



M Dalmar Trading Company Limited v Wambui & 2 others (Civil Application E076 of 2023) [2023] KECA 716 (KLR) (9 June 2023) (Ruling)

Neutral citation: [2023] KECA 716 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E076 OF 2023
K M'INOTI, HA OMONDI & KI LAIBUTA, JJA
JUNE 9, 2023**

BETWEEN

M DALMAR TRADING COMPANY LIMITED APPLICANT

AND

MARY GAKIBE WAMBUI 1ST RESPONDENT

SAMUEL KIBE NDUNGU 2ND RESPONDENT

RAAS RESIDENCE LIMITED 3RD RESPONDENT

(Being an application for injunction pending hearing and determination of an intended appeal from the Ruling and Order of the Environment and Land Court at Nairobi (Wabwoto, J.) dated 16th February 2023 in ELC No. 001 of 2023)

RULING

1. A brief background to this matter is that the applicant claimed to be the bona fide tenant of the 1st respondent on land reference number 36/vii/435 situated in the Eastleigh area of Nairobi (the suit property) pursuant to a lease agreement entered into on June 6, 2016; that, on October 21, 2021, the 1st respondent issued notice to vacate on the basis that she wanted to undertake some developments on the suit property; and that, subsequently, the applicant filed a reference under section 6 of the [Landlord and Tenants Act](#) opposing the said notice, arguing that the lease agreement had an arbitration clause which the parties should have exploited before embarking on judicial proceedings, thus making the 1st respondent contractually bound to submit to arbitration.
2. The applicant then filed a suit in the Environment and Land Court seeking orders for a permanent injunction to issue restraining the respondents whether by themselves or their agents from collecting rent from the tenants on the suit property, evicting the applicant, or in any manner interfering with its development. The applicant also sought damages for loss of business profits in the sum



- of Kshs 50,000,000/- being the loss of business and interruption by the respondents on the suit property; general and punitive damages for unlawful and illegal trespass together with interest thereon at commercial rates.
3. The applicant subsequently withdrew the suit aforesaid pursuant to a notice dated December 30, 2022; and filed at the Environment and Land Court at Nairobi in case number E001 of 2023 seeking a permanent injunction to restrain the respondents or their agents from taking over, or interfering in any manner with the unexpired lease over LR No 36/VI1/435 situated at Eastleigh, Nairobi, pending the appointment of an arbitrator; and commencement of the arbitration and/or finalization of the intended arbitration; and urged the court to refer the matter to arbitration. In a nutshell, the applicants sought declaratory, prohibitory and mandatory orders against the respondents.
 4. The 1st and 2nd respondents contested the suit through a preliminary objection dated January 13, 2023, to the effect that the trial court lacked jurisdiction and urged that the entire suit be struck out or dismissed with costs as the suit and application fell short of the res subjudice doctrine and offended the provisions of section 6 of the *Civil Procedure Act*, in view of the fact that the applicants had lodged the same claims on the same facts between the same parties which were pending determination in criminal case No 120A of 2022 and BPRT No E799 of 2021; offended the doctrine of *res judicata* as the matters had already been determined in High Court criminal revisions case No E170 of 2022, M. Dalmar Trading Company v Mary Wambui Gakibe and Nairobi City County, and BPRT No E734 of 2022 - M. Dalmar Trading Company Ltd v Mary Wambui Gakibe, as well as ELC Case No E263 of 2022 and that the applicant was simply engaged in forum shopping.
 5. In a ruling dated February 16, 2023, the learned judge upholding the preliminary objection and struck out the entire suit finding that there were multiple suits filed by the applicant despite the existence of a similar case relating to the same subject matter, which amounted to abuse of the court process; that the suit related to the same property and the same parties who had been engaged in previous litigation; and with no evidence of withdrawal of the previous pending suit, and that filing a fresh suit seeking similar prayers on the same cause of action was sheer duplicity.
 6. Dissatisfied with the said ruling, the applicant filed this appeal. By an application dated March 7, 2023 brought pursuant to rule 5(2) (b) of the *Court of Appeal Rules 2010*, and supported by the affidavit of even date sworn by Mustafa Abdullahi Omar, prays that, pending the hearing and determination of the intended appeal and arbitration, this court issues orders of injunction restraining the respondents, or their agents from terminating the lease over LR No 36/VIV435 situated at Eastleigh, Nairobi, or in any way interfering with the suit property.
 7. The applicant contends that it has an arguable appeal whose grounds include, *inter alia*, that the trial court ignored the notice of withdrawal and the orders that had been made in ELC No E263 of 2022; and the provision of an arbitration clause in the lease agreement; and that the applicant had only sought interim protection measure pending the appointment of an arbitrator in accordance with the arbitration clause in the lease agreement. The applicant also contests the trial court's application of the doctrine of *res judicata*.
 8. The applicant argues that the respondent used public health grounds as a pretext to evict it and other tenants. Yet, it had obtained approval of the Nairobi City Council in relation to building plans to allow it to commence construction on the suit property in accordance with the terms of the lease agreement and is apprehensive that if the respondent is allowed to take over the premises, then the subject matter will be under threat of disposal, and that this would render the arbitration proceedings and the appeal nugatory.



9. In support of the motion, learned counsel for the applicant, maintains that the applicant is in possession of the premises and injunctive orders should issue.
10. The application is opposed, by the 1st and 2nd respondents through a replying affidavit sworn on March 16, 2023, by Mary Wambui Gakibe, who describes herself as the registered proprietor of the property. She, disputes claims that the applicant is in possession of the premises as she terminated the lease on June 7, 2021, and the applicant vacated the premises which are now in possession of the 3rd respondent. She further avers that with the help of the 3rd respondent, the structures that were on the property have since been demolished to enable her put up new buildings in compliance with public health requirements.
11. The respondent further points out that in any event, and having taken the un-procedural step of filing several suits including a High Court criminal revision case No E170 of 2022, ELC No 263 of 2022 and ELC No 001 of 2023 between the same parties, and on the same subject matter, the applicant lost its right to rely on arbitration; that the matter is *res judicata*; and that the refrain about arbitration is an afterthought with no leg upon which to stand.
12. It is also contended that the appeal will not be rendered nugatory as the subject matter is a former tenancy, and that the value of the property is known. Therefore, if the appeal succeeds, the applicant can be compensated through damages, which can be computed with ease.
13. By the replying affidavit of Abdiwahab Hussein Mohammed sworn on March 15, 2023, the 3rd respondent supports the position taken by the 1st respondent, and confirms being in possession of the premises, having conducted due diligence vide a search certificate which confirmed that the property did not have any encumbrances; that it executed a duly registered lease with the 1st respondent on November 29, 2021, and made a lump sum payment in excess of Kshs 10,000,000/- (Kshs ten million) on account of rent. The 3rd respondent likewise questions the bona fides of seeking arbitration, saying this is deflated by the multiple applications filed in various fora, by the applicant.
14. In their written submissions, the 1st and 2nd respondents draw from this court's decision in [Multi Media University and another v Professor Gitile Naituli](#) [2014] eKLR and argue that the applicant has not satisfied the twin principles for grant of orders under rule 5(2) (b) of the rules of this court as set out in this case, to the effect that for an application under rule 5(2) (b) to be granted, an applicant must demonstrate arguability of the appeal, and that the appeal will be rendered nugatory, so as to warrant this court's exercise its discretion favourably.
15. The respondents contend that the application has been overtaken by events as the 1st respondent already took over possession of her property and the applicant is neither in possession nor in control of the same. In any event, several courts have already pronounced themselves that there is no tenancy relationship as there are no premises that the applicants may occupy [see criminal revision case No E170 of 2022 M. Dalmar Trading Company Limited v Mary Wambui Gakibe and Anor We are urged to be guided by the decision in [Eric V.J Makokha and 4 others v Lawrence Sagini and 2 others](#) [1994] eKLR to recognize that this court would be acting in vain, were we to issue the orders sought; that the net effect of the orders would be to dispossess the 3rd respondent of the property, yet he was not a party to the lease between the applicant and the 1st respondent; and that damages would adequately compensate the applicant for any loss incurred, should the appeal succeed.
16. This court has stated time and again, that for an applicant to merit stay or injunctive orders pending appeal pursuant to rule 5(2) (b) of the [Court of Appeal Rules](#), 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 stay or injunctive relief. 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 v Clement Kungu Waibara and IEBC* [2020] eKLR; and *Yellow Horse Inns Limited v A. A. Kawir Transporters & 4 others* [2014] eKLR).

17. We also recognize that this court in the case of *Wasike Swala* [1984] KLR 591 pointed out that an arguable appeal is not one that would necessarily succeed, but one that merits consideration by the court. (See *Stanley Kangethe Kinyanjui v Tony Ketter & others* [2013] eKLR).
18. A perusal of the grounds of appeal advanced in the applicant's memorandum of appeal reveals substantive issues of law which, in our view, are arguable, and deserving of the court's inquiry on appeal. However, but we must nonetheless refrain from saying anything more lest we embarrass the bench that will ultimately pronounce itself on the merits or otherwise of the intended appeal.
19. As to whether the appeal will be rendered nugatory if the orders sought are not granted, this court has held in the case of *Reliance Bank Limited v Norlake Investment Limited* [2002] 1 EA 227 that the factors which might render an appeal nugatory are to be considered within the circumstances of each case and, in so doing, the court is bound to consider the conflicting claims of both sides.
20. In the case of *African Safari Club Limited v Safe Rentals Limited*, Nai Civ App 53/2010 this court held:

“...with the above scenario of almost equal hardship by the parties, it is incumbent upon the court to pursue the overriding objective to act fairly and justly...to put the hardships of both parties on scale... we think that the balancing act is in keeping with one of the principles aims of the oxygen principle of treating both parties with equality or placing them on equal footing in so far as is practicable.”
21. In short, the court is to decide which party's hardship is greater. With that in mind, if the applicant's prayer for injunction is denied and the appeal eventually succeeds, it is our opinion that the applicant can be adequately compensated by an award of damages.
22. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed or restrained, if allowed to happen, is reversible; or, if not, whether damages will reasonably compensated the aggrieved party or parties.
23. The applicant contends that the appeal will be rendered nugatory because the suit land will be wasted/destroyed. Our perusal of the pleadings and, in particular, paragraph 10 of the applicant's own supporting affidavit, indicate that eviction did take place, courtesy of a Public Health Notice served on the applicant and other tenants, a position reiterated by all the respondents. In our considered view, and as has been attested to by the respondents, the application has been overtaken by events as the eviction/demolition has already taken place and, as such, the act that the applicant sought to forestall has since happened, and there is nothing for this court to preserve, because an injunctive order would not serve any purpose.
24. In view of the foregoing we find that the applicant has failed to satisfy the twin principles required to be satisfied to merit orders under rule 5(2) (b) of this *Court's Rules*. Consequently, this application fails and is hereby dismissed with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JUNE, 2023.

K. M'INOTI

.....



JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

