



**Ngige & another v Nyakairu (Civil Application E301 of 2023)
[2024] KECA 5 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KECA 5 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E301 OF 2023
SG KAIRU, F TUIYOTT & JW LESSIT, JJA
JANUARY 25, 2024**

BETWEEN

FRANCIS WAINAINA NGIGE 1ST APPLICANT

WILSON NJUGUNA GAKUHA 2ND APPLICANT

AND

ANN NYAMBURA NYAKAIRU RESPONDENT

(An application for stay of execution pending the hearing and determination of this application and the intended appeal from the Judgment and Decree of the Environment and Land Court at Thika (J. G. Kemei, J.) delivered on 7th December 2021 in ELC. Appeal No. 64 of 2019)

RULING

1. To deserve grant of an order for stay or of an injunction under Rule 5(2)(b) of the [Rules of this Court](#), an applicant must have an arguable appeal or intended appeal and the appeal or intended appeal will be rendered nugatory unless the stay or injunction is granted. Both must be demonstrated. Without the other, the application fails.
2. Here, the notice of motion dated 10th July 2023 will ultimately be determined on whether or not we are persuaded that the intended appeal of Francis Wainaina Ngige and Wilson Njuguna Gakuha (“the applicants”) will be rendered nugatory if their plea for stay of execution of the judgment of 7th December 2021 by Hon. J. G. Kemei, J. is Thika ELCA No. 64 of 2019 is not granted.
3. The dispute herein has its genesis in a sale agreement dated 25th February 2009 entered between the applicants on the one hand and one, Ann Nyambura Nyakairu (the respondent) on the other, in which land known as Ruiru/Kiuu Block 2/Githunguri/3611 measuring 0.5000 was sold to the applicants by the respondent. There has been a blame game between the two parties as to what went wrong with the transaction which ended in civil proceedings before the Senior Principal Magistrate’s Court at



Thika being SPMCC 820 of 2015. In a plaint dated 18th August 2015, the current applicants sought several orders against the respondent; an injunction; specific performance; general damages for breach of contract; and costs of the suit. The respondent counterclaimed for eviction orders, general damages for trespass and damages for loss of income.

4. That round of contest was in favour of the applicants when the learned trial magistrate held that although the applicants breached certain terms of the contract, the respondent contributed to the breach. In the end, a conditional judgment was entered in favour of the applicants, it being that they would pay to the respondent the balance of the purchase price of Kshs. 445,000 within 14 days of the judgment.
5. Aggrieved by that decision, the respondent moved the Environment and Land Court at Thika in ELCA No. 64 of 2019 in a first appeal. On this occasion, the fortunes were on the side of the respondent. The ELC (Kemei, J.) rendered itself thus:

“Given the finding of the court that the respondents failed to comply with the agreement: the agreement is void for want of land control board consent to sale and subdivide; sale agreement was breached by the respondents on account of non-performance; tainted with illegality – sale of land while they lacked legal capacity to do so; refunds having been made there was no agreement to anchor specific performance. It is the courts firm finding that specific performance cannot be granted in the circumstances and I find that the Hon. Magistrate erred in so granting.”

6. Ultimately, the appeal was allowed and applicants ordered to vacate the suit land within a period of 45 days. That is the decision that the applicants intend to challenge in an intended appeal before this Court.
7. While the applicants argue that the appeal will be rendered moot and nugatory if the application is not allowed because the respondent is likely to evict them from the land and dispose of it to third parties, the respondent retorts by submitting that the sale agreement provides for damages in case of breach and damages would be an adequate remedy for breach.
8. Reacting to this argument, Ms Njoroge, learned counsel appearing for the applicants contended that the respondent deems the sale agreement as cancelled and is no longer relying on it. Further, that the transaction happened 10 years ago and a refund of the money will not compensate her clients sufficiently.
9. Clause 7 of the sale agreement is unequivocal:

“7. Provided Always that it is hereby agreed by and between the parties hereto that if any parties make a breach of any clause of this agreement, shall pay to the other party 25% by way of liquidated damages of the purchase price plus all monies expended towards the property herein.”

10. As a matter of fact, one of the prayers sought by the applicants at the trial was damages for breach of the sale agreement or in the alternative payment of the value of the suit property at the time the suit was filed. And looking at the draft memorandum of appeal by the applicants, a central plank to the intended appeal is that the sale agreement still subsists and has never been rescinded. It therefore seems rather strange for the applicants to argue that compensation by way of damages is not available to them only because the position of the respondent is that the sale agreement no longer subsists when the success of their appeal is substantially pegged on the Court upholding the subsistence of the contract. We are not



told that the respondent is incapable of paying such damages as required should the intended appeal eventually prevail. And as to the adequacy of damages as a remedy, the applicants themselves thought it to be a good remedy at trial and should not be permitted to resile from that position. The intended appeal is therefore unlikely to suffer any peril even if stay is not granted.

11. The notice of motion dated 10th July 2023, is dismissed with costs.

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

S. GATEMBU KAIRU, FCIArb.

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

I certify that this is a true copy of the original

SIGNED

DEPUTY REGISTRAR

