



Wanjiru (Suing as the administrator of the Estate of the Late Francis Mbugua Njoroge (Deceased) & another v Thagishu (Sued as the legal representative of the Estate of Dominique Thagishu Karari) (Civil Application E541 of 2023) [2024] KECA 83 (KLR) (9 February 2024) (Ruling)

Neutral citation: [2024] KECA 83 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E541 OF 2023
MA WARSAME, S OLE KANTAI & PM GACHOKA, JJA
FEBRUARY 9, 2024**

BETWEEN

**MARGARET WANJIRU (SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE FRANCIS MBUGUA NJOROGE (DECEASED)) ... 1ST APPLICANT
DANIEL KIBERA 2ND APPLICANT**

AND

LUKA NDIWA THAGISHU (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF DOMINIQUE THAGISHU KARARI) RESPONDENT

(An application for stay of execution against the judgment of the High Court (Lady Justice Lucy N. Mbugua) at Nairobi delivered on 26th October, 2023) in ELC CIVIL SUIT NO. 524 OF 2002)

RULING

1. The motion on notice before us, dated November 17, 2023, is taken out principally under rule 5(2) (b) of the [Rules](#) of this Court and prays, on the main, for an order of injunction to restrain the respondent, his employees or agents from evicting the applicants from land known as Dagoretti/Riruta 4809 (“the suit property”) in execution of the Judgment and orders of the Environment and Land Court (Lady Justice Mbugua) issued on October 26, 2023, pending the hearing and determination of an intended appeal.
2. The litigation in the trial court giving rise to the instant application revolves around the competing interests in the suit property over which both parties claim ownership. The respondent who had title but lacked possession maintained that his title to the suit property is anchored on a sale agreement dated 28/11/1990 and a decree issued from a consent judgment in Nairobi HCCC No. 3216 of 1994. According to the sale agreement the respondent’s father (now deceased) purchased the suit property from vendors who occupied the land but he never took possession as they did not vacate.



3. Further, the consent order decreed that the original property LR No. Dagoretiti/Riruta/271 be subdivided and 0.16 Ha be registered in the respondent's name, Dominique Thagishu Karari. On the other hand the applicants alleged that the respondent's title was procured fraudulently, that subdivision did not occur as they still possess the original title.
4. Upon weighing the rival positions taken by the parties against the law, the learned Judge found that the respondent acquired his title pursuant to a court order and there was no evidence to indicate it was obtained through fraud. The applicants who are in occupation of the suit property had prevented the deceased from enjoying the fruits of his judgment for decades and cannot be allowed to perpetuate an illegality by circumventing an order of the court. Consequently, the court issued the following orders inter alia;
 - a. An order is hereby issued declaring that the Estate of Dominique Thagishu Karakiis the absolute owner of land parcel no. Dagoretti/riruta/4809
 - b. An order is hereby issued declaring that the defendants are trespassers upon parcel Dagoretti/Riruta/4809
 - c. An order is hereby issued requiring the defendants to vacate the land Dagoretti/Riruta/4809 within a period of 45 days, failure to which eviction is to take effect.
 - d. The defendants are hereby condemned to pay costs of the suit and interests thereof at court rates from the date of filing the suit.
5. It is this decision that precipitated the present application before us. The grounds upon which the stay of execution is sought, as set out in the application, the supporting affidavit sworn on November 17, 2023 by Margaret Wanjiru and the oral submissions of Mr. Kinyanjui, learned counsel for the applicants, are that the fear of eviction from the land they have lived on and developed for over forty years is imminent, that the respondent has served a notice of entry upon the suit property for the purposes of resurveying the suit property, that the appeal will be rendered nugatory given the attempts to demolish the property of the applicants.
6. It was further argued that the appeal is arguable, that the court erred in finding that the title held by the respondent is valid when the original title is still intact and had never been surrendered to the ministry of Lands and that the learned Judge erred by making orders not sought by the parties.
7. The respondent opposed the application vide a replying affidavit sworn on 1st February, 2024 where it was deponed that the prayers sought were untenable given that the applicants were evicted from the suit property on December 29, 2023 after the parties agreed to an amicable process with the assistance of the assistant area chief, that the suit property is in his possession and he has rented the shops thereon to paying tenants, that execution of the decree has not prejudiced the applicants and they can still pursue their appeal.
8. In determining an application under rule 5(2) (b) of the rules of this Court, we have to satisfy ourselves that the applicants have demonstrated that they have an arguable appeal or an appeal that is not frivolous, and secondly that if the order of injunction sought is not granted, the intended appeal will be rendered nugatory, if it eventually succeeds. (See *Reliance Bank Ltd (in Liquidation) v Norlake Investments Ltd* (2002) 1 EA A 227.

The applicant is obliged to satisfy both of those principles; it is not enough to satisfy only one of them. (See *Peter Mburu Ndururi v James Macharia Njore* CA No. 29 of 2009 (UR 14/2009).



9. On the limb of arguability, the applicants have availed a draft memorandum of appeal which sets out several grounds of appeal. In our view the issue of the validity of the title of the suit property is a matter worthy of consideration by this court. The applicants are not obliged to establish a multiplicity of arguable grounds; even a single arguable issue will suffice and is sufficient, if it can show that it has serious questions of law or a reasonable argument, deserving of consideration by this Court (See *Retreat Villas Ltd v Equatorial Bank Ltd & others*, Civil Application No. 40 of 2006 (unreported)).
10. On the nugatory aspect, it is evident from the respondent's replying affidavit that there was an attempt to enforce the decree by evicting the applicant from the suit property which was not successful. In order to preserve the substratum of the dispute and given that the applicants have invested and developed the suit property over many decades, it is in the interest of justice that status quo be maintained, pending the hearing and determination of the appeal.
11. The final orders are that the notice of motion dated November 17, 2023 is allowed and the appeal be heard on priority basis. Costs in the cause.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF FEBRUARY, 2024.

M. WARSAME

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

M. GACHOKA CIArb, FCIArb

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

