguable appeal and that unless the orders sought are granted, they may be evicted from the suit property which is their only home, and that their intended appeal will be rendered nugatory, if the suit property is transferred to the 1st respondent or sold to a third party.

[4] In a replying affidavit sworn by Justine Kazungu Baya, the 1st respondent opposes the applicants' motion contending that there is no

cause for alarm as he cannot execute the judgment without taxation, and that in any case the applicants have not demonstrated that they have been in occupation of the suit property, or that they have a home thereon. The 1st respondent contends that the applicants' motion is an abuse of the Court process as there is a similar application pending before the trial court.

[5] Due to the Covid-19 pandemic, hearing of the motion was scheduled to proceed by way of written submissions without the presence of the parties. Both the applicants and the 1st respondent filed written submissions. The applicants complained that they were not served with a notice informing them of the date for delivery of the judgment. They faulted the judgment submitting that they have an appeal that raises arguable issues such as the limitation period; the effect of change in land tenure; the finality of land adjudication exercise in ascertainment of rights and interests regarding land; and whether declaratory and injunctive orders can be issued in an action which is not a judicial review. The applicants urge that if the orders sought are not granted, the appeal will be rendered nugatory as the applicants who have their home on the suit property and live there with their families are not likely to recover the suit property as it may be sold to a third party.

[6] For the 1st respondent, it was observed that the appeal raises triable issues as discerned from the draft memorandum of appeal. However, it was argued that the grounds in the memorandum are frivolous, and that the applicants' suit was not defeated by limitation; that the grounds relating to the issue of adjudication was not triable as the same was dismissed by the court.

[7] On the nugatory aspect, it was submitted that the 1st respondent has not yet filed his bill of costs, nor obtained a certificate of costs; that the applicants have not demonstrated that they are in occupation of the suit property; nor has the 1st respondent filed any application for eviction. It was submitted that there was no appeal as the notice of appeal was filed out of time and without leave of Court, and therefore the Court lacks jurisdiction to grant the orders sought.

[8] Finally, it was submitted that there was an application for stay of execution pending before the trial judge, and therefore the matter was *sub judice*; that the application before us raising the same issue was a waste of judicial time; and that if entertained, the application has a possibility of leading to conflicting outcomes.

[9] We have considered the motion before us, the replying affidavit and the written submissions. It is trite that in an application brought under Rule 5(2)(b) of the Court Rules, an applicant must satisfy the twin requirements, which are, that the appeal is arguable and not frivolous, and that if the orders sought are not granted, the appeal would be rendered nugatory. (See **Multimedia University & Anor vs Prof. Gitile N. Naituli [2014] eKLR**; **Chembe Katana Changi vs The Minister for Lands & Settlement & 4 Others [2015] eKLR**).

[10] In regard to arguability, the applicants have provided a draft memorandum of appeal in which they have set out 11 grounds. As was stated in **Kenya Tea Growers Association & Anor vs Kenya Plantation & Agricultural Workers Union [2012] eKLR**, at least one ground that raises an arguable issue is sufficient. The ground does not necessarily have to be one that must succeed, but must be one that is not frivolous but capable of argument. From the memorandum of appeal, the issue of limitation stands out as an issue that is not frivolous, but one capable of argument. There is also the issue regarding the impact and legality of the adjudication alleged to have been declared in 2007. We are therefore satisfied that the applicants have met the threshold with regard to arguability.

[11] As concerns the nugatory aspect, the dispute herein concerns the suit property in regard to which orders have been made by the learned Judge that includes cancellation of title and issuance of a new title to the 1st respondent. It is evident that unless the orders sought are granted, and title is issued to the 1st respondent, the 1st respondent will be at liberty to deal with the land and the possibility of the suit property being disposed of is not farfetched. Should this happen, the applicants will not be able to have access to the suit property, even if successful in the appeal.

[12] We come to the conclusion that the applicants have satisfied the twin conditions of granting stay orders under Rule 5(2)(b) of the Court Rules and accordingly, we allow the application and issue orders of stay of execution of the judgment delivered on 29th January, 2021 and stay of further proceedings in Malindi ELC No. 206 of 2014 pending the hearing and final determination of the applicants' intended appeal.

**DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF JUNE, 2021.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU (FCIArb.)**

.....

**JUDGE OF APPEAL**

**J. MOHAMMED**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**