



**East Africa Institute of Certified Studies Limited & 2 others v Mombasa Trade Centre Ltd
(Civil Appeal (Application) E107 of 2023) [2024] KECA 411 (KLR) (26 April 2024) (Ruling)**

Neutral citation: [2024] KECA 411 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) E107 OF 2023
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA
APRIL 26, 2024**

BETWEEN

**EAST AFRICA INSTITUTE OF CERTIFIED STUDIES
LIMITED 1ST APPLICANT
DANIEL WAKABA MACHARIA 2ND APPLICANT
SERAH WANARU MACHARIA 3RD APPLICANT**

AND

MOMBASA TRADE CENTRE LTD RESPONDENT

*(Being an appeal against the judgment and decree of the Environment
and Land Court of Kenya at Mombasa (L. Naikuni, J.) given on 22nd
June, 2023 in Environment and Land Court (ELC) Case No. 104 of 2021)*

RULING

1. By a Notice of Motion dated 29th September 2023 brought pursuant to rule 5(2) (b) of the [Court of Appeal Rules](#), the applicants East Africa Institute of Certified Studies Limited, Daniel Wakaba Macharia and Serah Wanaru Macharia, seek:
 - (i) stay of execution of the judgment and decree of L. Naikuni, J. dated 22nd June 2023 in Mombasa Environment and Land Court (ELC) Case No. 104 of 2021 pending hearing and determination of this appeal and
 - (ii) the costs of this application be in the appeal.
2. The Motion is brought pursuant to the grounds on its face and on affidavit in support sworn by the 2nd applicant where the deponent contends that the suit filed by the respondent against the applicants related to rent in respect of a tenancy in the premises known as Mombasa/Block XXV1100 (the leased



- premises) in which the applicants were tenants and the respondent was the landlord; that the applicants had vacated the leased premises on account of the Covid-19 Pandemic before expiry of the 6-year period of tenancy. It was deposed that, after the case was heard, judgment was entered against the applicants on 22nd June 2023; that the applicants were dissatisfied with the judgment and filed an appeal to this Court; that the appeal is arguable with high chances of success; and that, on September 2023, the Bill of costs came up for taxation, and that the matter was to be mentioned on 1st November 2023 for the Deputy Registrar to give a date for ruling on taxation. It was further averred that, if execution were to proceed and the appeal thereafter succeeds, it would be rendered nugatory.
3. In a replying affidavit sworn on 21st November 2023 by Abdulkadernohamedali Sale Mohamed, the respondent's accountant, the respondent opposed the application and deposed that the application is misconceived, ill-intended and is an orchestrated attempt by the applicants to prevent the respondent from enjoying the fruits of a valid judgment, escape liability and delay justice for the respondent; that the applicants appeal does not raise any arguable grounds or issues with any probability of success; that the decree appealed from is a money decree, and that the respondent is financially capable of refunding the decretal sum in the unlikely event the appeal were to succeed; that the appeal would not be rendered nugatory; and that the applicants have not demonstrated how they will suffer irreparable loss or damage not capable of being compensated by the respondent should the appeal succeed. It was contended that the application does not in any manner satisfy the required threshold for the grant of an order for stay of execution pending determination of this appeal, and that it should therefore be dismissed with costs.
 4. During virtual hearing, Mr. Keyonzo, learned counsel for the applicant, submitted that he would rely on the written submissions where it was submitted that the Memorandum of appeal indicates that the applicants' complaint is that the trial judge misapprehended the evidence, and did not fully address the issues raised; that the respondent, having admitted that it has re-let the premises to other tenants after the applicants had vacated it, could not then claim rent for the rest of the 6-year period; that the judge misapprehended and misapplied the provisions of section 112 of the *Evidence Act*, that an amount totaling Kshs. 3,499,760 being deposit paid for the leased premises was not refunded to the applicants; that the costs of repair in the sum of Kshs. 2,330,790/58 had not been proved; that goods distrained upon in the leased premises in the value of Kshs. 1,008,000 had not been accounted for to the applicants; that the Covid-19 Pandemic was an event of force majeure which excused the applicants from paying rent; and that the Judge failed to consider that the tenancy was subject to the provisions of section 65 (f) of the *Land Act*, which gave the applicants the right to terminate the tenancy if the premises could no longer be used for the purposes for which they were intended.
 5. On the nugatory aspect, counsel submitted that the decree is a money decree of Kshs. 69,590,374/16; that the tenancies the subject matter of the dispute terminated when the applicants vacated the premises on 31st March, 2021; that, thereafter, the premises were re-let to other tenants; that, according to the respondent's Complaint, the total sum in arrears of rent was Kshs. 16,070,219/80 as at that date; and that the judgment includes rent up to the year 2025 when the leases are expected to lapse, which amounts to an extra Kshs. 53,520,155 payable to the respondent. It was submitted that they are unaware of whether the respondent has the financial means to repay the decretal amount were the appeal to succeed.
 6. In rebuttal, Mr. Mutubia, learned counsel for the respondent, submitted that the applicants have not demonstrated that, if stay is not granted, the appeal will be rendered nugatory; that nowhere in the supporting affidavit have the applicants stated that the respondent will be unable to refund the decretal amount in the event that it is paid in satisfaction of the amount claim; that the mere filing of an appeal is not a ground under rule 5(2) (b) of this *Court rules* for grant of orders for stay of execution; and



that the application had not met the threshold prescribed under rule 5(2) (b) of this Court's rules and, therefore, ought to be dismissed.

7. The jurisdiction of the Court in so far as rule 5(2) (b) is concerned is original and discretionally and, to succeed, an applicant must demonstrate, firstly, that his appeal or intended appeal is arguable or, put differently, that it is not frivolous; and, secondly, that unless he is granted stay of the orders of the court below, the appeal or intended appeal, if successful, will be rendered nugatory. See Chris Mungga N. Bichage v. Richard Nyagaka Tongi & 2 Others [2013] eKLR.
8. On the first limb, and having carefully considered the application, the supporting affidavit, the grounds of appeal, the replying affidavit, the rival submissions and the cited authorities, and without delving into the grounds of appeal, the applicant has raised grounds that, in our view, are arguable and worthy of being ventilated on appeal to this Court.
9. In determining the second limb as to whether or not the appeal will be rendered nugatory, the Court has to consider the conflicting claims of both parties and each case has to be determined on its own merits, and considering that the crux of the matter is a money decree.

In the case of Kenya Hotel Properties Limited v. Willeden Properties Limited, Civil Application No. 322 of 2006 (UR 178/2006), this Court stated as follows:

“The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree, so long as the court ascertains that the respondent is not a man of straw, but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant.”

10. In the same vein, this Court in the case of Youth Agenda v. Rita Kijala Shako [2014] eKLR further held:

“On the second requirement as to whether or not the appeal if successful would be rendered nugatory, what is involved here is a money decree. Ordinarily an appeal arising out of a money decree cannot be rendered nugatory if payment is effected, the assumption being that in the event that the appellant succeeds, the respondent would be in a position to repay. However, for the applicant to overcome this general principle, it should be able to demonstrate that the respondent is a person of straw or as poor as a church mouse and given those circumstances, if the decretal sum was to be paid, it would not be able to repay the same, to the successful appellant. (See Kenya Shell Ltd supra). However, with the advent of Oraro and Rachier Advocates (supra), another consideration seems to have been added in the mix, although the Judges who presided over the case where shy to not specifically say so, that in dealing with the issue whether or not success in the intended appeal will be rendered nugatory if stay is not granted particularly in money decrees, the Court ought to weigh the claims of both sides. The applicant may find itself in a very tight corner if it was forced to pay the decretal amount such that its operations may be crippled or adversely affected, whereas perhaps the respondent would not be hit as hard by being kept out of the sum for a while pending the outcome of the appeal.”

11. Our consideration of the pleadings does not disclose that the respondent is incapable of refunding the decretal sum should the applicants be successful in their appeal. In point of fact, the respondent has emphasized that the Decree appealed from is a money decree, and that the respondent is financially capable of refunding the decretal sum in the unlikely event the appeal was to succeed and that, therefore, the appeal will not be rendered nugatory. On the other hand, the applicants have not



demonstrated what hardship they are likely to bear were they to pay the decretal sums owed. In effect, they have failed to satisfy the second requirement that the appeal would be rendered nugatory in the event that they were to pay the decretal sums and the appeal succeeds.

12. In sum, the Notice of Motion dated 29th September 2023 has no merit.

13. It fails and is hereby dismissed with costs in the appeal.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 26TH DAY OF APRIL, 2024.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

signed

DEPUTY REGISTRAR

