IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CIVIL APPLICATION NO. 7 OF 2015

BETWEEN

CHEMBE KATANA CHANGI ……..…… APPLICANT

AND

1. **MINISTER FOR LANDS & SETTLEMENT**
2. **THE DIRECTOR OF LAND ADJUDICATION & SETTLEMENT**
3. **JAMES M.MBAJI**
4. **THE ATTORNEY GENERAL**
5. **THE CHIEF LAND REGISTRAR ……..…… RESPONDENTS**

(Being an Application for stay of execution and injunction pending the hearing and determination of appeal from the judgment and Decree in the High Court of Kenya at Malindi (Meoli, J.) dated 10th June, 2014

in

CIVIL APPEAL . No. 9 and 12 of 2002)

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RULING OF THE COURT

The applicant has come before us vide an application dated 6th March, 2015 seeking orders of stay of execution as well as injunctive reliefs against the respondents, to restrain them jointly and severally from utilizing and/ or dealing with plot Nos. 803 and 891 Mikahani/ Mawemabomu/ Chonyi Adjudication section *("the suit premises")* pending the hearing and determination of the intended appeal. The premise for these prayers is that the applicant claims to be the owner of the suit premises situate in the former Kilifi District, having inherited the same from his clan. As the description of the suit premises suggests, they were subject to adjudication under the ***Land Adjudication Act*** *("the Act").* In the course of the adjudication process, there arose a dispute that came in three phases. In the first phase, Mwangolo Nyaachi Mbata ("*Mwangolo*"), claimed to be entitled to Plot No. 803, while Mbaji Mumba Maruu ("*Mbaji"),* deceased and Hamisi Mbaji Mumba *(Hamisi)* contended to be the owners of Plot No. 891.

The trio made their claims known before the Land Adjudication Committee, which heard and resolved the same in favour of the applicant, thus awarding him the suit premises.

Dissatisfied with the Committee's decision, Mbaji and Hamisi lodged an appeal with the Land Adjudication Board with respect to Plot 891. During the pendency of the appeal, Mbaji passed on, leaving his son Hamisi at the helm of the matter. Nonetheless, he fared no better in this second phase of the dispute, as the appeal was heard and dismissed, with the Board upholding the Committee's decision.

At this point, Hamisi appears to have resolved to begin the objection process all over again, this time donning a different hat. In this third phase of the dispute, he abandoned his claim to Plot 891 and instead lodged an objection with the Land Adjudication Officer with respect to Plot 803. This objection too, failed, with the applicant once again retaining ownership to the parcel.

Simultaneously with the appeal on Plot 891, the late Mbaji had filed yet another appeal this time with the Minister for Lands (*"1st respondent")* in respect of both Plot No. 803 and a portion of Plot 891. His demise came during the pendency of this appeal and his son James M. Mbaji (*"the 3rd respondent")* was made administrator of his estate. As such administrator, the 3rd respondent successfully pursued this appeal against the applicant, as a result of which the 3rd respondent was awarded Plot No 803 and the disputed portion in Plot No 891. Aggrieved, the applicant felt that the proceedings before the Minister were irregular and a nullity as the 3rd respondent had never been privy to any of the earlier proceedings and with this in mind, filed Malindi High Court Civil Suit No 29 of 2006; seeking to nullify the said proceedings as well as stop the consequences thereof. All the respondents herein were joined in the said suit as co- defendants.

However, only the 3rd respondent defended the suit. In the course of trial, the said 3rd respondent raised an objection on the ground that the suit as against the 1st, 2nd, 4th and 5th respondents was time barred under ***Section 16*** of the ***Government Proceedings Act***. This objection was sustained by **Ouko, J**. (as he then was) and the names of the said respondents were removed from the proceedings. It is instructive that no appeal was filed in respect of that order. This left the applicant and the 3rd respondent as the only participants in the suit.

In arguing his case before the High Court, the applicant contended that the appeal proceedings conducted before the 1st respondent at the instigation of the 3rd respondent were a nullity as the 3rd respondent was never a party to the earlier proceedings before the Land Adjudication Officer and/ or the Land Adjudication Committee in respect of the suit premises. As a result, the consequential orders given in favour of the 3rd respondent could not hold as he lacked the *locus standi* to initiate that appeal. Consequently, the applicant sought an order declaring the exercise a nullity as well as an injunction restraining the implementation of the Minister's decision.

In response, the 3rd respondent opposed the claim urging the court to hold that the suit was bad in law, as it purported to secure prerogative orders through the back door under the guise of injunctive relief.

Meoli J, who heard the suit agreed with the respondent and deemed the suit unmerited and proceeded to dismiss it with costs on that basis. In agreeing with the 3rd respondent, the learned Judge saw the applicant's claim as a crafty attempt at securing prerogative orders of *certiorari* and prohibition under the cloak of declaratory and injunctive orders. Secondly, that given the conclusive dispute resolution mechanism laid out under the Act, the court had no jurisdiction in the matter and thirdly, that given the fact that the limitation period had expired in respect of the rest of the respondents save for the 3rd respondent, it would be unsustainable to grant the orders sought.

The applicant, being desirous of lodging an appeal in this court against the said decision, filed a notice of appeal and thereafter brought this application seeking a temporary injunction to restrain the respondents from dealing in the suit premises as well as an order of stay of execution of the Minister's decision pending the hearing and determination of the intended appeal. The application was predicated upon ***Rules***

5 (2) (b), 42 (1) (2) and 49 (1) of this Court's Rules.

Given that the application was unopposed, as the 3rd respondent neither filed documents in opposition to the application nor attended during the interpartes hearing, the hearing thereof proceeded *ex parte*. Before the hearing, we drew the attention of counsel for the applicant that **Ouko, JA** had previously handled an aspect of this dispute in the High Court and sought confirmation whether he had any objection with the application being heard by the bench as constituted. Learned counsel confirmed that the applicant had no objection and we accordingly directed the hearing of the application to proceed. In a bid to demonstrate the arguability of the appeal, ***Mr. Tindika,*** learned counsel for the applicant submitted that the ownership of the suit premises was an arguable point; that since the 3rd respondent had not participated in the objection proceedings in respect of the suit premises, his subsequent appeal to the Minister-through which he ostensibly secured ownership of the same- was a nullity. Counsel further submitted that a move to implement the decision of the Minister is in the offing and that if this is allowed, then should the appeal succeed, the same shall be rendered nugatory, as the suit premises will be out of the applicant's reach. It was counsel's view that since this application was unopposed, nothing stood in the way of the grant of the orders sought.

In our view, the supposition by counsel that the orders sought can issue automatically given the lack of opposition by the respondent is incorrect. This is because, even in the absence of an objection from the 3rd respondent, the applicant must nonetheless show that he has met the threshold required under ***Rule 5(2) (b)*** of the ***Court of Appeal Rules***, in order to warrant the grant of the orders. That is to say, he must demonstrate that he has an arguable appeal and that should the orders sought not be granted, the appeal shall be rendered nugatory if it is successful. This he must do, the absence of opposition notwithstanding. This Court is thus beholden to satisfy itself that the applicant has met this threshold.

That said, it is trite law that this Court's jurisdiction under rule 5(2) (b) of the Court of Appeal Rules is original, independent and discretionary. *(See* ***Githunguri v. Jimba Credit Corporation Ltd No. (2) [1988] KLR 88).*** As such, the Court is empowered to entertain an interlocutory application for preservation of the subject matter of the appeal or intended appeal. *(See* ***Equity Bank Ltd v. West Link NBO Civil Application No.78 of 2011 (UR****).*

The conditions to be met before a party can obtain relief under ***rule 5(2) (b)*** have been provided by common law. We reiterate, the applicant has to demonstrate, first, that the appeal or intended appeal is arguable. By arguable, it does not mean that an appeal or intended appeal must succeed. It only needs to have a bona fide issue worthy of consideration by the Court. *(See* ***Kenya Tea Growers Association & another v. Kenya Planters Agricultural Workers Union, Civil Application No. NAI 72 of 2001 (UR).*** **Thus, arguability does not connote success of the appeal, it will suffice if there are justifiable grounds that warrant interrogation by the Court.** ***(see. Kwench Limited v. Kwench Limited and 2 others [2014] eklr).***

In view of the foregoing, has the applicant established an arguable appeal? A cursory look at the defence as filed reveals that both Hamisi and the 3rd respondent are sons to Mbaji (deceased). This was never controverted. It is not in dispute that the applicant had initiated proceedings before the Land Adjudication Committee in respect of Plot no. 891 against the said Mbaji and won. It is also common ground that Mbaji was dissatisfied with this outcome and he, together with his son Hamisi, filed appeal No. 1 of 1985-86 before the Land Arbitration Board in respect of the said parcel. Further, that during the pendency of the said appeal, Mbaji passed on, leaving his son Hamisi to proceed with the matter with the same ultimately terminating in favour of the applicant. In the same spirit, it is also common ground that following his father's demise, the said Hamisi also preferred objection proceedings against the applicant before the Land Adjudication Officer in respect of Plot No 803 and lost. The cumulative outcome in all these matters was what gave rise to the 3rd respondent's impugned appeal with the 1st respondent.

Accordingly, what appears to be in dispute is whether the 3rd respondent had *locus standi* to appeal to the 1st respondent in respect of the two lost claims aforementioned. As per the application, the substratum of the applicant's intended appeal to this Court is that the 3rd respondent lacked such *locus* to mount the

appeal before the 1st respondent since he was never a party to the initial proceedings before the Land Adjudication Committee and/or the Land Arbitration Board. That by extension, the resultant decision by the 1st respondent was null and that the learned Judge in the superior court below erred in failing to hold as much.

There is an elaborate dispute resolution mechanism laid out under the Land Adjudication Act. Of particular importance is that according to ***Section 29*** of the Act, the last line of recourse under this process is an appeal to the Minister, for the time being responsible for Land, whose decision is final. This is an established position in law *see*. ***Nicholas Njeru v. A-G & 8 Others [2013] eklr).*** The Act even addresses the question of *locus standi*. Indeed **Section 29** of the Act and **regulation 4(1)** thereunder appear to allude to the possibility that even a person who was not involved in previous proceedings can bring an appeal before the Minister. Given the foregoing we doubt whether the question of *locus standi* can turn the intended appeal into an arguable appeal. It would appear that beyond the Minister's order, neither this Court nor the superior court below has the jurisdiction to entertain the issue further, save on a judicial review application, which was not the case herein. Again considering that 1st, 2nd, 4th and 5th respondents have been removed from the proceedings, how efficacious will the judgment of the 3rd respondent only be? That being the case, there can be no likelihood of an arguable appeal and without the possibility of an arguable appeal there can be no risk of the same being rendered nugatory. Both limbs (arguability of appeal and its possibility of being rendered nugatory) must be demonstrated to exist before one can obtain relief under ***rule 5(2) (b)*** of the Rules *(See.* ***Republic v. Kenya Anti-Corruption Commission & 2 others [2009] KLR 31***

It thus follows that the application must fail. It is accordingly dismissed with no order as to costs.

Dated and delivered at Malindi this 3rd day of July 2015.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W.OUKO

…..……..……

JUDGE OF APPEAL

K.M'INOTI

…….……..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR