



Eacphab Ltd & 2 others v Othere Limited & 4 others (Civil Application E487 of 2024) [2025] KECA 1535 (KLR) (3 October 2025) (Ruling)

Neutral citation: [2025] KECA 1535 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E487 OF 2024
DK MUSINGA, F TUIYOTT & M NGUGI, JJA
OCTOBER 3, 2025**

BETWEEN

THE EACFPHAB LTD 1ST APPLICANT

EUROPEAN FOUNDATON FOR POLISH KENYA COOPERATION 2ND APPLICANT

PROF ROMUALD JOZEF SCIBORSKI 3RD APPLICANT

AND

OTHERE LIMITED 1ST RESPONDENT

GOLDEN CENTURY LIMITED 2ND RESPONDENT

LAN XIAO 3RD RESPONDENT

NEMA 4TH RESPONDENT

COUNTY GOVERNMENT OF NAIROBI 5TH RESPONDENT

(Being an application for injunction pending appeal against the Ruling of the Environment and Land Court at Nairobi (A. Omollo, J.) dated 19th September 2024 in ELC EPCC No. E008 of 2023)

RULING

1. By their application dated 27th September 2024 supported by an affidavit sworn by the 3rd applicant, Prof. Romuald Jozef Sciborski, the applicants seek an injunction to restrain the respondents from evicting them from apartment No. B-004, Block B, Ground Floor, Golden Century Apartments on LR No. 3734/1478, Othaya Road, Lavington, Nairobi (hereafter ‘the suit premises’) pending the hearing and determination of their intended appeal against the ruling of the Environment and Land Court (ELC) at Nairobi (A. Omollo, J.) dated 19th September 2024 in ELC EPCC No. E008 of 2023.



The application is brought under rule 5(2)(b) of the Court of Appeal Rules and section 3A of the *Appellate Jurisdiction Act*.

2. In their suit before the ELC, the applicants sought an order that the EACFPHAB LTD, the 1st applicant, which was the 1st plaintiff before the ELC, be recognized as half owner of the suit premises; that the respondents, the defendants before the ELC, be compelled to cease construction of the apartment development on the neighbouring plot; and that an order for environmental restoration be issued. The applicants also sought injunctive orders pending hearing of the suit, which were issued on 8th March 2024.
3. The respondents then filed an application dated 19th March 2024 seeking to have the applicants' suit struck out as being res judicata. In its impugned ruling dated 19th September 2024, the ELC struck out the applicants' suit for being res judicata previous suits, namely ELC Misc. 12 of 2022 which had been dismissed; and ELC No. E581 of 2022 which had been stayed pending arbitration of a claim by the 3rd applicant. The ELC found that the 1st plaintiff (the 1st applicant) derived its right through purchase from the 2nd and 3rd plaintiffs (2nd and 3rd applicants); and that the issues raised in the suit ought to have been dealt with in E581 of 2022, or in the arbitral proceedings. It also found that the environmental issues raised in the suit before it, E008 of 2023, ought to have been raised in ELC Misc. 12 of 2022.
4. Briefly, the background to the application as it emerges from the pleadings before us and the trial court is that the 3rd applicant and the 1st respondent had entered into a sale agreement for sale of the suit premises. A dispute had arisen between them and the 3rd applicant had filed a claim before a sole arbitrator pursuant to an arbitration clause in the sale agreement.
5. Upon hearing the parties, the sole arbitrator rendered his award dated 15th July 2022 in which he found the 3rd applicant in breach of the sale agreement and dismissed his claim. The arbitrator directed the 3rd applicant to pay to the 1st respondent Kshs. 14,650,000 plus interest of KShs. 4,287,487 within 75 days of the award, in default of which the 3rd applicant would be evicted from the suit premises. The arbitrator's award was adopted as an order of the court in Misc. E 581 of 2022 (Consolidated with HCCOM Arb. E068 of 2023).
6. In his affidavit in support of the application now before us, the 3rd applicant avers that he resides in the suit premises; that the applicants have invested over Kshs. 20 million in the suit premises; and that their occupation is lawful, based on prior contractual arrangements. It is the applicants' case that the ELC erred in striking out their suit on grounds of res judicata as some of the applicants were not parties to the prior proceedings. The applicants assert that their appeal would be rendered nugatory if an eviction is carried out; and they would suffer irreparable loss that cannot be compensated in damages.
7. It is the applicants' case further that their intended appeal raises weighty and arguable issues touching on property rights, corporate personality, and misapplication of the res judicata doctrine.
8. In submissions dated 22nd October 2024 which were highlighted by their learned counsel, Mr. Nyambeki, at the hearing of the matter, the applicants submit that they have an arguable appeal, setting out some seven grounds which they contend render their appeal arguable. They further submit that their appeal would be rendered nugatory if the orders sought are not granted as they have a 'sentimental attachment' to the suit premises and monetary compensation would not be sufficient recompense should they be evicted.
9. The 1st 3rd respondents opposed the application through a replying affidavit sworn by Lan Xiao, the 3rd respondent and a director of the 2nd respondent, Golden Century Limited. It is deposed for the respondents that the present application is an abuse of the court process in light of the many suits filed



- by the applicants over the same subject matter, which have been dismissed or determined against the applicants; that the issues raised have already been conclusively determined through arbitration and subsequent High Court proceedings that upheld the arbitral award; that the 3rd applicant was declared in breach of the sale agreement and ordered to vacate the premises or forfeit part of the purchase price; that the eviction proceedings stem from a separate High Court enforcement process and not from the suit that is under appeal; and the applicants' appeal would not be rendered nugatory if the orders sought are not granted as any potential loss is monetary and can be compensated in damages.
10. In their submissions dated 14th November 2024 which were highlighted by their learned counsel, Ms. Njoroge, the respondents submit that the issue of the applicants' rights over the apartment has already been determined with finality through arbitration and the ensuing court orders; that the ELC correctly found that the applicants' suit was *res judicata* because all questions concerning the sale agreement and the parties' entitlements were resolved either in the arbitral award or in the applications to enforce the arbitral award or set it aside, which were consolidated and determined in their favour.
 11. The respondents submit that the issue of eviction was not before the trial court in the impugned ruling; that the appeal cannot be rendered nugatory as the relief sought on appeal is reinstatement of the suit in which the issue of the ownership of the suit property is in contention as opposed to the eviction of the 3rd applicant, the current occupier of the suit premises; and that there is already a court decision in a separate case that upholds the arbitral award and finds the 3rd applicant in breach. The respondents submit therefore that the applicants have not met the threshold for grant of orders under rule 5(2)(b), and they pray that the application be dismissed with costs to them.
 12. There was no appearance at the hearing for the 4th and 5th respondents.
 13. We have considered the application and the affidavits in support and opposition thereto, as well as the submissions of the parties. The applicants seek an order, pending the hearing and determination of their intended appeal, restraining the respondents from evicting them (but specifically the 3rd appellant, who is in occupation) from apartment number B-004, Block B on the ground floor of Golden Century Apartments on L.R No.3734/1478.
 14. The application is brought under rule 5(2)(b) of this Court's Rules, and our mandate under this rule needs no belabouring: it is to exercise discretion to grant such order if the applicants satisfy us as to the existence of two principles. First, that the intended appeal is arguable and, secondly, that unless the orders sought are granted, the applicant's appeal will be rendered nugatory-see *Reliance Bank Ltd v. Norlake Investments Ltd* [2002] 1 EA 227; *Jaribu Holdings Ltd. v. Kenya Commercial Bank Ltd* [2008] eKLR; and *Stanley Kang'ethe Kinyanjui v. Tony Keter & Others* [2013] eKLR
 15. To succeed, an applicant must satisfy the Court on both limbs, and in making our determination, we are required to refrain from making any conclusive findings on issues that properly belong to the pending appeal, confining ourselves to determining whether the applicants have satisfied the two settled principles.
 16. With regard to the first principle, whether their appeal is arguable, the applicants have set out in their application several grounds which they intend to raise on appeal. These include the question whether the ELC erred in finding that the matter before it, ELC EPCC No. E008 of 2023, was *res judicata*, and in striking it out. The law is that even one arguable point is sufficient to satisfy the question of arguability, and we find that the applicant has met the first principle under rule 5(2)(b).
 17. The second principle requires the applicant to satisfy the Court that if the orders sought are not granted, the intended appeal, if successful, will be rendered nugatory. As was held in *Stanley Kang'ethe Kinyanjui v. Tony Keter & Others* (*supra*), whether or not an appeal would be rendered nugatory



depends on whether or not what is sought to be stayed, if allowed to happen, is reversible or if it is not reversible, whether damages would be sufficient recompense for the aggrieved party. In making this determination, the Court must consider each case on its unique facts.

18. In the present matter, we must ask the question: what was at issue before the trial court, and what do the applicants seek from this Court on appeal? In the case before the ELC, the 1st applicant sought to be recognized as half owner of the suit premises; an order compelling the respondents to cease construction on an adjoining property; and an order for environmental restoration. The ELC, on the application of the respondents, struck out the applicants' suit for being res judicata.
19. The question of whether or not the applicants should be evicted from the suit premises was not a matter for determination in the suit. As submitted by the respondents, the issue of eviction was a matter that was the subject of decision in the arbitral award rendered in the arbitral proceedings between the 3rd applicant and the respondents. There is no appeal relating to the decision of the arbitrator or its adoption before us.
20. It is not in dispute that should the applicants' intended appeal against the ruling of the ELC striking out their suit succeed, they would be entitled to an order reinstating their suit. If the orders they seek in the present application are not issued, it would not affect their intended appeal, or the orders sought therein. In any event, even if the question of eviction had been at issue before the ELC, there is no indication that should their appeal succeed, the respondents would not be able to compensate them in damages. The applicants have, therefore not satisfied the second principle under rule 5(2)(b).
21. We are therefore not satisfied that the application before us is merited, and it is hereby dismissed with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF OCTOBER, 2025.

D. K. MUSINGA (PRESIDENT)

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

