



REPUBLIC OF KENYA



**Nkirina & another v Nkatha & 3 others (Civil Application E056 & 62 of 2022  
(Consolidated)) [2023] KECA 1016 (KLR) (20 April 2023) (Ruling)**

Neutral citation: [2023] KECA 1016 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPLICATION E056 & 62 OF 2022 (CONSOLIDATED)  
W KARANJA, LK KIMARU & AO MUCHELULE, JJA  
APRIL 20, 2023**

**BETWEEN**

**CELINE NKIRINA ..... 1<sup>ST</sup> APPLICANT**

**DANIEL KIRIMI MUTUA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**SUSAN NKATHA ..... 1<sup>ST</sup> RESPONDENT**

**TERESA KAINDA THIRINDI ..... 2<sup>ND</sup> RESPONDENT**

**PATRICK KAMENCHU ROBERT ..... 3<sup>RD</sup> RESPONDENT**

**MARTHA WANJA GITONGA ..... 4<sup>TH</sup> RESPONDENT**

*(Being an application for conservatory order and mandatory injunction  
against the decree and ruling of the ELC Court at Meru (L.N.Mbugua, J.) dated  
5th May 2021) in ELC Case No. 41 OF 2020 Consolidated with 42 OF 2020)*

**RULING**

1. Celina Nkirina and Daniel Kirima Mutua (the applicants), were tenants on business premises on plot No 3 and 3A Laare which property was the subject of Succession Cause No 308 of 2010 (in the estate of M’Imiringo M’Uthaka, (deceased), before the High Court.
2. One of the tenancies expired on December 31, 2021 while the other one expired on September 1, 2022. So as at October 12, 2022 when this application came up for hearing before us both tenancies had already expired. That notwithstanding, before the expiry of the tenancies the applicants had already been evicted from their premises on September 2, 2020 following a court order issued in the Succession matter. They challenged the eviction before the Environment and Land Court (ELC) vide two separate suits which were nonetheless consolidated.



3. Contemporaneously with the complaints, the applicants filed applications seeking, inter-alia, mandatory injunctions to reinstate them to their business premises. The applications were heard and dismissed by the learned Judge (Mbugua, J) who found that the eviction orders were lawful and the evictions in question were through a court sanctioned process. The learned Judge declined to interfere with those orders reasoning that doing so would amount to overturning orders given by a court of equal or coordinate jurisdiction and she had no jurisdiction to do so.
4. It is against those orders that the applicants filed a Notice of Appeal before this Court, followed by the instant application dated May 21, 2021 expressed to be brought under section 3A of the Civil Procedure Act, 3A and 3B of the Appellate Jurisdiction Act and rule 5 of the Court of Appeal Rules.
5. The applicants seek a conservatory order to preserve their tenancies and a mandatory injunction to reinstate them into their respective tenancies on plot 3 or 3A Laare.
6. The application is premised on the grounds that judgment was entered in favour of the respondents as against the applicants whereby the learned Judge held that the trial court was of equal status with the High Court having concurrent and horizontal jurisdiction, and the court “could not clothe itself with appellate attire” in so far as the orders issued in succession cause were concerned. In other words, the learned Judge held that she could not sit on appeal or set aside the Ruling of the High Court given in the succession matter.
7. In support of the motion is an affidavit sworn on May 21, 2021 by Daniel Kirimi Mutua, the 2<sup>nd</sup> applicant, who swore the same on his own behalf and on behalf of the 1<sup>st</sup> applicant. In his affidavit, he has given the history of the matter in detail, but in our view those details will come in handy during the hearing of the appeal itself, and are of little persuasion for purposes of this application. We have, nonetheless, noted the said averments.
8. The 1<sup>st</sup> and 2<sup>nd</sup> respondents have opposed the application by way of a replying affidavit dated November 3, 2021 sworn by Susan Nkatha. She states that the application is misconceived and a deliberate misrepresentation of facts and the applicants have not met the threshold to grant the orders sought. She has controverted the issues raised by the applicants in the supporting affidavit, but again, as stated above, those details are, in our considered view, for the bench that will be seized of the appeal itself, and not for us to rule on. The respondents assert that the application has been overtaken by events and the same should be dismissed.
9. Rival submissions were filed by both parties in support of their positions. We have considered the same along with the requirements set for an application under Rule 5(2) (b) to succeed.
10. This Court in Trust Bank Limited & another vs. Investech Bank Limited & 3 others [2000] eKLR delineated the jurisdiction of this Court in such an application as follows:

“The jurisdiction of the court under rule 5(2)(b) aforestated is original and discretionary, and it is trite law that to succeed an applicant has to show firstly, that the appeal or intended appeal is arguable, or put in another way, it is not frivolous; and secondly, that unless he is granted a stay the appeal or intended appeal, if successful, will be rendered nugatory. These are the guiding principles but these principles must be considered against the facts and circumstances of each case...”

But, be that as it may, this Court, has on some rare occasions been called upon to invoke its original jurisdiction pursuant to section 3, 3A and 3B of the Appellate Jurisdiction Act and also as stipulated under rule 5(2)b where the interests of justice have cried out for such recourse. Even then, the Court has explicitly pronounced that the purpose of such orders is for preservation of the subject matter of



the appeal, so that by the time the appeal is heard, the court orders that may be granted in the appeal will not be rendered moot.

11. In this case, it is conceded that the appellants' tenancies had already expired even as at the time this application was canvassed. It was also not in contention that following the succession cause, the properties in question had changed ownership, and it is highly doubtful that the Court would impose tenancies on beneficiaries who were not parties in the proceedings giving rise to the ELC ruling, now impugned. In other words, other than there being nothing to conserve or preserve, the lease tenancies having expired, the arguability of the appeal itself has not been demonstrated as required. We are not persuaded that a mandatory injunction is available to the applicants at this stage in the circumstances of this case given that the main suit before the ELC has not been determined. From whichever angle we look at this application, the same is doomed to fail for not meeting the threshold set for applications of this nature to succeed.
12. Accordingly, the Notice of motion dated May 21, 2021 is hereby dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

**DATED AND DELIVERED THIS 20<sup>TH</sup> DAY OF APRIL, 2023.**

**W. KARANJA**

.....

**JUDGE OF APPEAL**

**L. KIMARU**

.....

**JUDGE OF APPEAL**

**A. MUCHELULE**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

