



**General v Musembi & 4 others (Civil Application 046 & E 045
(Consolidated) of 2021) [2021] KECA 125 (KLR) (5 November 2021) (Ruling)**

Neutral citation: [2021] KECA 125 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION 046 & E 045 (CONSOLIDATED) OF 2021
A MBOGHOLI-MSAGHA, SG KAIRU & P NYAMWEYA, JJA
NOVEMBER 5, 2021**

BETWEEN

ATTORNEY GENERAL APPELLANT

AND

MARIAM MUENI MUSEMBI 1ST RESPONDENT

TIMOTHY MUCHINA CHEGE 2ND RESPONDENT

ROSE KAVITHA MWIVITHI 3RD RESPONDENT

J N MWIVITHI 4TH RESPONDENT

TIMOTHY MUCHINA CHEGE 5TH RESPONDENT

(Being an application for stay of pending lodging, hearing and determination of the appeal from the Environment and land court at Malindi (Hon. Mr. J.O. Olola) delivered on 30th April, 2021 in Malindi Environment and Land Case No. 102 and 107 of 2008)

RULING

1. The application in Civil Application No. E046 of 2021 is interrelated with that in Civil Application No. E045 of 2021, in that the applicant is the same, and represents the Principal Secretary of the Ministry of Lands in both applications, albeit against different respondents. The applicant also seeks the same order as against the different respondents, who are represented by the same counsel in both applications. Lastly, the two applications emanate from similar orders granted by the Environment and Land Court on 30th April 2021 in two suits, namely Malindi Civil Suit No. 102 of 2008 and Malindi Civil Suit No. 107 of 2008.
2. During the hearing of the applications, the counsel for the applicant and respondents agreed that the two applications be argued together, and that the lead file shall be that of Civil Application No. E046 of 2021. Further, that the ruling therefrom shall apply to Civil Application No. E045 of 2021.



3. The respondents hold a decree in their favour which has not been satisfied in full. They had obtained an order of mandamus against the Principal Secretary in the Environment and Land Court, followed by issuance of an order that the said Principal Secretary appears in person to show cause why he should not be arrested and committed for violating the said order. It is not disputed that part of the decree has been satisfied but which leaves a substantial part thereof due and payable.
4. On 30th April, 2021 the Environment and Land Court ordered that summons do issue to the said Principal Secretary in person, to appear and show cause why he should not be punished by way of imprisonment for failing to comply with the orders of the court. Following imminent threats in the execution of that order, the applicant brought this application stating, inter alia, that the applicant has filed an appeal to challenge the said order on the basis that the appeal is arguable and that if the order is not granted the appeal shall be rendered nugatory.
5. This being an application for stay, it behoves the applicant to demonstrate that the appeal is arguable and that if the order is not granted the appeal shall be rendered nugatory. See *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others (2013) e KLR*.
For the applicant to succeed the two limbs must be satisfied.
6. An arguable appeal is not one that will necessarily succeed, but deserving the courts' consideration. On the other hand, the principle that an appeal may be rendered nugatory is where, unless the Court grants the order of stay, and the intended appeal is successful, the harm done may not be reversed and that damages may not be adequate to compensate the aggrieved party.
7. We have perused the proceedings before the Environment and Land Court, and the draft Memorandum of Appeal annexed to this application and marked PM 6. The Memorandum of Appeal raises one ground, namely that the court did not consider that part of the decretal sum had already been paid to the decree holders. Without going into the merits of the intended appeal, we are persuaded that the applicant has an arguable appeal. The applicants have not denied that part of the decretal sum has already been paid.
8. The official position of the Principal Secretary in the Ministry and attendant responsibilities has elaborately been set out in the application. If the Principal Secretary were to be punished as contemplated in the application, his official duties shall be compromised to the detriment of many innocent parties. Further, his personal freedom shall also be compromised as he will have been condemned unheard. In that regard therefore, the appeal shall be rendered nugatory if the order is not given.
9. In view of the foregoing, the application for stay succeeds in favour of the applicant. We accordingly grant a stay of execution of the order and ruling of the Environment and Land Court in Malindi Civil Suit No.102 of 2008 dated 30th April 2021, and stay further proceedings therein pending the lodging, hearing and determination of the applicant's intended appeal. The costs of the applications shall abide by the outcome of the appeal.
10. This decision shall apply mutatis mutandis to Civil Application No. E045 of 2021.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 5TH DAY OF NOVEMBER 2021.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL



A. MBOGHOLI MSAGHA

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JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

