



**Mangi & 2 others v Mwinyikai & 7 others (Civil Application  
71 of 2020) [2021] KECA 202 (KLR) (5 November 2021) (Ruling)**

Neutral citation: [2021] KECA 202 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION 71 OF 2020  
W KARANJA, J MOHAMMED & JW LESSIT, JJA  
NOVEMBER 5, 2021**

**BETWEEN**

**SAFARI MWERI MANGI ..... 1<sup>ST</sup> APPLICANT  
PETER MWERI MANGI ..... 2<sup>ND</sup> APPLICANT  
CORNEL L. SHISANYA ..... 3<sup>RD</sup> APPLICANT**

**AND**

**ESTATE OF HAMISI MWINYIKAI RAMADHAN ALIAS KHAMISI  
MWINYIKAI (DECEASED) ..... 1<sup>ST</sup> RESPONDENT  
SULEIMAN KHAMISI MWINYIKAI ..... 2<sup>ND</sup> RESPONDENT  
MAYAM MWINYIKAI ..... 3<sup>RD</sup> RESPONDENT  
MASIKA KHAMISI MWINYIKAI ..... 4<sup>TH</sup> RESPONDENT  
PHINEAS ERNEST WOLFFER ..... 5<sup>TH</sup> RESPONDENT  
HASSAN HUSSEIN ..... 6<sup>TH</sup> RESPONDENT  
NATIONAL LAND COMMISSION ..... 7<sup>TH</sup> RESPONDENT  
CHIEF LAND REGISTRAR MOMBASA ..... 8<sup>TH</sup> RESPONDENT**

*(An application for stay of execution of the Ruling and the proceedings of the Environment and Land Court at Mombasa (S. Munyao, J.) delivered on 30th July, 2020 pending the hearing and determination of the intended appeal in ELC Case No. 68 of 2020 (O.S.))*

**RULING**

1. Safari Mweri Mangi, Peter Mweri Mangi and Cornel L. Shisanya (1st, 2nd and 3rd applicants respectively) were the plaintiffs in Mombasa Environment and Land Court (ELC) Case No. 68 of



2020 (OS) in which they had sued the eight respondents herein over property known as LR 4314/1/MN (the suit property) which they are claiming by way of adverse possession. Contemporaneously, they filed an application seeking, inter alia, orders of temporary injunction against the respondents, their servants, agents and others to stop them from further constructing, fencing, building, destroying vegetation and trees planted thereon, from selling alienating or dealing in any way with the suit property.

2. The Originating Summons as well as the notice of motion were opposed. The court (Sila Munyao, J.) after hearing the application inter partes, for reasons given in the Ruling dated 30th July, 2020 found that the applicants had failed to demonstrate a prima facie case with a probability of success. Accordingly, the learned Judge dismissed the application and directed that the suit proceeds for hearing “without the benefit of an injunction”.
3. The applicants have now moved to this Court under Certificate of Urgency seeking stay of execution of the said Ruling and the proceedings in ELC No. 68 of 2020 (OS) pending hearing and determination of this application and the intended appeal.
4. Among the grounds raised on the face of the application is that the respondents have filed no defence in the main suit, and that the applicants herein have established a prima facie case with probability of success.
5. There were no replying affidavits filed in opposition to the application but learned counsel for the 1st to 4th respondents filed submissions in which he has raised factual issues. According to learned counsel, the application for stay was filed after inordinate delay, it having been filed on 11th September, 2020 while the impugned Ruling was delivered on 30th July, 2020.
6. Counsel posited that the applicants have not demonstrated a prima facie case with a probability of success as the suit property has already been subdivided and sold to third parties. He urged us to dismiss the application.
7. Unfortunately, the issues raised in the submissions, factual as they are could only be raised by way of replying affidavits duly sworn by the respondents. The submissions detailing issues of fact, we must say, were of no help at all to the Court.
8. That said, we have scrutinised the application before us and all the annexures thereto. We note that there is no Notice of Appeal among the said annexures. There is no deposition in the supporting affidavit either to the effect that the applicants herein filed a notice of appeal against the impugned Ruling.
9. Although there is a document on record titled “Memorandum of Appeal” the same is not dated or signed nor does it bear any court stamp to demonstrate that it was ever filed at the registry as required. Clearly therefore, there is no Notice of Appeal and this is a direct contravention of Rule 75 of the Rules of this Court.
10. This Court derives its jurisdiction to entertain applications under Rule 5(2)(b) of the *Court of Appeal Rules* from a Notice of Appeal filed in accordance with Rule 75 of the Rules of this Court as provided hereunder:-

“5. (1)...

2. Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may —

a. ...



b. In any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75 , order a stay of execution,\*an injunction or a stay of any further proceedings on such terms as the Court may think just.”\*\*  
(Emphasis supplied)

Without evidence of such Notice of Appeal having been filed, this Court is bereft of jurisdiction to entertain this application. See [Safaricom Limited vs Oceanview Beach Hotel Limited & 2 Others \[2010\] eKLR.](#)

11. In view of this important mis-step by the applicants, there is only one logical conclusion that we can come to; that is, that the application before us is incompetent and is doomed to be struck out.
12. Accordingly, this application is hereby struck out with no order as to costs.

**DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF NOVEMBER, 2021.**

**W. KARANJA**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

**J. LESIIT**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

