



REPUBLIC OF KENYA



**Njaria & 15 others v Gatheca & another (Civil Appeal
E788 of 2022) [2023] KECA 516 (KLR) (12 May 2023) (Ruling)**

Neutral citation: [2023] KECA 516 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E788 OF 2022
DK MUSINGA, K M'INOTI & KI LAIBUTA, JJA
MAY 12, 2023**

BETWEEN

ESTHER WAMBAIRE NJARIA 1ST APPLICANT
GEORGE MWANGI MWATHE 2ND APPLICANT
MILKA WAMBUI KIARIE 3RD APPLICANT
PETER GIATHAIGA WANDIGA 4TH APPLICANT
KINAMU SELF HELP GROUP 5TH APPLICANT
CHRISTOPHER WANGOMBE 6TH APPLICANT
SALOME WANJIKU WAWERU 7TH APPLICANT
ALEXENDER NDUNGU MUNDATI 8TH APPLICANT
PETER MWANTHI MBUGUA 9TH APPLICANT
VERONICA NJOKI KINYUA 10TH APPLICANT
JOSEPH GITHAKA MWANGI 11TH APPLICANT
SALOME NJENGA WAINAINA 12TH APPLICANT
LYDIA WANJIKU MWNAGI 13TH APPLICANT
FLORENCE WANJA MWANGI 14TH APPLICANT
PATRICK MAINA MURIITHI 15TH APPLICANT
PATRICK GITAU 16TH APPLICANT

AND

LUCY NDUTA GATHECA 1ST RESPONDENT
MARY MUMBI GATHECA 2ND RESPONDENT



(Being an application for an injunction pending appeal from the Judgment and Decree of the Environment and Land Court of Kenya at Thika (J. G. Kemei, J.) delivered on 3rd October 2022 in E.L.C.A No. 35 of 2021)

RULING

1. The respondents sued the applicants in the Senior Principal Magistrates' Court at Thika in MCELC No 162 of 2019 seeking: orders to evict the applicants from the property known as LR No Ruiru/Ruiru East Block 2/1249 (the suit property); in the alternative, compensation by the applicants to the value of the suit property; and costs of the suit.
2. Briefly stated, the respondents' case was that the 2nd respondent purchased the suit property from Nyakinyua Investments Limited in 1988 and caused it to be registered in the name of the 1st respondent, her daughter; that one Wangari Njoroge, the deceased mother to the 16th applicant, Patrick Gitau, also purchased LR No Ruiru/Ruiru East Block 2/1302 and had it registered in her name; that, in the process of taking possession, the 2nd respondent and the deceased inadvertently took possession and occupied each other's properties; that, to resolve the mistake, the 2nd respondent and the deceased agreed to exchange their properties; that the deceased died in 2015 before the exchange was formally registered; and that, following his mother's demise, the 16th applicant allegedly sold LR No Ruiru/Ruiru East Block 2/1302 then registered in his deceased mother's name to the 1st applicant, Esther Wambaire Njaria, on his assurance that the 2nd respondent, who was in occupation thereof, would formalize the exchange with the suit property; that assured of the prospect of exchange, the 1st applicant took possession and subdivided the suit property and sold the unregistered portions thereof to the 2nd to 15th applicants, who took possession and undertook various developments on the respective portions.
3. In her defence, the 1st applicant confirmed having purchased the deceased's LR No Ruiru/Ruiru East Block 2/1302 from the 16th respondent at KShs 400,000. She averred that the 2nd respondent was in occupation thereof; and that she took possession of the suit property on the 16th applicant's assurance that the 2nd respondent would facilitate the exchange.
4. On their part, the 2nd to 15th applicants averred that they purchased the various plots from the 1st applicant as innocent purchasers for value without notice of defect of title; that they took possession thereof; that they have been in occupation for a period exceeding twelve (12) years, and that they were entitled thereto by adverse possession.
5. The 16th applicant's case was that the 2nd respondent trespassed onto parcel No 1302 in 2008 and began constructing a house thereon in 2010; that it was not true that she has been in occupation thereof for 34 years; and that he had sued her in MCLE No 94 of 2019, but did not disclose the outcome of that case. He refuted any honest mistake in the occupation of the two parcels, and averred that he was a stranger to the 2nd to 15th applicants.
6. It is also noteworthy that the 1st to 15th applicants took out a Notice of Indemnity against the 16th applicant seeking full indemnity in respect to any orders that may be granted to the respondents.
7. Gathering from the record as put to us in the absence of a copy of the SPMC's judgment, the learned Magistrate allowed the respondents' claim and granted orders of eviction against the 1st to 15th applicants.



8. Dissatisfied by the decision of the learned Senior Principal Magistrate, the applicants lodged an appeal to the Environment and Land Court at Thika in ELCA No 35 of 2021. In its judgment dated October 31, 2022, the ELC (JG Kemei, J.) dismissed the applicants' appeal with costs to the respondents.
9. Aggrieved by the decision of Kemei, J., the applicants moved to this Court on second appeal on a whopping 15 grounds, most of which include issues of fact that do not fall to be determined on second appeal. The relevant grounds on points of law on which the applicants fault the learned Judge for are, inter alia, that the learned Judge erred: in failing to hold that the 1st to 15th applicants did not acquire title by prescription or adverse possession; by acceding to, and granting, the reliefs sought by the respondents notwithstanding the fact that their suit was barred by dint of section 7 of the [Limitation of Actions Act](#); in finding and holding that the 1st to 15th applicants were not bona fide purchasers for value; failing to adjudicate upon the notice of indemnity; by failing to properly evaluate, appraise and analyse the entirety of the evidence placed before her; in failing to consider the provisions of Articles 10(2) (c), 50(1) and 159(2) (d) of the [Constitution](#); and for condemning the applicants to bear the costs of the appeal.
10. By a Notice of Motion dated November 14, 2022, the applicants moved this Court pursuant to rule 5(2) (b) of the [Court of Appeal Rules](#) seeking an order of temporary injunction to restrain the respondents from commencing, undertaking or carrying out eviction of the 1st to 15th applicants from the suit property and, in the alternative, a conservatory order to conserve the occupation and possession of the 1st to 15th applicants over and in respect of the suit property and, in particular, to restrain levying of the imminent eviction by the respondents. They also sought costs of the application.
11. The applicants' Motion is supported by the annexed affidavit of the 1st applicant sworn on November 15, 2022, and is anchored on 17 grounds, which we need not replicate here. Suffice it to appreciate that the applicants merely narrate the history of their dispute with the respondents and contend that, by the judgment of the superior court, the eviction orders issued by the subordinate court are bound to take effect; that the 1st to 15th applicants, who have been in possession and occupation of the suit property for more than 12 years, are now exposed to eviction and demolition of their houses; and that they would thereby be rendered destitute. According to them, their appeal is arguable, and that the same (if successful) would be rendered nugatory if the orders sought are not granted.
12. In support of the Motion, learned counsel for the applicants, M/s Kamunge & Nyakeri, filed written submissions and case digest dated November 25, 2022 citing 5 judicial decisions, including: [Josephine Koki Raymond vs Phelomena Kanini Maingi & Another](#) [2018] eKLR on the twin principles for granting orders under rule 5(2) (b) of the [Court of Appeal Rules](#); and [Stanley Kang'ethe Kinyanjui vs. Tony Ketter & 5 Others](#) [2013] eKLR where the Court defined the term "nugatory". The remaining three touch on the merits of the intended appeal, which we cannot address in this ruling.
13. The respondents have not filed any replies to the applicants' Motion.
Neither did they file submissions or appear at the virtual hearing of the application on March 14, 2023.
14. This Court has pronounced itself time and again, holding that for an applicant to merit stay orders pursuant to rule 5(2)(b) of the [Court of Appeal Rules](#) pending appeal, he or she must demonstrate to the satisfaction of the Court that he or she has an arguable appeal; and that the appeal (or intended appeal as the case may be), if successful, would be rendered nugatory absent an order of stay of execution. The two requirements constitute what is commonly referred to as the twin principles that must be satisfied before such orders can avail (see [Anne Wanjiku Kibeh vs Clement Kungu Waibara and IEBC](#) [2020] eKLR; and [Yellow Horse Inns Limited vs AA Kawir Transporters & 4 Others](#) [2014] eKLR).



15. A cursory look at the applicant’s Motion and the grounds proposed to be advanced on the intended appeal in the backdrop of the record as put to us reveals a number of substantive issues of law deserving of the Court’s inquiry on second appeal. Moreover, and as this Court has often stated, even one ground of appeal is adequate to satisfy the first limb of the twin principle. *University of Nairobi vs. Ricatti Business of East Africa* [2020] eKLR is a case in point.
16. Regarding the second limb of the twin principle, the term “nugatory” was defined in *Reliance Bank Ltd vs Norlake Investments Ltd* [2002] 1 EA p 227 at p 232 as “worthless, futile or invalid”. It also means “trifling”.
Having concluded that the applicant’s intended appeal is arguable, the remaining question is whether the intended appeal, if successful, would be rendered nugatory if the temporary injunctive relief sought is not granted. Put differently, would the results of the imminent eviction of the applicants and demolition of their houses be reversed or undone or, otherwise, compensated by an award of damages, in the event that their intended appeal succeeded? We think not.
17. We take to mind this Court’s decision in the case of *Venture Capital & Credit Limited vs Consolidated Bank of Kenya Ltd* Civil Application No Nairobi 349 of 2003 (174 of 2003 UR)] (Unreported) where the Court observed:

“An order for injunction pending appeal is a discretionary matter. The discretion must, however, be “exercised judicially and not in whimsical or arbitrary fashion.”
18. This discretion is guided by the following principles, which are by no means exhaustive: the discretion will be exercised against an applicant whose appeal is frivolous (See *Madhupaper International Limited vs Kerr* (1985 KLR 840;
 - a. the Applicant must show that he or she has an arguable appeal on grounds that merit interrogation by the Court (see *JK Industries vs KCB* (1982 – 88) KLR 1088;
 - b. the discretion should be withheld, and the injunctive relief sought declined, where granting such relief would inflict greater hardship than denying it (See *Madhupaper supra*); and
 - c. the Applicant must show to the satisfaction of the Court that refusal of the temporary injunction pending appeal would render his appeal nugatory (See *Butt vs Rent Restriction Tribunal* (1982) KLR 417).
19. Having carefully examined the impugned judgment, the applicants’ Motion, the grounds on which it is anchored, the affidavit in support, the written and oral submissions of learned counsel for the applicants, and the cited authorities, we form the view that the intended appeal would be rendered worthless or futile if we declined to grant the orders sought pending the intended appeal. Indeed, such enforcement would lead to the applicants’ eviction and possible demolition of their residential and other premises, which would also result in untold and irreversible loss and damage that cannot be compensated by an award of damages.
20. In view of the foregoing, we reach the inescapable conclusion that the applicants have satisfied the twin principles for the grant of the orders sought pursuant to rule 5(2) (b) of this *Court’s Rules*. Accordingly, the applicant’s Notice of Motion dated November 14, 2022 succeeds. The same is hereby allowed with orders and directions that:
 - a. pending hearing and determination of the intended appeal, the respondents be and are hereby restrained from evicting the 1st to 15th applicants from the suit property;



- b. The applicants do file and serve the record of appeal within forty-five (45) days from the date hereof failing which the injunctive orders hereby granted shall automatically lapse; and
- c. The costs of the Motion do abide the outcome of the intended appeal.

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

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

K. M'INOTI

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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

