



**Brookshill Limited & another v County Government of Kwale & 3 others;
Mwadzugwe & 2 others (Interested Parties) (Environment & Land Petition
25 of 2021) [2024] KEELC 5829 (KLR) (15 August 2024) (Ruling)**

Neutral citation: [2024] KEELC 5829 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND PETITION 25 OF 2021**

**AE DENA, J
AUGUST 15, 2024**

BETWEEN

BROOKSHILL LIMITED 1ST PETITIONER

ASHBROOK LIMITED 2ND PETITIONER

AND

THE COUNTY GOVERNMENT OF KWALE 1ST RESPONDENT

THE NATIONAL LAND COMMISSION 2ND RESPONDENT

THE CHIEF LAND REGISTRAR 3RD RESPONDENT

THE HON ATTORNEY GENERAL 4TH RESPONDENT

AND

SULEIMAN ALI MWADZUGWE INTERESTED PARTY

SALIM HUSSEIN OMAR INTERESTED PARTY

HATIBU MJAKA MTENGO INTERESTED PARTY

RULING

1 The application the subject of this ruling is dated July 3, 2024. The application seeks the following orders

1. Spent
2. Spent



3. This court be pleased to extend the limited stay of execution issued by the court on June 20, 2024 pending the hearing and determination of Mombasa Court of Appeal Civil Application No 072 of 2024 Ashbrook Limited & Brookshill Limited v County Government of Kwale & others .
 4. In the alternative to prayer 2 and 3 above the Honourable court be pleased to extend the interim orders issued on 20th June 2024 for a period of 90 days from 4th June 2024.
 5. Costs.
2. The application is premised on the grounds on its face and the Supporting Affidavit sworn by Niraj Shah a shareholder of the applicant. The grounds are reiterated in the affidavit. It is averred that the applicant has filed an application dated 24th June 2024 before the Court of Appeal seeking orders of injunction pending appeal to preserve the suit property herein and to stop the eviction of the applicants pending the determination of the said appeal. That following the delivery of judgement in the Petition, the Petitioners filed an application dated 21/02/24 before this court for injunction against the Respondents restricting them from demolishing the Petitioners structures pending the hearing of the intended appeal which the court allowed on 20/6/24 in the interim. That however the said application was dismissed on the basis that there was a similar application before the Court of Appeal but made an order of status quo for 14 days within which the Petitioners were to file an application before the appellate court.
 3. It is averred that the application before the Court of Appeal has been certified urgent and directions issued on its disposal which the applicant has complied. However, the hearing of the application is dependent upon the Court of Appeal diary necessitating the present application. According to the applicant the court allocates dates based on the date of filing, hearing notices for applications filed in the month of July have not been received. That the court will be proceeding for the August vacation and it was likely the application will be heard in September 2024 when the new term begins. That if the orders herein are not granted the Respondents were likely to restart the eviction and demolishment as well as disposing the property which had earlier been stopped by this court, rendering the appeal nugatory.
 4. The application is opposed by the 1st Respondent through grounds of opposition dated 5th July 2024. It is stated that the application is frivolous and an abuse of the court process. That no stay order was granted by the court on 20/6/24 and if any was granted the same has not been extracted. The order is non-existent and which cannot be extended. That there can be no stay since there is nothing to execute from the ruling of 20/6/24 which merely dismissed the application dated 21/02/24. That the only avenue available to the Applicant is to appeal the ruling delivered on 20/6/24. That the applicant was forum shopping approaching this court after it had failed to secure orders at the Court of Appeal. That the application if granted will be prejudicial to the 1st Respondent who is the registered owner of the suit property and is at preliminary stages of having a county project in site for the benefit of the entire county. That the applicant should await further directions from the Court of Appeal since the court herein has already pronounced itself on most of the issues raised.
 5. The Interested Party opposed the application by adopting the above grounds of opposition.
 6. The application was canvassed orally on 23/7/24. The Petitioners were represented by Mr. Andiwo, the 1st Respondent by Ms. Jadi and the Interested Party by Mr. Kariuki Henry. I have considered the submissions and the list of authorities filed before court.



Determination

- 7 Having considered the application, the grounds of opposition and the submissions of the parties, I find the main issue commending determination being, whether the orders sought should be allowed by this court.
- 8 My understanding of the present application is that the applicants invite this court to extend the orders this court made on 20th June 2024, for a period of 90 days from 4th June 2024. This understanding is premised on the fact that this court already dismissed the applicant's application dated 21/02/24 and the other reason would be that there is already an application filed by the Applicants herein before the Court of Appeal, a court of a higher hierarchy than this court for orders of Injunction Pending Appeal.
- 9 On the 20th June 2024, after the delivery of the ruling dismissing the application dated 21st February 2024, the Applicant made an oral application for a status quo order for a period of 60 days. Counsel stated that this was to enable the applicants file an application before the Court of Appeal as an application they had filed had been withdrawn. I declined this invitation noting that the court had rendered its decision and it could not purport to review the same. That the only option was to appeal the decision of this court and only for purposes of appealing my decision I allowed the status quo to be maintained for 14 days. I further made an order that upon the lapse of the said 14 days the status would revert to be that obtaining on 26/6/24. This therefore meant going back to the situation before the dismissal of the initial application for injunction whose interim orders collapsed with its dismissal.
10. It is contended by Ms. Jadi that there is nothing to stay, the effect of the court ruling being the dismissal of the application. It also submitted that on the face the application seeks limited stay of execution and does not speak to status quo. That the applicant was seeking for a stay through the back door. To me the issue as earlier stated is to extend the said orders of status quo pending the determination of the application before the Court of Appeal to preserve the suit property and to pre-empt eviction that had earlier commenced.
11. Mr. Kariuki reiterating most of the 1st respondents' submissions added that the present application is overtaken by events since the orders granted were only to enable the Applicants file an application before the Court of Appeal which they had done. That the court was being drawn to a game of musical chairs with the court of appeal should this court allow the present application.
12. While it was submitted on behalf of the Respondents that the Applicants should await the Court of Appeal directions on the date of the hearing and determination of the application, this court notes that this is the same reason that the Applicant has approached this court. Every case is to be decided on its own merit and this is the essence of inherent discretionary powers given to the court. I must note the efforts deployed by the Applicants who have now filed an application for orders of injunction pending appeal though this court does not condone the withdrawal of the previous application. The duty judge at the Court of Appeal has certified the application urgent and evidence in this regard was attached to the supporting affidavit herein including the directions given for disposal of the application which the Applicant has demonstrated compliance thereto.
13. I have reviewed the case law cited and in my view the case of *Madhupaper International Limited v Kerry* (1985) eKLR is a useful guide in view of the applications this court has had to consider this far including the instant application. The Court of Appeal after noting that the learned judge was incorrect for ignoring the decision in *Erinford Properties Ltd v Chesire County Council* (1974)" All ER 445 where it was held that where a judge dismissed an application for interlocutory injunction, he has



jurisdiction to grant the unsuccessful applicant an injunction pending appeal against the dismissal. The court went further to state thus; -

‘There are cases, however, where it would be wrong to grant an injunction pending Appeal. These would include where the Appeal is frivolous or to grant it would inflict greater hardship than it would avoid’ (Emphasis mine)

14. Arising from the above exception and applying the principle to the present case I think to grant an extension of the status quo orders will not inflict any greater hardship to the Respondents. Let me state that this court is not being moved to make orders on the application that is before the court of Appeal but to extend the status quo orders it had earlier issued. What is a status quo order?

The *Black’s Law Dictionary*, Butter Worths 9th Edition, defines Status Quo as a Latin word which means “the situation as it exists”.

15. The purpose of an order of *status quo* has been reiterated in a number of decisions. In *Republic v National Environment Tribunal, Ex-parte Palm Homes Limited & another* [2013] eKLR, Odunga J. stated,

“When a court of law orders or a statute ordains that the status quo be maintained, it is expected that the circumstances as at the time when the order is made or the statute takes effect must be maintained. An order maintaining status quo is meant to preserve existing state of affairs...Status quo must therefore be interpreted with respect to existing factual scenario...”

16. Counsel for the Applicant explained to the court the status quo, being that Kwale/Diani Beach Block/1526 was transferred to the Interested Party and LR Kwale/Diani Beach Block/1527 is registered in the 1st Respondents names. This then in my view means the properties shall remain as registered being the status quo as pertains the registration at the Kwale Land Registry. That the Petitioners are still in possession and the structures are still in place though demolition and eviction had commenced. This is not disputed except the contention that the County has plans for the suit property which plans/project will benefit the entire County. I think for me weighing the balance of convenience this project and which is stated is at its preliminary stages, can await the outcome of the application before the court of appeal. I also don’t see any prejudice to the Respondents as they already hold title. However, for the Respondents the Appeal could be rendered nugatory if the demolition proceeds and I agree with the Court of Appeal decision in *Arusha Kingoina (suing as the Legal Representative of Jeremiah Kingoina Obego-Deceased) v Peter Okari Kingoina & 3 others* (2024) KECA 129 (KLR).

17. In any event this court also recognises that any orders given by this court shall not supersede the orders of the Court Appeal that will be pronounced on the application before the said court and I’m not persuaded by the contention about musical chairs herein.

18. Based on the foregoing the court issues the following orders to dispense of the application dated July 3, 2024; -

1. The *status quo* orders issued on the 21st February 2024 are hereby extended. For the avoidance of doubt there shall be no eviction and or further transactions on the titles LR No Kwale/Diani Beach Block/1526 and LR Kwale/Diani Beach Block/1527.
2. The *status quo* orders in 1) above shall subsist until and or terminate at the ruling and determination of Mombasa Court of Appeal Civil Application No E072 of 2024 Ashbrook Limited & Brookshill Limited v County Government of Kwale & others .



3. The costs of this application to be costs in the appeal.

Orders accordingly.

RULING DATED SIGNED AND DELIVERED THIS 15TH DAY OF AUGUST 2024

A.E DENA

JUDGE

Mr. Makori for the Applicant

Ms. Jadi for the 1st Respondent

Mr. Kariuki Henry for the Interested Party

Mr. Daniel Disii – Court Assistant

