



**Kamindi Self Fridges Supermarkets Limited v Kiambu Murutani Company Limited
(Civil Application E360 of 2022) [2024] KECA 10 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KECA 10 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E360 OF 2022
K M'INOTI, F TUIYOTT & GWN MACHARIA, JJA
JANUARY 25, 2024**

BETWEEN

KAMINDI SELF FRIDGES SUPERMARKETS LIMITED APPLICANT

AND

KIAMBU MURUTANI COMPANY LIMITED RESPONDENT

(Being an application for an injunction pending appeal pursuant to the judgement of the Environment and Land Court (L. Gacheru, J.) delivered on 15th November 2019 in ELC Thika No. 77 of 2017)

RULING

1. Before us for determination is the applicant's Notice of Motion dated 30th June 2023, brought pursuant to rule 5 (2) (b) of the Court of Appeal Rules, 2022. It is supported by the affidavit of one George Njenga Kamithi of even date. The main prayers sought are that: this Court grants a temporary injunction restraining the respondent, its servants, officers, workmen, employees and agents or any other person from occupying, suing, selling, leasing, transferring, charging, pledging, alienating, tampering with, altering or otherwise howsoever dealing with the property known as Title No. Kiambu Township Block 11/87 in a manner that is prejudicial to the applicant pending the hearing and determination of an intended appeal; and that the costs of the application abide the outcome of the appeal.
2. This matter precipitates from the applicant's suit instituted by way of a plaint dated 16th August 2011, in Thika Environment and Land Court (ELC) Case No. 420 of 2011. The applicant pleaded that it placed a bid to purchase a parcel of land known as Kiambu Township Block 11/87 (suit property), whose Certificate of Lease is being held by the respondent. The applicant pleaded that it entered into a sale agreement dated 24th October 2009 with Njuakim Commercial Agencies, the purported agents of the respondent. It was contended that the applicant placed a bid of Kshs.40,250,000/= towards the purchase of the suit property, which was accepted and it (the applicant) paid the agents a sum of



Kshs.6,037,500/=, being 15% of the purchase price. It was further pleaded that the respondent failed and/or refused without any justification to deliver the completion documents, thus necessitating the suit in the ELC.

3. The respondent entered appearance, and filed a defence and counterclaim dated 30th January 2012, by which it sought the following orders:
 - a. A declaration that the purported agreement dated 24th October 2009 is illegal, null, void and unenforceable.
 - b. An order directing the Land Registrar to lift the caution on the suit property dated 23rd February 2010.
 - c. A return of the original title documents being held by the advocates that represented the parties in the transaction.
4. The respondent denied any dealings with the applicant's purported agents. It stated that there was no company board meeting resolution authorizing the sale of the suit property and/or the agents to act on its behalf in the sale of the suit property. It was emphatic that one of its former directors was intent on defrauding it of its ownership to the suit property; that the sale agreement was not sealed by its common seal; and that it never received any monies in relation to the sale of the suit property.
5. The ELC delivered its judgement on 15th November 2019, dismissing the applicant's suit. It found that the newspaper advertisement of the sale of the suit property of 13th August 2009, the resultant bids received and the subsequent sale agreement entered into, were all illegal and not binding to the respondent, since it did not authorize the sale. The learned judge also found that the sale agreement was unenforceable to the respondent, and, as such, an order of specific performance could not issue against it. Consequently, the court allowed the respondent's counterclaim.
6. Aggrieved, the applicant has now preferred an appeal to this Court as well as the instant application.
7. The application is opposed vide a replying affidavit sworn on 10th July 2023 by one Jamuel Mwakandana Kiwinda, the advocate in conduct of the matter on behalf of the respondent.
8. The application came up for hearing before us via the Goto virtual platform on 27th September 2023. Learned counsel Ms. Kimachia holding brief for Mr. S.M. Chege appeared for the applicant while learned counsel Mr. Kiwinda appeared for the respondent.
9. The application was canvassed by way of written submissions with very brief oral highlights. We underscore that the averments in the respective affidavits in support of, and in opposition to, the application are a replicant of the parties' submissions. We shall therefore only briefly highlight the submissions. The applicant's submissions are dated 12th July 2023 while those of the respondent are dated 21st July 2023.
10. On arguability of the appeal, Ms. Kimachia merely submitted that the learned trial judge failed to consider that the applicant had already made some deposit towards the purchase of the suit property. On the nugatory limb, she submitted that there was a likelihood that the suit property would be sold to third parties, thereby occasioning the applicant irreparable loss that cannot be compensated by way of damages. Counsel also submitted further that in any event, the balance of convenience tilts towards granting the orders as the applicant was a bonafide purchaser of the suit property for value. She confirmed to us that a similar application as the instant one had been filed in this Court, but by a ruling dated 19th March 2021, it was dismissed.



11. On his part, Mr. Kiwinda submitted that the supporting affidavit disclosed no arguable ground, but upon being questioned by the Court, he conceded that the grounds of appeal raise points that require a consideration by the Court. He cited the contestation of whether any purchase price was paid, and whether if it was paid, the payment was made to a fictitious party.
12. On whether the appeal would be rendered nugatory if the orders sought are not granted, counsel submitted that the applicant has not contended that it (the respondent) is incapable of restituting it in the event that the appeal is successful; and that furthermore, the applicant had instituted a similar application before this Court which was dismissed.
13. We have accordingly considered the application, the respective submissions and the law. The application is hinged on rule 5(2)(b) of the *Court of Appeal Rules*, 2022 which provides that:
 - (2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may—
 - b. In any civil proceedings where a notice of appeal has been lodged in accordance with rule 77, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.
14. It is now settled law that for an applicant to succeed in an application under rule 5(2)(b), he or she must establish the twin principles, namely that the appeal is arguable, and that if the stay is not granted, the intended appeal will be rendered nugatory. The Court must not make definitive findings on the arguability of the appeal of either fact or law at this stage, so as not to embarrass the hearing of the main appeal. The importance of rule 5 (2) (b) is to preserve the substratum of an appeal or the intended appeal, and this illuminates this Court’s inherent jurisdiction. See Supreme Court case of *Teachers Service Commission vs. Kenya National Union of Teachers*, Sup. Ct. Appl. No. 16 of 2015.
15. This Court, aptly articulated the principles that it considers in discharging its mandate under rule 5 (2) (b) in the case of *Stanley Kang’ethe Kinyanjui vs. Tony Ketter & 5 Others* (2013) eKLR as follows:

“In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the Judge’s discretion to this Court. The first issue for consideration is whether the intended appeal is arguable. This court has often stated that an arguable ground is not one which must succeed but should be one that is not frivolous; a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable.”
16. On the first limb, as stated in *Stanley Kang’ethe’s* case (*supra*), an arguable appeal is not necessarily one which must succeed, but it is one which is not frivolous. If a party establishes even a single bona fide ground of appeal, that is sufficient to render the intended appeal as arguable. In *Cleophas Wasike vs. Mucha Swala* (1984) eKLR, this Court held that an applicant need not show that his appeal had an overwhelming probability of success. An applicant just needs to show that there is merit in his appeal.
17. We have perused and appreciated the grounds of appeal. As concede by the respondent, we discern that indeed the appeal raises arguable points that are not frivolous. For instance, it will be a point for determination as to whether the learned judge erred in finding; that the sale was not authorized by the respondent when in fact, the Board meetings were signed by the Company Secretary and sanctioned by one of its Directors; that there was no sale agreement at all between the parties; and that there was no payment of the deposit made to the respondent. As to whether these grounds will succeed, it will be a question of determination during the hearing of the appeal.



18. On the second limb, we observe that the applicant has not deposed, advanced or expressed any apprehensive reasons as to why it thinks that the respondent will not be able to compensate it for any loss incurred if the appeal is successful. We reiterate the findings of this Court in National Credit Bank Ltd. vs Aquinas Francis Wasike & Another (2006) eKLR that:

“...a legal duty is placed on the applicant to prove the allegation that its intended appeal will be rendered nugatory because the respondent will be unable to pay back the decretal sum should the applicant succeed on appeal. This requirement is however not absolute. It is qualified in that it is unreasonable to expect the applicant to know in detail the resources owned by a respondent or the lack of them. Once the applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden shifts to the respondent to show what resources he has to satisfy the decree should the appeal succeed, since that is a matter likely to be peculiarly entirely within the knowledge of the respondent.”

19. The applicant deposed in its supporting affidavit that it is apprehensive that the respondent will sell the suit property to a third party by virtue of the property being advertised in the newspaper of 23rd June 2023. We make two observations; first, the applicant has not confirmed whether it paid the full purchase price of the suit property as per the sale agreement dated 24th October 2019 and secondly, at the hearing of this application, it was not confirmed to us if the sale had crystallized. Finally, it is trite that the applicant has not shown that the respondent would not be in a position to compensate it by way of damages in the event that the suit property is sold to a third party. For these reasons, we are not convinced that the applicant has sufficiently demonstrated how the appeal will be rendered nugatory if the injunctive orders are not issued.

20. It follows that the applicant has failed to satisfy the two limbs of the test under rule 5 (2) (b). And, since it is settled law that the two limbs must operate conjunctively and not disjunctively, the application must fail. We accordingly dismiss the applicant’s Notice of Motion dated 30th June 2023. Costs shall abide the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JANUARY 2024.

K. M’INOTI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

F. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

SIGNED

DEPUTY REGISTRAR

