



**Catholic Diocese of Malindi Registered Trustees v Mlewa & 2 others (Environment and Land Appeal E029 of 2023) [2024] KEELC 7117 (KLR) (30 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7117 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT AND LAND APPEAL E029 OF 2023  
FM NJOROGE, J  
OCTOBER 30, 2024**

**BETWEEN**

**CATHOLIC DIOCESE OF MALINDI REGISTERED TRUSTEES .... APPELLANT**

**AND**

**KAZUNGU MWATETE MLEWA ..... 1<sup>ST</sup> RESPONDENT**

**KALUME YAA BAYA ..... 2<sup>ND</sup> RESPONDENT**

**ROBERT MUREITHI GITHINJI ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The notice of motion dated 21/12/2023 has been placed before this court for determination. In that motion the applicants seek a stay of all proceedings in Malindi Misc Application No E028 of 2023 Kazungu Mlewa & Another Vs The Land Registrar Kilifi County & 2 others as well as a stay of the execution of the orders of the subordinate court given on 11/10/2023 in the same case pending the hearing and determination of the appeal herein. The grounds in support of the application are that:-
  - a. The court was misled into issuing the orders of 11/10/23;
  - b. The orders will lead to cancellation of the title to the appellant's land without the appellant having been accorded a hearing;
  - c. The orders were heard without joinder of the appellant to the suit and its application for joinder was dismissed;
  - d. The 1<sup>st</sup> and 2<sup>nd</sup> respondents are attempting to enforce the orders;
  - e. The entire miscellaneous application and the proceedings before the lower court are res judicata owing to matters previously heard before this very court;



- f. The orders of the lower court were made without jurisdiction as they attempt to set aside this superior court's determinations of fact and law;
  - g. At the inception of that application the title to one parcel had been closed on subdivision and subplots sold to third parties;
  - h. The 1<sup>st</sup> and 2<sup>nd</sup> respondents' rights under the land disputes tribunal award in case no 6 of 2005 if any are barred by limitation as previously held by this court.
2. The affidavit sworn on the even date by Fr Bernard Mwambingu Malasi is attached to the application, and it reiterates the grounds herein above set out.

### **Interim orders**

3. This court issued orders staying all proceedings in the lower court case pending the hearing and determination of the present motion.

### **Responses to the motion.**

4. The 1<sup>st</sup> respondent filed his sworn affidavit dated 24/1/2024 in opposition. His response is that the suits that the applicant alludes to were not prosecuted to the trial level and were not determinative in nature and the matter is not res judicata; that all the respondents are seeking in the lower court is the enforcement of a decree finding in their favour, which only required implementation of the award of the tribunal in their favour; that the tribunal award was a judgment in rem and not subject to limitation as opposed to a judgment in personam and thus section 4(4) of the *Limitation of actions act* does not apply; that the award of the tribunal has never been challenged; The 1<sup>st</sup> respondent also filed another replying affidavit dated 28/2/2024 in opposition to the same motion date regarding which I need not delve into the contents which are primarily of facts that may affect and prejudice the hearing of the main appeal.
5. The 2<sup>nd</sup> respondent filed grounds of opposition dated 7/2/2024 stating that the threshold for the orders sought has not been met; that the appeal is fatally defective in that the memorandum was filed late on 21/12/23. The 2<sup>nd</sup> respondent also filed a replying affidavit on 6/3/2024 which reiterates the matters in the 1<sup>st</sup> respondent's replying affidavit dated 28/2/2024.

### **Submissions.**

6. The appellant filed submissions on 5/3/24 plus a bundle of authorities. Submissions of the 1<sup>st</sup> respondent were filed on 4/3/24; the 2<sup>nd</sup> respondent filed submissions dated 6/3/24. Both of those sets of submissions were replied to by the appellant in its submissions dated 12/6/24

### **Determination**

7. I have considered the application and the replying affidavits and the submissions on record. The main issue that arises is whether a stay of proceedings and a stay of execution ought to be granted. There are already interim orders staying proceedings and execution. During the interregnum, while the parties were in pursuit of the application dated 21/12/2024, the Record of Appeal was filed on 7/3/2024 and the lower court record was availed by the Deputy Registrar. It is observable that the matter is therefore ripe for issuance of directions as to hearing.



8. In the circumstances and as the appeal appears to be highly contested, in order not to prejudice the trial of the appeal and also in order to expedite the determination of the appeal which is already almost one year old, I hereby order as follows:
- a. The interim orders issued on 27/12/2024 staying all proceedings in Malindi Misc Application No E028 of 2023 Kazungu Mlewa & Another Vs The Land Registrar Kilifi County And 2 Others are hereby confirmed to last till the hearing and determination of the appeal and for the avoidance of doubt prayers nos 2 and 3 of the notice of motion application dated 21/12/2023 are allowed;
  - b. The appeal shall be tried by way of written submissions;
  - c. The appellant shall file and serve written submissions within 21 days of this order and the respondent shall file and serve submissions within 42 days of this order;
  - d. This matter shall be mentioned on 16/12/2024 for issuance of a judgment date.
  - e. There shall be liberty to apply.

**RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 30<sup>TH</sup> DAY OF OCTOBER, 2024.**

**MWANGI NJOROGE**

**JUDGE, ELC, MALINDI.**

