



**Marete v Ndegwa & 2 others (Civil Appeal (Application)  
E042 of 2021) [2023] KECA 11 (KLR) (20 January 2023) (Ruling)**

Neutral citation: [2023] KECA 11 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL (APPLICATION) E042 OF 2021  
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA  
JANUARY 20, 2023**

**BETWEEN**

**JANE MARETE ..... APPELLANT**

**AND**

**JOSEPH WAITIKI NDEGWA ..... 1<sup>ST</sup> RESPONDENT**

**IRENE JULIET NDEGWA ..... 2<sup>ND</sup> RESPONDENT**

**REGISTRAR OF TITLES, MOMBASA ..... 3<sup>RD</sup> RESPONDENT**

*(An application for injunction under Rule 5(2)(b) of the Court of Appeal Rules pending the hearing and determination of an appeal from the judgment and decree of the Environment and Land Court at Mombasa (Omollo, J.) dated 25th October 2018 in ELC Civil Suit No. 201 of 2008)*

**RULING**

1. In her application dated May 4, 2022 presented under rule 5(2)(b) of the *Court of Appeal Rules*, Jane Marete, the applicant/appellant seeks an order of injunction to restrain the respondents from offering for sale, advertising, alienating, transferring, evicting the applicant or otherwise interfering with her possession and occupation of the property known as land reference number 5608 (original number 5303/221) section I Mainland North, Mombasa County (the property) pending the hearing and determination of the appeal. It is supported by her affidavit sworn on May 4, 2022. The application is opposed. Irene Juliet Otinga, the 2<sup>nd</sup> respondent filed a replying affidavit sworn on May 19, 2022 in opposition to the application.
2. We heard the application on November 8, 2022 when the applicant was represented by Mr P Murgor, senior counsel appearing with Mr B Otieno, learned counsel. We were informed from the bar that the 1<sup>st</sup> respondent is deceased. Learned counsel Mr Munyithya appeared for the 2<sup>nd</sup> respondent. He also



held brief for Mr Makuto, learned counsel for the 3<sup>rd</sup> respondent. Mr Murgor and Mr Munyithya orally highlighted their written submissions dated May 11, 2022 and May 18, 2022 respectively.

3. The matter has a long history. In short, the facts appear to be that the applicant entered into an agreement for sale in respect of the property, as purchaser, with the 1<sup>st</sup> respondent (the vendor) over sixteen years ago in October 2006. The sale transaction does not appear to have been completed. The applicant filed suit in the lower court seeking to restrain the vendor and the 2<sup>nd</sup> respondent from dealing with the property; a declaration that the vendor was estopped from selling the property to any other person; and an order of specific performance to compel the vendor to execute a transfer of the property in her favour. The vendor's position was that the applicant defaulted in payment of the purchase price; that he rescinded the agreement with the applicant; and thereafter sold and transferred the property to the 2<sup>nd</sup> respondent in July 2007.
4. In a judgment, the subject of the present appeal, delivered on October 25, 2018, the Environment and Land Court (ELC) dismissed the applicant's claim and: ordered the vendor to refund to the applicant Kshs 1,500,000 the applicant had paid towards the purchase price; found that the 2<sup>nd</sup> respondent is the registered owner of the property; ordered the applicant to vacate the property within 45 days; ordered the applicant to pay general damages at the rate of Kshs 500,000 per year from the date of filing suit until vacant possession is obtained.
5. Having lodged a notice of appeal, by application dated November 8, 2018, the applicant applied before the ELC for an order of stay of execution of the said judgment. On December 7, 2018, an order was recorded before the ELC conditionally allowing the application for stay of execution. The conditions being that the applicant was to deposit Kshs 5,000,000 in a joint account in the names of the advocates for the parties within 30 days from the date of the order and was to pay into the said account Kshs 500,000 annually at the beginning of the quarter of the year 2019 and every subsequent quarter. In the event of default by the applicant, liberty was granted to the respondents to execute the decree.
6. By an application, Civil Application No 1 of 2019, to this court dated January 23, 2019 and made under sections 3, 3A & 3B of the *Appellate Jurisdiction Act* and, like the present application, rule 5(2) (b) of the *Court of Appeal Rules*, the applicant applied for, among others, orders: of stay of proceedings in ELC Civil Suit No 201 of 2008 and more particularly against the orders granted on December 7, 2018; and that "pending the hearing and determination of the intended appeal this honourable court be pleased to stay execution of the decree of the High Court in Mombasa ELC Civil Suit No 201 of 2008." That application was heard by this Court and dismissed in a ruling delivered on March 19, 2021.
7. Shortly after that ruling, and undeterred, the applicant went back to the ELC with an application dated April 7, 2021 seeking an order for review of the orders given by the ELC on December 7, 2018. That application was heard by the ELC alongside an application by the 2<sup>nd</sup> respondent dated February 28, 2019 seeking security to the bailiff to remove the applicant from the property.
8. In a ruling delivered on April 28, 2022, the ELC dismissed the applicant's application for review and allowed the 2<sup>nd</sup> respondent's application. By that ruling, the ELC gave the applicant "7 days to graciously vacate" the property and in default, the 2<sup>nd</sup> respondent would be at "liberty to appoint a court bailiff and proceed to evict" the applicant.
9. Shortly after that ruling, the applicant, lodged the present application seeking the reliefs to which we have already referred. Mr Murgor submitted that the applicant's appeal against the judgment of the ELC given on October 25, 2018 is arguable. In that regard our attention was drawn to the complaints set out in the memorandum of appeal. It was submitted that unless the restraining orders sought are granted, the applicant will be evicted from the property, the appeal will be rendered nugatory.



10. Mr Munyithya on the other hand submitted that the court has no jurisdiction to entertain or grant this application as there is no appeal preferred against the orders of the ELC given on April 28, 2022 which precipitated this application. Moreover, the applicant's previous similar application for stay of the judgment of the ELC given on October 25, 2018 was heard and determined and the present application is therefore *res judicata*. In response counsel for the applicant stated that the applicant's previous application dated January 23, 2019 was not heard on merits and the doctrine of *res judicata* does not therefore apply.
11. We have carefully considered the application, the affidavits, the submissions, and the authorities cited. The powers of the court under rule 5(2)(b) of the [Court of Appeal Rules](#) involve exercise of judicial discretion. The applicant is required to demonstrate that the appeal or intended appeal is arguable. Secondly that if the orders sought are not granted, the appeal, if successful will be rendered nugatory. See for instance [Isbmael Kagunyi Thande v Housing Finance of Kenya Ltd \[2006\] eKLR](#). Counsel have addressed us on that.
12. There is however an underpinning jurisdictional issue, namely, the contention by counsel for the 2<sup>nd</sup> respondent that the court does not have jurisdiction to entertain the present application on account of application of the doctrine of *res judicata*. In that regard it was urged, on the strength of the case of [John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others \[2015\] eKLR](#) that "*res judicata* is essentially a bar to subsequent proceedings involving the same issue as had been finally and conclusively decided by a competent court in a prior suit between the same parties or their representatives." As indicated, the applicant's answer to that contention is that the previous application was not determined on merits.
13. There is no doubt that the applicant's appeal is against the judgment of the ELC delivered on October 25, 2018. It is the basis on which the present application is based. It is the same judgment and the same appeal on which the applicant's earlier application of January 23, 2019 was based. The order of the ELC of April 28, 2022 declining the applicant's application for review, which appears to have precipitated the present application, is not the subject of this appeal. There is, as pointed out by counsel for the 2<sup>nd</sup> respondent, no notice of appeal with respect to the orders of the ELC of April 28, 2022.
14. The applicant's earlier application dated January 23, 2019 was heard and determined by the court. In dismissing it, the court expressed:

"In the case at hand, the applicant lodged an application for stay dated November 8, 2018 in the ELC which resulted in a conditional stay being granted. It has been stated without rebuttal from the applicant that the conditional stay was as a result of a consent in which her advocate participated. In addition, it has not been denied that she partially complied with the consent and deposited some funds. In those circumstances, we do not think that the applicant deserves the exercise of our discretionary power."
15. Evidently, the court considered the rival arguments canvassed before it before determining that the applicant did not "deserve the exercise of our discretionary power." The essence of determination of a 5(2)(b) application entails exactly that, an exercise of discretion. As Githinji, JA stated in [Equity Bank limited v West Link MBO Limited \[2013\] eKLR](#), "in dealing with 5(2)(b) applications the court exercises discretion as a court of first instance." We are therefore not in any doubt that the applicant's earlier application was determined and dismissed on merits and it is not open to the applicant to re-litigate the same, notwithstanding that in the present application an order of injunction is sought whereas an order for stay of execution was sought in the previous application. Both applications invoke the same jurisdiction of the court under rule 5(2)(b) of the [rules](#) of the court.



16. As for the complaint that Hon Mr Justice Musinga, JA should not have been part of the bench that heard the application of January 23, 2019 as he had previously recused himself in the matter, there is no indication that the matter was raised before that bench prior to the hearing of the application. It was incumbent upon the parties to raise the matter at that point. We cannot therefore, at this stage, disregard the ruling of the court of March 19, 2021 on that account.
17. Based on the foregoing, we uphold the contention by the 2<sup>nd</sup> respondent that the applicant's application dated May 4, 2022 is *res judicata*. Accordingly, it is hereby struck out with costs to the 2<sup>nd</sup> respondent.

**Orders accordingly.**

*Dated and delivered at Mombasa this 20<sup>th</sup> day of January 2023.*

**S GATEMBU KAIRU, FCI Arb**

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**JUDGE OF APPEAL**

**P NYAMWEYA**

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**JUDGE OF APPEAL**

**J LESIIT**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

