



**Githaiga & another v Karanja; Murigi (Interested Party) (Civil Application E074 of 2023) [2024] KECA 605 (KLR) (24 May 2024) (Ruling)**

Neutral citation: [2024] KECA 605 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E074 OF 2023  
K M'INOTI, JM MATIVO & HM OKWENGU, JJA  
MAY 24, 2024**

**BETWEEN**

**GRACE WANJIRU GITHAIGA ..... 1<sup>ST</sup> APPLICANT**

**PAUL KURIA GITHAIGA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**JOHNSON GITHII KARANJA ..... RESPONDENT**

**AND**

**ALICE WANJIKU MURIGI ..... INTERESTED PARTY**

*(Application for stay of execution of the judgment and decree of the ELC at Nairobi (O.Mboya J.) delivered on 9th February 2023 in ELC E059 of 2021)*

**RULING**

1. Before this Court is a notice of motion dated 6<sup>th</sup> March, 2023 brought under Section 3, 3A & 3B of the [Appellate Jurisdiction Act](#) and Rule 5(2)(b) of the [Court of Appeal Rules](#). The motion stems from a suit that was filed in the Environment and Land Court (ELC) at Nairobi, by Grace Wanjiru Githaiga and Paul Kuria Githaiga as administrators of the Estate of the late James Githaiga Kuria, against Johnson Githii Karanja (now the respondent).
2. In the suit, the legal representatives who are the applicants herein, had sought inter alia declarations: that the lease agreement dated 30<sup>th</sup> June 2015 entered into between the deceased and the respondent in regard to the properties known as LR 209/18279 and 209/18280 Digo Road Nairobi (herein leased property) was renewed upon expiry on 30<sup>th</sup> August 2021 and the renewed lease is due to expire on 30<sup>th</sup> October 2025; and that the developments and structure within the leased property belong to the deceased's estate.



3. The respondent had filed a defence and counterclaim in response to the applicants' suit, in which it denied the claim and counterclaimed from the applicants' mesne profits and general damages for trespass, as well as an injunction restraining the respondents from trespassing or interfering with the leased property.
4. Upon hearing and considering the evidence, the learned Judge of the ELC delivered a judgment on 9<sup>th</sup> February 2023 in which he dismissed the applicants' claim, gave judgment in favour of the respondent on the counterclaim, and issued inter alia orders directing the applicants to vacate and hand over vacant possession of the leased property within 90 days from the date of the judgment, and in default, the respondent be at liberty to evict the applicants, their employees, servants or agents. In addition, the applicants to pay the respondent mesne profits that were assessed at Kshs. 3,360,000/=.
5. As would be expected, the applicants who were aggrieved by the judgment of the ELC moved to this Court, and filed the notice of motion subject of this ruling. In the motion the applicants seek in the main an order of stay of execution of the judgment and decree delivered on 9<sup>th</sup> February, 2023, together with all other consequential orders arising therefrom, pending determination of their appeal.
6. In support of the motion, the applicants rely on grounds set out on the face of the motion and an affidavit sworn in support of the motion by Grace Wanjiru Githaiga. In a nutshell the applicants maintain that the initial lease agreement in regard to the lease property lapsed, but was orally renewed; that pursuant to the initial lease agreement, the deceased developed a four-storey building, where he carried out business and sublet to other tenants; that the deceased continued to pay rent in accordance with the lease agreement until his demise; that clause 5 in the initial lease agreement allowed the tenant to remove all the structures he had put up on the leased property at the expiry of the lease; that the applicants have an arguable appeal which raises pertinent and salient issues; and that the appeal has overwhelming chances of success.
7. The applicants are apprehensive that unless an order of stay of execution is granted, they will be evicted from the leased property, as the respondent is on the verge of executing the judgment and has started engaging in acts of aggression geared towards dispossessing the applicants of the leased property. Citing *Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others* [2013] eKLR, the applicants submit that if they are evicted from the leased property, the respondent will be at liberty to deal with the leased property and the structures that were put up by the deceased, in a manner that may be impossible to reverse, and this will cause substantial loss to the applicants and render the intended appeal worthless.
8. The motion has been opposed through a replying affidavit sworn by the respondent. He deposes that the impugned judgment was in regard to a dispute over the leased property that comprises two adjacent properties, which presently have a four storied building; that he is the registered proprietor of the leased property and had leased it to the deceased for a 5-year term running from 1<sup>st</sup> July, 2015 to 30<sup>th</sup> September, 2020; that when the lease expired, the respondent and the deceased entered into negotiations for extension of the lease, but the deceased passed on before the negotiations were concluded; and that the lease was not renewed as the applicants were unwilling to enter into new terms.
9. The respondent swore that he demanded vacant possession of the leased property but the applicants filed a suit seeking declaration that the lease had been renewed, and that the structures erected upon the leased property by the deceased belonged to the estate; that the respondent filed a defence and counterclaim to the suit, seeking inter alia vacant possession, injunctive orders, mesne profits and damages for unlawful trespass; and that following the hearing of the suit, judgment was entered in his favour on the counterclaim.



10. In regard to the notice of motion, the respondent contended that the applicants have not attached a draft memorandum of appeal, hence, the Court cannot tell whether the intended appeal is arguable; that the appeal cannot be rendered nugatory as the relationship between the applicants and the respondent was commercial; that any loss is easily quantifiable and capable of being compensated in monetary terms; and that the orders sought by the applicants if granted, would prejudice the respondent as he used a lot of resources to acquire the leased property, with the intention of getting an income; but has not earned any money from the leased property for the last one year due to interim orders that were made by the ELC.
11. The respondent protested that the applicants have purported to give as security the rent deposited in the joint account by the tenants in the leased property; that this money cannot provide adequate security to the respondent as it actually belongs to him; and that the applicants were ordered in the judgment to pay mense profits amounting to Ksh 3,360,000 together with interest, which amount remains outstanding and will continue to increase if the order of stay of execution is granted. The respondent therefore, urged the Court to dismiss the motion with costs for lack of merit.
12. It is trite law that an applicant moving to this Court under Rule 5(2)(b) of the *Court of Appeal Rules*, has to satisfy a threshold laid out in certain principles. These principles were summarized in *Stanley Kang'ethe Kinyanjui vs Tony Ketter & 5 Others* [2013] eKLR, 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.”
13. It is not disputed that the respondent is the registered proprietor of the leased property, and that he had entered into a lease agreement for the property with the deceased who died after the expiry of the lease. The applicants have maintained that they have an arguable appeal, a major issue in contention being whether the deceased’s estate owns the developments that were put up by the deceased on the leased property. Also, in contention is whether the lease for the leased property was extended orally upon its lapse.
14. We are alive to the fact that at this stage it is not for us to make definitive findings of either fact or law least we embarrass the Court that will hear the appeal. However, we cannot ignore Section 3(3) of the [Law of Contract Act](#) which provides that:
- “No suit shall be brought upon a contract for the disposition of an interest in land unless: -
- a. The contract upon which the suit is found-
    - i. Is in writing
    - ii. Is signed by all the parties thereto; and
  - b. The signature of each party signing has been attested by a witness who is present when the contract was signed by such party.”
15. Therefore, a party cannot found a claim on an oral lease of real property in view of the mandatory provisions of section 3(3) of the [Law of Contract Act](#). As per the facts before us the applicants’ claim including the structures on the land, is based on an oral lease agreement and this is not enforceable in law as nothing signed by the parties has been exhibited. In our view there is no arguable issue in regard to the oral lease agreement because the same is not enforceable.

For these reasons the motion before us has not met the threshold of arguability.

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF MAY, 2024**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**K. M’INOTI**

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**JUDGE OF APPEAL**



**J. MATIVO**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

