



**Heike & 4 others v Maunga & 8 others (Civil Suit 137 of 2021)
[2024] KEELC 13820 (KLR) (16 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13820 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
CIVIL SUIT 137 OF 2021
AE DENA, J
DECEMBER 16, 2024**

BETWEEN

**ISBRECHT GEB DEDEDEN HEIKE 1ST PLAINTIFF
MAREN ALFKE 2ND PLAINTIFF
ANKE WINDELER 3RD PLAINTIFF
HEIDE LINDER 4TH PLAINTIFF
MANFRED LINDER 5TH PLAINTIFF**

AND

**EDWARD KAUNDA MAUNGA 1ST DEFENDANT
PETER ADAMS LUDAAVA 2ND DEFENDANT
ARVINDER SINGH JANDU 3RD DEFENDANT
PETER MWAURA KUNGU 4TH DEFENDANT
THE LAND REGISTRAR KWALE 5TH DEFENDANT
THE ATTORNEY GENERAL 6TH DEFENDANT
SAMUEL MUTUGI 7TH DEFENDANT
ANTHONY MWITI KAUNDA 8TH DEFENDANT
JOSHUA MUTHUI KITHENDU 9TH DEFENDANT**

RULING

1. On 10/7/2024, this court rendered its judgement in this matter. Dissatisfied with the judgement, the 1st Defendant lodged an appeal at the court of Appeal in Mombasa. The appeal is designated as court



of appeal MSA Civil Appeal No. E176 of 2024 Edward Kaunda Maunga V Isbrecht Geb Deden Heike & 4 Others. In the pendency of the appeal, the Defendant has filed the application subject of this ruling under certificate of urgency. Grace A Okumu Advocate, counsel for the 1st Defendant states the urgency as follows;

That the 1st Respondent will set into motion the process of transfer of the title deeds in the suit properties and eviction against the 1st Defendant to enforce the judgement of 10/7/2024 and render the appeal nugatory.

2. Based on the above, the 1st Defendant/Applicant has moved this court for the following verbatim orders;
 1. SPENT
 2. SPENT
 3. That pending the hearing and determination of the appeal, this honourable court be pleased to stay the judgement entered herein on 10/7/2024 in Kwale and any other order that may be issued pursuant thereto pending the hearing of the appeal
 4. That costs incidental to the application abides the results of the said appeal.
3. The application is premised upon the following grounds; -
 1. That judgement was delivered on the 10th day of July 2024 in Kwale ELC No 137 of 2021 between the Plaintiffs and the Defendants
 2. That the Applicant is dissatisfied with the judgement delivered against the 1st Defendant by honourable lady justice A. Dena on 10/7/2024 and has exercised his right of appeal against the judgement vide a Notice of Appeal dated 19/7/2024.
 3. That the said appeal is arguable and is meritorious and since it raises the issue of ownership, it is therefore in the interest of justice that the said orders be stayed pending the hearing and determination of the appeal
 4. That one of the orders issued against the Applicant is to execute transfer documents in respect of the suit properties and if he fails to execute the transfer documents the registrar of this court do execute the transfer documents which if not stayed will render the appeal nugatory
 5. The respondent has already drafted a decree pending approval of parties herein and incase the same is not approved it will take effect as by law provides
 6. That the balance of convenience clearly weighs in favour of the applicant in the matter owing to the drastic effect of the decision of the Environment and Land Court delivered on 10/7/2024
 7. That this application is made in the interest of justice and would not prejudice any of the parties
 8. That this application has been made expeditiously, without undue delay and has merit and is only fair and just that the orders sought herein be granted.
4. The application is supported by an affidavit sworn by the 1st Defendant/Applicant, Edward Kaunda Maunga. It reiterates the averments raised in the grounds above.



PRELIMINARY OBJECTION

5. The Plaintiffs/Respondents have raised a preliminary objection to the application and the same raises the following grounds; -
 1. That there is currently pending before the court of appeal MSA Civil Appeal No E176 of 2024 EDWARD KAUNDA MAUNGA V ISBRECHT GEB DEDEN HEIKE & 4 OTHERS which appeal has been filed by the 1st Defendant herein.
 2. That the Court of Appeal is therefore seized of the appeal, has the full jurisdiction and authority to address any applications pursuant to the provisions of the Court of Appeal Rules 2022 since there is no longer an intended appeal as indicated in the application but rather an actual existing and pending appeal.
 3. That by virtue of the provisions of Article 164[3] of *the Constitution* of Kenya 2010 as read with section 3[1] of the *Appellate Jurisdiction Act* Cap 9 laws of Kenya this honourable court therefore no longer has jurisdiction to hear and determine this application and ought to down its tools and let any applications such as the subject one be filed in the Court of Appeal
 4. That the application should be struck out and the costs of the application be awarded to the Plaintiffs/Respondents

GROUND OF OPPOSITION

6. The Plaintiffs/Respondents further oppose the application vide grounds of opposition dated 13/9/2024 and which are as follows;
 1. The application is unmerited because the 1st Defendant has not demonstrated that; -
 - a. He has an arguable appeal or
 - b. Substantial loss would otherwise occur if an order for stay of execution is not granted or
 - c. If a stay of execution is not granted, the appeal will be rendered nugatory
 2. The application is mis-contemplated, incompetent, unmeritorious an abuse of the court process and ought to be dismissed with costs to the Respondent.

SUBMISSIONS

7. The application and the preliminary objection was heard concurrently by way of written submissions.

Applicants Submissions

8. The Applicants submissions are dated 24th October 2024 and the Respondents. Referring to Section 3(1) of the *Appellate Jurisdiction Act* it is submitted that the court of appeal will hear and determine the substantive appeal and the section does not relate to an application that is not before the said court.
9. Enumerating the provisions of Order 42 Rule 6 (1) upon which the application is premised it is submitted that applications for orders seeking stay of execution of the superior court decree may be lodged either at the court where the appeal is emanating from or higher court thus conferring jurisdiction on this court. That based on the definition of a preliminary objection in *Mukhisa Biscuits Vs. West End Distributors Ltd (1969) EA 696*, that is before this court is an application which cannot



dispose of this suit, the suit having been determined. Further the filing of a Memorandum of Appeal in the court of Appeal does not oust the jurisdiction of this court.

10. It is urged by the Applicant that the application has merit and has met the requisite requirements stipulated in Order 42 Rule 6(2) as likelihood of substantial loss occurring. That if the orders are not granted execution will result to an eviction of the School from the suit property. Further that ownership will be lost as the Registrar will execute documents of transfer. The court is referred to the case of Antoine Ndiaye Vs. African Virtual University (2015) eKLR and Kenya Shell Limited Vs. Kibiru (1986) KLR. That the appeal will be rendered nugatory. It is also submitted that the application has been brought without undue delay judgement was delivered on 10/07/24 and Notice of Appeal filed on 19/07/24 and the application on 29/07/24. The Applicant further undertakes to abide by any reasonable terms ordered by the court for security.

Plaintiffs/ Respondent Submissions

11. The Plaintiffs submissions are dated 1st November 2024. Together with the submissions was filed a Notice dated 1st November 2024 withdrawing the Notice of Preliminary objection dated 13th September 2024. The plaintiff however retained their grounds of opposition to the application herein.
12. On whether the appeal is arguable the court is referred to ground no. 3 of the application and paragraph 5 of the supporting affidavit, it is submitted on behalf of the Plaintiff, there is absolutely no indication of what the Applicant believes to be errors of either fact or of law. That without this indication, there is no way for the Honourable Court to discern the arguability of the appeal. That the notion that just because it relates to ownership of land, then the appeal must be arguable, is a fallacy and a ridiculous position. That it would mean that all matters flowing from the Environment and Land Court's Land Division should obtain automatic stay just because the case relates to ownership of land.
13. On the requirement to demonstrate substantial loss it is contended that it is on record that the Applicant wanted the suit properties transferred to a different entity not to the trusts created by the 2nd to 5th Plaintiffs. As a trustee, the beneficial interest in the Suit Properties vests in other persons and not the applicant. That in any event, the evidence on record is that the schools were closed and what the Applicant was doing on the properties was illegal rental and coral mining business not sanctioned by his co-owner. That for the appeal to be seen as nugatory, it must be demonstrated that what is sought to be prevented cannot be reversed or that the same is not reparable by compensation in damages. The Applicant removal as a trustee, which would be the effect of the execution of the decree is something that is reversible should his appeal succeed. Reliance was placed on the case of Luka & 3 others v Chairman Land Adjudication Committee, Leshuta Land Adjudication Section & 6 others (Civil Appeal (Application) E005 of 2022) [2023] KECA 1232 (KLR) (6 October 2023) (Ruling) where the Court of Appeal held inter alia Land can be quantified in monetary term.
14. Pursuant to the foregoing it is submitted that the Applicant has not demonstrated the substantial loss that he himself would suffer if the decree is not stayed or that his Appeal would be rendered nugatory if the stay he seeks is not granted. The court is invited to dismiss the application.

ANALYSIS AND DETERMINATION

14. I have considered the pleadings on record and the submissions of the parties for and against the application dated 29/7/2024. The Notice of Preliminary objection having been withdrawn, the issue for determination therefore remains to be whether the application is merited.



15. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(2) of the Civil Procedure Rules which provides:

“No order for stay of execution shall be made under subrule (1) unless—

- (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

16. The court, in *RWW v EKW* [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

17. On substantial loss the Court of Appeal in *Kenya Shell Limited –vs- Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) KAR 1018* pronounced itself that Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.

18. I note that the issue of arguability of the appeal has been canvassed by both parties. For me this issue should not be a consideration in whether or not to grant a stay in the instant proceedings. I say so for the reason that the appeal has been lodged against the judgement of this court. Therefore, to comment on its arguability would be to evaluate my own judgement which cannot be sustained. It is a ground to be addressed where the appeal is before me from a lower court and or before the Court Appeal had the application been filed before that court. I will therefore steer off a discussion of this issue.

19. The first ground to be established is whether substantial loss would result to the Applicant unless stay of execution is granted. What amounts to substantial loss was expressed by the Court of Appeal in the case of *Mukuma vs Abuoga (1988) KLR 645* where the court stated that “Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”

20. I find it imperative that I recap the final orders in the judgement herein for the reason that the orders and the decree thereof are the subject of the application for stay. The final orders were as follows’-

- i. A declaration that the 1st Defendant and the 1st Plaintiff are holding parcels Kwale/Diani Complex/26, Kwale/Diani Complex/201, Kwale/Diani Complex/203 and Kwale/Diani Complex/195 in trust for and on behalf of the 2nd, 3rd, 4th and 5th Plaintiffs as the trustees of the Kids Kindergarten in Diani and the kid kindergarten in Diani & Academy Trusts.
- ii. The 1st Defendant to sign all documents necessary to transfer the title deed number Kwale/Diani Complex/26, Kwale/Diani Complex/201, Kwale/Diani Complex/203 and Kwale/



Diani complex/195 to the 2nd, 3rd, 4th and 5th Plaintiffs as the trustees of the Kid Kindergarten in Diani and the kid kindergarten in Diani & Academy Trusts within 60 days of this judgement.

- iii. In default of compliance of Order [ii] above the Deputy Registrar of this Honourable court be directed to execute the documents of transfer and all other necessary documents required to give effect to order [ii] above on behalf of the 1st Defendant under seal of this Honourable court.
 - iv. An order be issued directing the 5th Defendant to lift and/or cancel any encumbrances placed by the 1st Defendant on the titles number Kwale/Diani Complex/195, Kwale/Diani Complex/26, Kwale/Diani complex/201 and Kwale/Diani Complex/203 and facilitate the implementation of the orders of this court.
 - v. A permanent injunction restraining the 1st, 7th, 8th and 9th Defendants by themselves or through their servants or agents or through anyone deriving title through them jointly and severally from entering onto or trespassing upon or occupying or using or remaining thereon or continuing to trespass or from damaging, wasting, developing, selling, leasing, alienating, transferring, digging, mining, taking anything out of or away from or dealing howsoever with all those parcels of land known as Kwale/Diani Complex/201, Kwale/Diani Complex/203 and Kwale/Diani Complex/26 without the consent of the 2nd, 3rd, 4th and 5th Plaintiffs as the trustees of the Kids Kindergarten in Diani and the kid kindergarten in Diani & Academy Trusts.
 - vi. Each party shall bear their own costs in view of the charity herein.
21. From the judgement itself, it is clear that the contest was as to the ownership of the suit properties in the suit being Kwale/Diani Complex/26,201,203 and 195. And indeed I'm in total agreement with the holding of the court of appeal in *Luka & 3 others v Chairman Land Adjudication Committee, Leshuta Land Adjudication Section & 6 others (supra)* that land is quantifiable and can therefore be compensated by way of damages.
 22. My worry would be the deposition that the implementation of the judgement would result into eviction of the school. The Plaintiffs submit that the school is closed. At paragraph 77 of the judgement drawing from the definition of a trust, the court reiterated a trust is not set up for the benefit of an individual. The focus of the court was the benefit of the needy children around the community and I also recognised the intention of the Plaintiffs to continue sponsoring the needy children and revival thereof. I'm motivated therefore to consider the school in its totality as an institution. Whether it is closed or not, the original objective and purpose of the trust should not be lost or clouded. In this regard therefore I will invoke the inherent jurisdiction of this court pursuant to the Section 3A of the *Civil Procedure Act* to protect the institution.
 23. On whether the application has been filed within reasonable time, I note it was filed on 29/7/2024 which was 2 weeks after the judgement of this court. I find that the same has been filed within a reasonable period of time.
 24. On the issue of security for costs, this is at the discretion of the court. Applicant has not made any proposal as to what he intends to deposit as security for costs. However, the Applicant states they are ready to abide with any terms as to reasonable security as the court shall order. This is a sign of good will on the part of the Applicant.
 25. Accordingly, I hereby allow the application dated July 29, 2024 in the following terms; -
 1. The stay of the judgement rendered on 10/7/2024 is granted on condition that the order of permanent injunction restraining the 1st, 7th, 8th and 9th Defendants by themselves or through their servants or agents or through anyone deriving title through them jointly and severally



from damaging, wasting, developing, selling, leasing, alienating, transferring, mining, taking anything out of or away from the parcels of land known as Kwale/Diani Complex/201, Kwale/Diani Complex/203 and Kwale/Diani Complex/26 without the consent of the 2nd, 3rd, 4th and 5th Plaintiffs as the trustees of the Kids Kindergarten in Diani and the kid kindergarten in Diani & Academy Trusts shall be maintained as modified herein for purposes of this application.

2. Costs of the Application to abide the outcome of the Appeal.

Orders accordingly.

RULING DATED SIGNED AND DELIVERED THIS 16TH DAY OF DECEMBER 2024

AE DENA

JUDGE

Mrs Mohamed holding brief for Mr. Karega for the Plaintiffs

Mr. Katete holding brief for Ms. Okumu for the 1st Defendant

No appearance for the 5th and 6th Defendants

Mr. Daniel Disii– Court Assistant

