



**Gatabaki & 2 others (Co-Administratrixes of the Estate of Samuel
Mundati Gatabaki - Deceased) v Muga Developers Ltd & 3 others (Civil
Application E383 of 2022) [2023] KECA 547 (KLR) (12 May 2023) (Ruling)**

Neutral citation: [2023] KECA 547 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E383 OF 2022
K M'INOTI, HA OMONDI & KI LAIBUTA, JJA
MAY 12, 2023**

BETWEEN

NANCY WANJA GATABAKI 1ST APPLICANT

SUSAN WANGARI GATABAKI 2ND APPLICANT

AND

JOSEPHINE BEATRICE GATABAKI PLAINTIFF

**CO-ADMINISTRATRIXES OF THE ESTATE OF SAMUEL MUNDATI
GATABAKI - DECESAED**

AND

MUGA DEVELOPERS LTD 1ST RESPONDENT

SURAYA SALES LTD 2ND RESPONDENT

EQUITY BANK (KENYA) LTD 3RD RESPONDENT

SURAYA PROPERTY GROUP LTD 4TH RESPONDENT

*(Application for injunction pending the hearing and determination
of an appeal from the ruling and order of the High Court of Kenya at
Nairobi (Majanja, J.) dated 18th October 2022 in HCCC No. 151 of 2017)*

RULING

1. The motion on notice before us is dated January 12, 2023 and is taken out by the three applicants in their capacity as administratrixes of the estate of Samuel Mandate Gatabaki (deceased). The applicants seek an order of injunction to restrain the respondents from selling or interfering with the properties known as LR No 5980, LR No 4508/1 and LR No 28233/22 (the suit properties), pending the hearing



and determination of an intended appeal from the ruling and order of the High Court of Kenya at Nairobi (Majanja, J), who declined to set aside a consent order entered into by the applicants and the 4th respondent on December 21, 2021 pertaining to the suit properties. The applicants also seek an order for stay of further proceedings in High Court civil suit No 151 of 2017.

2. After a joint venture agreement entered into by the parties to undertake a development known as Fourways Junction Estate floundered, the applicants filed civil suit No 151 of 2017 in the High Court at Nairobi against the respondents. By a letter dated December 21, 2021 and duly signed by the advocates for the applicants and for the 4th respondent, Equity Bank Kenya Ltd, those parties informed the trial court that they had reached a consent which would compromise the suit and other related claims. They accordingly requested the court to adopt the same as an order of the court. The rather elaborate consent order was duly adopted as an order of the court and the suit was marked compromised.
3. Earlier, on November 1, 2021, the applicants and the 1st, 2nd and 3rd respondents had recorded another consent order by which the applicants withdrew all their claims against those respondents. That consent order was recorded in court on November 3, 2021.
4. On July 7, 2022, the applicants applied to the High Court for a raft of orders, among them an order for setting aside the consent order entered into on December 21, 2021 with the 4th respondent, reinstatement of the suit, and an injunction to stop the respondents from interfering with, disposing of or selling the suit properties. The grounds upon which the application was based were that the consent order was recorded without the applicants' consent or knowledge; that the said consent order was the product of collusion between the applicants' advocates then on record and those of the 4th respondent; and that the consent order was recorded without consensus from the 1st, 2nd and 3rd respondents.
5. The 1st, 2nd and 3rd respondents opposed the application, pointing out that, by the earlier consent order of November 1, 2021 recorded in court on November 3, 2021, the applicants withdrew all claims against those particular respondents and that therefore, they were no longer parties to the suit or the dispute. In their view, it was not necessary to involve them in the consent recorded on December 21, 2021 between the applicants and the 4th respondent. It was also their view that the applicant had not presented any genuine grounds for setting aside the consent order.
6. The 4th respondent also opposed the application contending that the consent order was a binding agreement between the parties to it, and could not be set aside arbitrarily. It was urged that the applicants had not presented any valid ground to set aside the consent order, such as fraud, mistake, collusion or an agreement that was contrary to the court's policy, and that the applicants were fully aware of the consent agreement because they had already performed part of its terms. The 4th respondent further argued that all the correspondence on negotiations regarding the consent order was copied to the applicants, and that they were fully in the picture. In the 4th respondent's view, the applicants had a change of mind and only wanted to benefit from some parts of the consent order, whilst rejecting others.
7. In the ruling that the applicants intend to appeal, the learned judge found that the burden was on the applicants to show that the consent was obtained by fraud, collusion misrepresentation or other valid ground, which burden they had failed to discharge. He also found that the applicants' former advocates had apparent and ostensible authority to enter into the consent order, which consent the applicants had partly implemented, and were therefore bound by it. Accordingly, the court dismissed the application with costs to the 4th respondent.



8. The applicants were aggrieved and filed a notice of appeal on October 25, 2022 followed by the current motion in respect of which they submit that they have an arguable appeal because the consent order was obtained fraudulently, illegally and irregularly. They add that their former advocates negotiated and entered into the consent order without their authority, and against their interest. They further contend that their former advocates had previously acted for the 1st, 2nd and 3rd respondents, and therefore, the consent order was vitiated by conflict of interest. It is the applicants' further argument that the High Court erred by failing to transfer the matter to the Environment and Land Court, which had jurisdiction over the suit properties.
9. On whether the intended appeal risked being rendered nugatory, the applicants submit that the suit properties comprise matrimonial and ancestral land where the deceased is buried and that, if the suit property is alienated, they will be rendered homeless. They further contend that developments on some parts of the suit properties are owned by third parties who will be adversely affected.
10. Opposing the application, the 4th respondent submitted that the applicants had not filed a notice of appeal challenging the consent order itself; that the applicants had full knowledge of the consent order and concurred with it as demonstrated by the elaborate correspondence exchanged between the parties before adoption of the consent order; that the applicants had happily performed parts of the consent order that were beneficial to them, such as purchasing 19 units on the suit properties below market price; that the applicants merely want to reap the benefits of the consent order while rejecting their obligations under it; and that the applicants had not adduced any evidence of fraud, collusion or misrepresentation.
11. It was the 4th respondent's further submission that, once the consent order was adopted and the suit compromised, there was nothing to transfer to the Environment and Land Court; that the dispute was not over the ownership of the suit properties but, rather, the purchase of some units on part of the suit property, which was charged to the 4th respondent, and that the applicants had not pleaded that there was a matrimonial home in the suit properties. In any event, it was contended that the applicants' dispute with the 4th respondent did not relate to property belonging to the applicants.
12. Lastly, it was the 4th respondent's submission that the intended appeal will not be rendered nugatory because the applicants had performed a substantial part of the consent order and that they had already withdrawn their claims against the 4th respondent. The 4th respondent also asserted that it is a first tier banking institution which will be readily able to compensate the applicants should their intended appeal succeed.
13. We have anxiously considered the application, the submissions by learned counsel and the cited authorities. To begin with, the applicants' prayer for stay of further proceedings in High Court civil suit No 151 of 2017 is misplaced because the parties compromised that suit. By the impugned ruling, the trial court declined to set aside the consent order pursuant to which the suit was compromised. In those circumstances, we do not see how we can stay proceedings in a suit that, as of now, is already compromised.
14. Turning to the merits of the application, it is common ground that to obtain an order of injunction, the applicants must establish that their intended appeal is arguable and that unless stay of execution is granted, the appeal will be rendered nugatory if it succeeds (see *J. K Industries Ltd v Kenya Commercial Bank Ltd* [1982 – 88] KAR 1088). Both requirements must be satisfied. Otherwise, the applicants will not be entitled to an order of injunction if they satisfy only one of the requirements (see *Republic v Kenya Anti-Corruption Commission & 2 others* [2009] KLR 31).



15. On the first consideration of an arguable appeal, the relevant principles are that an arguable appeal is not one which must necessarily succeed. It is simply an appeal that raises a bona fide arguable point that deserves to be considered and determined by the court. In other words, an arguable appeal is one that is not frivolous (see *Kenya Tea Growers Association & another v Kenya Planters & Agricultural Workers Union*, civil application No Nai 72 of 2001). To establish an arguable appeal, the applicants do not have to present a multiplicity of grounds. Even a single bona fide ground will suffice (see *Abmed Musa Ismael v Kumba Ole Ntamorua & 4 others* [2014] eKLR).
16. The primary ground upon which the applicants fault the trial court is failure to hold that the consent order was obtained fraudulently, with collusion, and without their knowledge and authority. By dint of the elaborate correspondence between the parties leading to the adoption of the consent order, which correspondence is exhibited in the 4th respondent's replying affidavit, the applicants will be hard pressed to show that the consent was indeed the product of corruption and the fertile imaginations of their former advocates and those of the 4th respondent. Be that as it may, that is not our call to make at this stage, and granted the low threshold we have set out above on what constitutes an arguable appeal, we grant that the appeal is arguable.
17. As regards the second consideration of whether the intended appeal risks being rendered nugatory, the pertinent principles are, firstly, that what will render an appeal nugatory depends on the peculiar circumstances of the case (see *Reliance Bank Ltd v Norlake Investments Ltd* (2002) 1 EA 227). Secondly, the court's concern is to ensure that a successful appeal does not end up as a mere pyrrhic victory or paper judgment (see *Hashmuklal Virchand Shah & 2 others v Investment & Mortgage Bank Ltd* [2014] eKLR). Lastly, the court will grant stay of execution if what is apprehended cannot be undone once it happens, or cannot be undone without undue hardship or expense, or cannot be adequately compensated by award of damages. In *Stanley Kangethe Kinyanjui v Tony Ketter & others* [2013] eKLR), the court expressed itself thus:

“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.”
18. The applicants do not deny that they have performed a substantial part of the consent order and have acquired 19 units at prices and terms set out in the consent order that they intend to challenge. Further, the 4th respondent has deposited, which is not challenged by the applicants, that it is a first tier banking institution which will have no problem compensating the applicants should their intended appeal succeed. Accordingly, the applicants have not satisfied us that the intended appeal will be rendered nugatory should it succeed.
19. Having failed to satisfy both considerations under rule 5(2)(b) of the *Court of Appeal Rules*, this application is hereby dismissed with costs to the 4th respondents. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MAY, 2023

K. M'INOTI

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL



DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

