



**Maina & another v Passaris & another (Civil Application
E502 of 2023) [2024] KECA 369 (KLR) (12 April 2024) (Ruling)**

Neutral citation: [2024] KECA 369 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E502 OF 2023
SG KAIRU, F TUIYOTT & GWN MACHARIA, JJA
APRIL 12, 2024**

BETWEEN

CHARLES KANYUGA MAINA 1ST APPLICANT

GRACE WANJIKU KANYUGA 2ND APPLICANT

AND

ESTHER MUTHONI PASSARIS 1ST RESPONDENT

ALKA ROSHANLAL HANSPAL 2ND RESPONDENT

(An application for stay of execution of the judgment and decree of the Environment and Land Court at Nairobi (Komingoi, J.) delivered on 12th October 2023 in ELC Case No. 1256 of 2014)

RULING

1. By their application dated 30th October 2023 made principally under rule 5(2)(b) of the [Court of Appeal Rules](#), the applicants, Charles Kanyuga Maina and Grace Wanjiku Kanyuga, seek an order that pending the hearing and determination of their intended appeal, there be a stay of execution of the judgement of the Environment and Land Court (ELC) (Komingoi, J.) delivered on 12th October 2023 in ELC Case No. 1256 of 2014.
2. The applicants are aggrieved by that judgment in which the ELC declared that the 1st respondent, Esther Muthoni Passaris, has the right, upon payment of Kshs.35,000,000.00, to purchase the property known as LR No. 7741/75 from the estate of Kuttar Singh Hansal, deceased, through the 2nd respondent Alka Roshanlal Hansal; declared that the sale and transfer of the property in favour of the applicants by the 2nd respondent as null and void; directed the Chief Land Registrar to revoke and cancel the registration of the property in favour of the applicants; and ordered the 2nd respondent to execute a transfer of the property in favour of the 1st respondent.



3. The applicants' case is that they purchased the property over a decade ago for Kshs. 100,000,000.00 and are the registered proprietors pursuant to a transfer dated 16th May 2014; that on the property are two houses one of which they occupy while the other is occupied by the 1st respondent under an undated and unregistered lease that took effect on 1st September 2006 which contained the option to purchase in favour of the 1st respondent.
4. It is the applicants' case that the ELC erred in enforcing the option to purchase in favour of the 1st respondent because the unregistered lease in favour of the 1st respondent lacks legal validity. The applicants urge, through learned counsel Mr. M. Muchemi, that the intended appeal is arguable; that among the issues the Court will be called upon to determine in the appeal include the question whether the ELC erred in upholding enforceability of the option to purchase under an unregistered lease.
5. The applicants are supported in the application by the 2nd respondent, through learned counsel Mr. G. E. O. Oduor, who complains that the existence of the right to exercise the option to purchase is contentious; and that he is wrongly being compelled to accept Kshs. 35,000,000.00 and to transfer the property to the 1st respondent failing which the Deputy Registrar of the court was mandated to do so.
6. On her part, the 1st respondent, through learned counsel Mr. Issa Mansur, states that she has been in occupation of the property for over 18 years since September 2006 having entered into a binding lease agreement with the deceased through his wife, agent and lawful attorney, the 2nd respondent; that she has made substantial renovation to the property; that in accordance with the provisions of the lease, the 1st respondent duly exercised the option to purchase; gave notice in that regard and has been ready and willing to pay the purchase price of Kshs.35,000,000.00; that the applicants purchased the property with full knowledge of pending litigation between the 1st respondent and the deceased and cannot claim to be innocent purchasers for value without notice; and in any event there is no evidence that the applicants paid the purchase price of Kshs. 100,000,000.00 as they claim.
7. It was urged that the intended appeal does not have high chances of success and the application should be dismissed.
8. We are satisfied, in keeping with the legal principles applicable to applications of this nature as stated in *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others* [2013] eKLR, that the intended appeal is arguable. There is for instance the question whether the ELC erred in upholding the enforceability of the option to purchase in favour of the 1st respondent. There appears to be questions involving execution of the lease granting the option to purchase.
9. On the nugatory aspect, the 1st respondent asserts that granting the orders sought will be prejudicial having been in continuous possession of the property since 2006 and that the balance of convenience tilts in favour of declining the orders.
10. The applicants on the other hand urge that they will face irreversible loss of the property should the judgment of the ELC be effected as it will result in cancellation of their title.
11. We are satisfied that this is proper case for the Court to exercise its discretion in favour of the applicants by holding matters where they are so that the 1st respondent's possession is not disturbed, and the property is not transferred during the pendency of the appeal.
12. Consequently, we grant prayer (c) of the application dated 30th October 2023 and order a stay of execution of the judgment of the ELC in ELC Case No. 1256 of 2014 pending the hearing and determination of the applicants' appeal.
13. Costs of the application will be costs in the appeal.



DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF APRIL 2024.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

F. TUIYOTT

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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

