



**Ng'ang'a & another v Karunga Women Company Limited (Civil Application E156 of 2023) [2024] KECA 23 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KECA 23 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E156 OF 2023  
HA OMONDI, A ALI-ARONI & GWN MACHARIA, JJA  
JANUARY 25, 2024**

**BETWEEN**

**STEPHENSON KING'ARA NG'ANG'A ..... 1<sup>ST</sup> APPLICANT**

**KING'ARA INVESTMENTS LIMITED ..... 2<sup>ND</sup> APPLICANT**

**AND**

**KARUNGA WOMEN COMPANY LIMITED ..... RESPONDENT**

*(Being an application for stay of execution of the judgment of the ELC Court at Thika (L. Gacheru, J.) delivered on 4th July 2019 in ELC Case No. 528 of 2017 (formerly ELC No. 1077 of 2014; formerly ELC No. 1088 of 2003 Nairobi)*

**RULING**

1. By a Notice of Motion dated 20<sup>th</sup> April 2023, the applicants seek an order of stay of execution of the judgment and/or decree of the Environment and Land Court (ELC) at Thika (Gacheru, J.) delivered on July 4, 2019 in ELC Case No. 528 of 2017 (formerly ELC No. 1077 of 2014 and ELC at Nairobi Case No. 1088 of 2003).
2. The Motion is supported by an affidavit sworn on even date, by the 1<sup>st</sup> applicant. The 1<sup>st</sup> applicant avers that there is ultimate threat of execution of the judgment of the trial court, as the respondent has already issued to them a notice dated April 11, 2023 to show cause as to why the applicants' movable properties should not be attached and sold. It is further urged that the appeal is arguable on grounds that the learned judge: failed to determine that the suit was barred by the Limitation of Actions Act; erred by awarding the respondent damages of Kshs.4 million when the respondent was in fact indebted to the bank and the selling price of Kshs.2.8 million was a fair market value, and; failed to find that any claim lay with the bank. It is also contended that the appeal will be rendered nugatory if the orders sought are not granted as it is unlikely that the applicants will recover property sold in realization of the



- decree; and that the decretal amount is colossal and if execution proceeds, it is capable of debilitating them, consequently occasioning substantial loss.
3. The respondent opposed the application vide a replying affidavit sworn on 28<sup>th</sup> April 2023 by Mary Wanjiru Njuguna, its director. She avers that the appeal was filed two years after judgment; that the applicants filed two applications seeking stay of execution of the judgment dated 15<sup>th</sup> August 2019 and 22<sup>nd</sup> March 2021 respectively, which applications are still pending before the trial court; that further filing a similar application before this Court, is a clear abuse of the court process; that the respondent has already commenced execution proceedings towards satisfying the decree; and that the application coming four years after the judgment, is an afterthought and is intended to deny the respondent the fruits of its judgment; that the applicants filed the record of appeal; also served the submissions to this application out of time; and are not therefore deserving of the exercise of this Court's discretion. We were accordingly urged to dismiss the application.
  4. The applicants filed a further affidavit sworn by the 1<sup>st</sup> applicant on 2<sup>nd</sup> May 2023, contending that the appeal was filed together with a certificate of delay; that the applications before the trial court have not yet been heard, as every time they are fixed for hearing, the court is not sitting; that they have undertaken all steps to prosecute the appeal; and that the respondent will suffer no prejudice if the orders sought are granted.
  5. Before we delve into the salient issues requiring our attention, it is paramount that we set forth a brief background to this matter.
  6. The respondent filed a suit by way of a plaint dated 23<sup>rd</sup> October 2003, seeking mesne profits, special damages equivalent to the value of the suit property, punitive and exemplary damages, general damages, costs of the suit and interests at court rate. It contended that at all material times up to 7<sup>th</sup> August 2001, it was the registered proprietor of the suit property and around 1987, they charged it to Kenya Finance Bank Limited, which is now under liquidation to secure a loan facility of Kshs. 1,500,000/= for purposes of developing the property. Due to financial difficulties, it was unable to service the loan and the bank opted to exercise its statutory power of sale. However, the 1<sup>st</sup> applicant approached its directors who were illiterate and offered to intercede on their behalf and forestall further adverse action. On 5<sup>th</sup> June 1995, the parties met and agreed that the 1<sup>st</sup> applicant would negotiate with the bank on redemption of their loan account; he would initially deposit a sum of Kshs. 2,000,000/= of his own money with the bank and negotiate how the balance would be paid. He would then take over the management of the suit property for purposes of collecting rent from the tenants, which he would deposit in its loan account. And that upon the bank being satisfied with the running of the respondents account, the parties would agree on how the respondent would compensate the 1<sup>st</sup> applicant for his assistance. The 1<sup>st</sup> applicant prepared what he purported to be minutes of what transpired, and relying on his representations, the respondent's officials/directors signed the same. They later learnt that the said minutes did not reflect what was discussed at the meeting, the 1<sup>st</sup> applicant had deceived them that the said minutes were a true reflection of their discussions; and that he took advantage of their directors' illiteracy and misled them, concealing the true contents of the alleged minutes.
  7. In pursuance of the discussions, the respondent allowed the 1<sup>st</sup> applicant to take possession of their property, and the applicants started collecting rent from the tenants until the property was sold. The respondents having trusted the 1<sup>st</sup> applicant, the respondent's directors did not follow up with the bank but in breach of the agreement, the 1<sup>st</sup> applicant failed to pay the loan arrears. By October 1996, the issue between them and the bank had not been resolved. They only came to know that the 1<sup>st</sup> applicant offered to purchase the suit property from the bank. He had procured their officials to execute an agreement dated 9<sup>th</sup> October 1996, for sale of the suit property in favour of the 2<sup>nd</sup> applicant



- by representing to its officials/directors that they were executing mere papers related to income tax department over the suit property, and that therefore its (the bank) conduct was fraudulent.
8. It was the respondent's contention that the agreement could not be performed, as it was not in a position to sell the suit property since it was charged to the bank; that the bank could not discharge the suit property as their account had not been redeemed, as such, the suit property could not be sold by private treaty; and that the bank was subsequently placed under liquidation by Central Bank of Kenya.
  9. The applicants continued collecting rent amounting to Kshs. 57,000/= per month but failed to remit the same either respondent or to the bank. Eventually in exercise of its statutory power of sale, the bank sold the suit property for Kshs. 2,800,000/=. Contrary to the then value of the land of Kshs. 4,000,000/= which was as a result of the 1<sup>st</sup> applicant failing to perform its part of the agreement reached on 5<sup>th</sup> June 1995. The Notification of Sale was served upon one Simon Ng'ang'a, a son to the 1<sup>st</sup> applicant and director of the 2<sup>nd</sup> applicant who described himself as the caretaker; it was never forwarded to them. The highest bidder of the suit property during the public auction was M/s. Rune Farm and the said Simon Ng'ang'a signed the sale agreement on their behalf. On 7<sup>th</sup> August 2001, the suit property was transferred to the name of Alice Wangari Ng'ang'a and Mary Wanjiru Kingara, who are the wife and daughter-in-law of the 1<sup>st</sup> applicant respectively. It is the contention of the respondent that the loss of the suit property was directly attributable to the applicants whose main aim was to acquire the property for themselves which they did by proxy.
  10. The applicants filed their statement of defence on 6<sup>th</sup> November 2003, and denied all the allegations made in the plaint. The 1<sup>st</sup> applicant averred that if there was any meeting held on 5<sup>th</sup> June 1995, the respondent's directors having read and understood the implications of the resolutions and agreement, voluntarily signed them. They denied taking possession of the suit property and collecting rent from the tenants, and the trial court was urged to dismiss the suit with costs and interest.
  11. The matter proceeded for hearing by way of *viva voce* evidence. The respondent called one witness while the applicants called two witnesses. Upon considering the evidence presented, the trial court entered judgment for the respondent as against the applicants jointly and severally on the following terms; -
    - a. Mesne Profit at Kshs. 2,016,000/=.
    - b. Special damages on the value of the property at Kshs. 4,000,000/=.
    - c. General damages of Kshs. 1,500,000/=.
    - d. Costs of the suit and interest at court rate from the date of filing of the suit to payment in full.
  12. We heard the application on virtual platform on 26<sup>th</sup> July 2023. Learned counsel Mr. Okullo appeared for the applicants whilst learned counsel Mr. Wanjohi appeared for the respondent. The applicant filed submissions dated 3<sup>rd</sup> May 2023 and the respondent filed submissions dated 12<sup>th</sup> May 2023.
  13. The submissions proffered by both counsel were a regurgitation of the averments contained in the affidavits in support of, and in opposition to, the application, and we therefore see no need to rehash them save for salient issues. We thus add that, Mr. Okullo relied on the case of [\*Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others\*](#) [2013] eKLR to submit that the applicants had demonstrated that they had satisfied the twin principles for grant of an application of this nature. He also stated that the reason for the delay in filing the application, was that there was an understanding between the parties that the respondent would not seek to execute the judgment before the appeal was heard and determined. Further, that the substratum of the appeal relates to the respondent's financial inability or incapability to compensate the applicants in the event that the appeal was successful, thus rendering



the appeal nugatory. Mr. Wanjohi on his part stated that the appeal will not be rendered nugatory if execution proceeds as the decree is monetary, as such, the property can be sold and compensation for any loss incurred by the applicants made.

14. We have carefully considered the application, the grounds in support thereof, the respective affidavits, the submissions by both counsel, the authorities cited and the law. We take cognizance of the fact that this is an application under rule 5(2)(b) of this Courts Rules. The principles that guide the consideration of such an application were stated by this Court in Stanley Kangethe Kinyanjui v Tony Ketter & 5 others (supra), as follows; -
- i. In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this court. See *Ruben & 9 others v Nderitu & another* (1989) KLR 459.
  - ii. The discretion of this court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so.
  - iii. The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. *Halai & another v Thornton & Turpin* (1963) Ltd. (1990) KLR 365.
  - iv. In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. *David Morton Silverstein v Atsango Chesoni*, Civil Application No Nai 189 of 2001.
  - v. An applicant must satisfy the court on both of the twin principles.
  - vi. On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No. Nai 345 of 2004.
  - vii. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. *Joseph Gitahi Gachau & another v Pioneer Holdings (A) Ltd & 2 others*, Civil Application No 124 of 2008.
  - viii. In considering an application brought under Rule 5(2)(b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal. *Damji Pragji (supra)*.
  - ix. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 227 at page 232.
  - x. Whether or not an appeal will 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 will reasonably compensate the party aggrieved.
  - xi. Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecunity, the onus shifts to the latter to rebut by evidence the claim. *International Laboratory for Research on Animal Diseases v Kinyua*, [1990] KLR 403.



15. We are cognizant that an arguable appeal is not one that must necessarily succeed, but simply one that is deserving of the Court’s consideration. See [Dennis Mogambi Mang’are v Attorney General & 3 others](#) [2012] eKLR where the Court held that:

“An arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court’s consideration.”

16. The applicants have filed a Memorandum of Appeal dated 3<sup>rd</sup> January 2022 in which they have raised several grounds, which were reiterated at the hearing. Among them are that the suit was time barred; whether the suit was founded on tort, fraud, breach of trust or contract; and whether the respondent should have directed its claim against the bank. At this stage, it is not for us to gauge the merit of the arguments or their success, but rather, find that there are issues that ought to be considered and determined by this Court, which we do find accordingly.

17. On whether the appeal would be rendered nugatory, depends on the circumstances of each case. (See [Reliance Bank Ltd v Norlake Investments Ltd](#) (2002) 1 EA 227). In the case of [Ahmed Musa Ismael v Kumba Ole Ntamorua & 4 others](#) [2014] eKLR, the Court had this to say:

“...to preserve the integrity of the appellate process so as not to render any eventual success a mere pyrrhic victory devoid of substance or succour by reason of intervening loss, harm or destruction that turns the appeal into a mere academic ritual.”

18. As was stated by this Court in the case of [Stanley Kangethe Kinyanjui v Tony Ketter & 5 others](#) (*supra*), an appeal will be rendered nugatory if what is sought to be forestalled cannot be reversed or can only be reversed at great expense or cannot be adequately compensated with damages.

19. Judgment herein was rendered on 4<sup>th</sup> July 2019, and it was not until the applicants were served with a notice to show cause dated 11<sup>th</sup> April 2023 for 26<sup>th</sup> April 2023, almost four years later, that they filed the application herein. All this while, the applicants never sought stay of execution of the impugned judgment or the orders arising therefrom. Their inaction not only reeks of indolence, but portrays a litigant who went to slumber and was only awakened by the respondents’ action.

20. Further, we do hold that the issue at hand does not delve into the ownership of the suit property, rather, this is a monetary claim. The applicants have not laid before us any figures for this Court to ascertain the loss likely to be suffered or what it is that has been suffered. To our minds, any monetary loss can be compensated. We therefore find that there is nothing to be rendered nugatory and the applicant has failed to satisfy the second limb of the application.

21. Consequently, the application fails and is hereby dismissed with costs to the respondent.

**DATED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF JANUARY 2024.**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

**ALI-ARONI**

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**JUDGE OF APPEAL**

**G. W. NGENYE-MACHARIA**



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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

