



**Thiongo v Elsie Ridge Limited & 4 others (Civil Appeal (Application)
E631 of 2023) [2024] KECA 1189 (KLR) (20 September 2024) (Ruling)**

Neutral citation: [2024] KECA 1189 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E631 OF 2023
SG KAIRU, S OLE KANTAI & PM GACHOKA, JJA
SEPTEMBER 20, 2024**

BETWEEN

GEOFFREY MUNGAI THIONGO APPELLANT

AND

ELSIE RIDGE LIMITED 1ST RESPONDENT

**SICHUAN HUASHI ENTERPRISES CORPORATION EAST AFRICA
LIMITED 2ND RESPONDENT**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 3RD
RESPONDENT**

NATIONAL CONSTRUCTION AUTHORITY 4TH RESPONDENT

NAIROBI CITY COUNTY GOVERNMENT 5TH RESPONDENT

*(Being an application for stay of proceedings pending hearing and determination
of the appeal from the Ruling of the Environment and Land Court of Kenya at
Nairobi (Mogeni, J.) dated 14th March, 2023 in ELC Cause No. 1593 of 2016)*

RULING

1. In his application dated 8th February 2024 brought under Rule (5)(2)(b) of the *Court of Appeal Rules*, the applicant, Geoffrey Mungai Thiongo, seeks an order of stay of further proceedings in Nairobi ELC Case No. 1593 of 2016, pending the hearing and determination of his appeal against a ruling delivered on 14th March 2023. In that Ruling, the Environment and Land Court (ELC) (Mogeni, J.) struck out, with costs, the applicant's suit, on the grounds that the ELC lack jurisdiction.
2. The background in brief is that the applicant instituted suit against the respondents in which he sought, among other reliefs, a declaration that the development of LR Nos. 15005/12 and 15005/13, a property apparently in his neighbourhood: is illegal; was done without requisite approvals; in



contravention of zoning policy of Nairobi City County; did not comply with requirements pertaining to Environment Impact Assessment and the Physical Planning Act.

3. In opposition to the suit, the 1st and 2nd respondents filed preliminary objections contesting the jurisdiction of the court to entertain the suit on grounds that there existed dispute resolution mechanisms under the *Physical and Land Use Planning Act*; that the National Environment and Management (NEMA) approvals had already been challenged before the National Environment tribunal; that the ELC further lacked jurisdiction on account of the doctrine of Exhaustion due to existing statutory alternative dispute resolution mechanisms.
4. In its impugned ruling delivered on 14th March 2023, the ELC upheld the preliminary objections and struck out the suit, hence the present appeal in which the application under consideration is hinged.
5. Based on the grounds appearing on the face of the application, the applicant's supporting and supplementary affidavits and the written and oral submissions by learned counsel for the applicant, Mr. H. Tembo, it is the applicant's case that the intended appeal is arguable; that the learned Judge of the ELC erred in upholding preliminary objections to his suit, and the matter was not heard on merits; that the 2nd respondent has claim for costs of Kshs. 12,761,803.77; that unless the orders sought are granted, there is risk of execution of taxed costs and the appeal will be rendered nugatory.
6. In his replying affidavit and written and oral submissions in opposition to the application, learned Senior Counsel Allen Gichuhi for the 2nd respondent supported by learned counsel Mr. Isaac Odhiambo for the 5th respondent urged that the application is not merited; that the order appealed from is a negative order not capable of stay; that the appeal cannot be rendered nugatory as the applicant would have recourse, by way of a reference, if aggrieved by an order of costs on taxation; that in any event, if the appeal is successful, costs can be refunded.
7. Although the 1st, 3rd and 4th respondents were served, they did not appear during the hearing of the application before us on 15th May 2024.
8. We have duly considered the application against the established legal principles. See *Stanley Kangethe Kinyanjui v. Tony Ketter & others* [2013] eKLR. Considering that an arguable appeal is not one that will necessarily succeed, we are persuaded that the appeal is not frivolous. There is for instance the contention by the applicant that the learned Judge erred in failing to consider that the issues raised in his suit could not be effectively resolved through the alternative mechanisms. That is arguable.
9. We are however not persuaded that the applicant has demonstrated that the appeal will be rendered nugatory. For a start, the proceedings before the ELC, it would appear, are at an end. We were informed from the bar during the hearing of the application that costs have already been taxed. There is no suggestion in the material the applicant has presented to indicate that should the appeal ultimately succeed, the costs cannot be refunded.
10. In conclusion therefore, the application dated 8th February 2024 fails and is hereby dismissed with costs to the 2nd and 5th respondents.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

S. ole KANTAI



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JUDGE OF APPEAL

M. GACHOKA, C.Arb, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

signed

DEPUTY REGISTRAR.

