



**Muthee (As Administrator of the Estate of Karl Jacobs Ruedin-Deceased) & 2 others v Munga & 10 others (Suing on their Behalf and on Behalf of 367 Employees of African Safari Club Limited); Erdemann Property Limited & 3 others (Interested Parties) (Civil Appeal (Application) E263 of 2022) [2023] KECA 642 (KLR) (9 June 2023) (Ruling)**

Neutral citation: [2023] KECA 642 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL (APPLICATION) E263 OF 2022  
P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA**

**JUNE 9, 2023**

**BETWEEN**

**SHEILA NKATHA MUTHEE (AS ADMINISTRATOR OF THE ESTATE OF  
KARL JACOBS RUEDIN-DECEASED) ..... 1<sup>ST</sup> APPLICANT  
HANSPETER RUEDIN ..... 2<sup>ND</sup> APPLICANT  
ROLAND RUEDIN ..... 3<sup>RD</sup> APPLICANT**

**AND**

**ALPHONSE MWANGEMI MUNGA ..... 1<sup>ST</sup> RESPONDENT  
PETER MUCHIRI MURIUNGI ..... 2<sup>ND</sup> RESPONDENT  
MICHAEL ONYANGO OCHIENG ..... 3<sup>RD</sup> RESPONDENT  
PETER MAKAU ..... 4<sup>TH</sup> RESPONDENT  
CHIVATSI KATAMA ..... 5<sup>TH</sup> RESPONDENT  
MARICOS NYAMWANGA OKONGO ..... 6<sup>TH</sup> RESPONDENT  
STEPHEN NZIOKA KASINA ..... 7<sup>TH</sup> RESPONDENT  
SHADRACK C. LEWA ..... 8<sup>TH</sup> RESPONDENT  
BENEDICT ORWARU ..... 9<sup>TH</sup> RESPONDENT  
NICHOLAS MUOKI ..... 10<sup>TH</sup> RESPONDENT  
JAMES KINGELE ..... 11<sup>TH</sup> RESPONDENT  
SUING ON THEIR BEHALF AND ON BEHALF OF 367 EMPLOYEES OF  
AFRICAN SAFARI CLUB LIMITED**



**AND**

**ERDEMANN PROPERTY LIMITED ..... INTERESTED PARTY**  
**STEPHEN KIMANI KARUU (T/A KIRIIYU MERCHANTS**  
**AUCTIONEERS) ..... INTERESTED PARTY**  
**FRANK NEUGEBAUER ..... INTERESTED PARTY**  
**AFRICAN SAFARI CLUB LIMITED (IN LIQ) ..... INTERESTED PARTY**

*(An application for orders of injunction pending the appeal from Ruling and Order of the Employment & Labour Relation Court at Nairobi (M. Onyango J.) delivered on 19th November 2021 in Cause No. 133N OF 2008)*

**RULING**

1. The question before us is whether we should grant an order restraining the Erdemann Property Limited, the 1<sup>st</sup> Affected/ Interested Party herein, from registering any charge over plot number LR 2525/1/MN registered as CR No 17731 (hereinafter referred to as the suit premises) pending the hearing and the determination of the appeal filed by the Applicants herein. This order is sought by the Applicants in a Notice of Motion application dated June 17, 2022, which is supported by affidavits sworn on June 20, 2022 and July 1, 2022 by the 1<sup>st</sup> Applicant, Sheila Nkatha Muthee, the Administrator of the Estate of Karl Jacobs Ruedin (hereinafter “the deceased”), and with the authority of the 2<sup>nd</sup> and 3<sup>rd</sup> Applicants, who are beneficiaries of the deceased’s estate and out of this Court’s jurisdiction.
2. We need to indicate at the outset that the application was filed in an appeal that is pending in the Court of Appeal in Nairobi from a ruling delivered by the Employment and Labour Relations Court at Nairobi in Nairobi ELRC Cause No 133N of 2008, and directions were given by the President of the Court of Appeal that the instant application be heard by the Court of Appeal at Mombasa, due to its urgency and considerable number of urgent applications that were pending hearing in the Court of Appeal at Nairobi, and given that the subject matter of the dispute is located in Mombasa. We were availed the correspondence and directions in this respect. We will also restrict ourselves in this ruling to the relevant averments made by the parties, since some of the pleadings filed by the parties contained unsavoury allegations that are not necessary to reproduce in reaching a determination of the question before us.
3. The main grounds for the application are that the Applicants lodged a Notice of Appeal dated November 19, 2021 and their Record of Appeal on April 28, 2022 and effected service upon the Respondents and Affected Parties, which appeal is against the ruling of the Employment and Labour Relations Court at Nairobi (“the ELRC”) delivered on November 19, 2021 in Nairobi ELRC Cause No 133N of 2008. That the ELRC in the said ruling declined to set aside a fraudulent consent recorded between the Respondents and the 3<sup>rd</sup> Affected party and fictitious auction and sale of the suit premises which belonged to the deceased to Edermann Properties Limited, the 1<sup>st</sup> Affected/ Interested Party for Kshs 120,000,000/= and without hearing the estate, when the said premises are valued at Kshs. 420,000,000/=. Further, that the 1<sup>st</sup> Affected/ Interested Party has attempted to register a charge over the suit premises in order to defeat and render this appeal nugatory. The Applicants annexed copies of the email correspondence between their advocate and the 1<sup>st</sup> Affected party, a copy of a letter to the Land Registrar dated June 16, 2022, and a copy of the Record of Appeal dated April 29, 2022.



4. The 1<sup>st</sup> Applicant deponed that the Applicants' advocates received a call from an advocate in the firm of Coulson Harney LLP, informing them that they had prepared a charge over the suit premise on behalf of the financiers in the sum of Kshs 200,000,000/= and presented it for registration, and confirmed that the charge was by the 1<sup>st</sup> Affected party, though the identity of the financier was not disclosed and could therefore not be joined to the application or appeal. The Applicants contend that the impeding registration of the charge would cause the Applicants substantial and irreparable loss and prejudice. They also urge that the appeal is arguable and is not frivolous since each of their 41 grounds of appeal had overwhelming chances of success. Further, that, the Applicants are ready to prosecute the appeal and are waiting for case management and for the appeal to be fixed for hearing.
5. The application was opposed by the Respondents and 1<sup>st</sup> Affected/Interested Party. The Respondents advocate, Henry Kurauka, filed a replying affidavit he swore on June 30, 2022 with the authority of the officials and surviving Respondents. The Respondents' advocate deponed that the application was incompetent, fatally defective, premature, overtaken by events, otiose, *res judicata*, lacked merit, an abuse of court process and should be struck out with costs, since the Applicants had been economical with the truth and concealed material facts from the Court. In particular that the issues raised on appeal were the subject matter of Civil Appeal No 314 of 2014 (Nairobi) in which the Court of Appeal dismissed the 1<sup>st</sup> Applicant's appeal with costs on May 19, 2016; of ELC Petition No 17 of 2017 (Mombasa) which was also dismissed by Omollo J.; of Petition No 24 of 2014 (Mombasa) which was dismissed for want of prosecution by Majanja J.; and of High Court Succession Cause No 421 of 2014 (Mombasa) Estate of Karl Jacobs Ruedin (Deceased), which was pending ruling over the suit premises. Further, that the 1<sup>st</sup> Applicant had failed to pay the Respondents taxed costs arising from the said cases.
6. The deponent further averred that Stephen Kimani Karuu t/a Kiriiyu Merchant Auctioneers died on August 12, 2021 but the Applicants had not substituted him as required by law, while African Safari Club Limited was under liquidation as per the pleadings and the Applicant's had not sought the Court's leave to lodge the instant proceedings as per the provisions of the *Companies Act*. Therefore, that the Applicants had grossly abused the Court process by filing multiple matters before the Court of Appeal and the High Court over the same subject, and it is trite law that the Court should not issue orders in vain or issue orders that were impractical to be complied with. Lastly, that the Respondents were employed by the deceased, who refused to pay their salary arrears and terminal benefits, and being lawful creditors of the deceased, the Respondents had priority over the Applicants with regards to the assets of the deceased until the decretal amount was fully paid. The deponent in this respect averred that the Applicants were yet to pay the Respondents over Kshs 100 million being the outstanding decretal amount after part payment through the proceeds of the sale of the suit premises.
7. The 1<sup>st</sup> Affected/Interested Party's managing director, Zeyun Yang asserted in a replying affidavit sworn on June 28, 2022 that the application lacked merit as it sought to dispose of the substantive appeal at an interlocutory stage, and was vexatious, premature and unmeritorious as it made allegations founded on speculative reasons as to the dealings with the suit property. They further submitted that the Applicants failed to satisfy the mandatory triple requirement for the grant of the injunctive remedy of stay for reasons that they had failed to establish a prima facie case for the grant of a stay as they had made mere allegations and presumptions of the 1<sup>st</sup> Affected/Interested Party charging the suit property and no rebuttable evidence was presented to confirm the existence of the allegations; they had failed to demonstrate irreparable injury they would suffer if the stay they sought was not granted especially considering that they cited the monetary value of the suit property and they would therefore be duly compensated by damages; and they failed to demonstrate on a balance of convenience that their interest would be prejudiced more compared to those of the 1<sup>st</sup> Affected/Interested Party, who was the legal owner of the suit property free from any encumbrance.



8. The Applicant in reply detailed the particulars of the fraudulent sale of the suit premises, and asserted that the Respondents are not registered proprietors of the suit premises and no orders sought against them in the motion under consideration. Further, that the issues in this appeal were not issues in Nairobi Civil Appeal No 314 of 2014; that Mombasa ELC Petition no 17 of 2017 and Mombasa High Court Petition No 24 of 2014 were not heard on merit and could not therefore be relied upon to invoke the doctrine of *res judicata*; while Mombasa High Court Succession Cause No 421 of 2014 concerned proceedings in which the Applicants had obtained a full and confirmed grant in 2016 and had nothing to do with the setting aside of fraudulent consent orders and the fraudulent and fictitious auction sale of the suit premises in proceedings in the ELRC. The Applicant denied filing several applications and asserted that they had filed one application in the ELRC whose dismissal triggered the filing of the instant appeal. further, and an earlier application dated January 30, 2014, was found to be incompetent and was not determined on its merits.
9. Lastly, the Applicants denied that the Respondents were employees of the deceased, and stated that they were employees of Africa Safari Club Limited, and that the deceased was not a party or a judgment debtor in Nairobi ELRC Cause No 133N of 2008. Additionally, that assets valued at more than Kshs 557,000,000.00/= had been auctioned in execution of the decree given in the said cause of Kshs 50.6 million, and the Respondents further wanted to collect Kshs 100,000,000.00/- without an explanation.
10. These averments were reiterated by the respective counsel for the parties during the virtual hearing of the application held on February 7, 2023 during which learned counsel, Mr. Kinyua, appeared for the Applicants, learned counsel, Mr. Henry Kurauka, appeared for the Respondents, learned counsel Mr. Mureithi appeared with Ms. Maina, for the 1<sup>st</sup> Affected/Interested Party, and the said counsel relied on their respective written submissions dated June 29, 2022, June 30, 2022 and July 1, 2022. Learned counsel Mr. Kabiru, was also present appearing for the 3<sup>rd</sup> Affected/Interested Party, and indicated that he would not participate in the proceedings as he had applied to withdraw from acting.
11. The principles applicable in the exercise of this Court's discretion under Rule 5(2) (b) of the [Court of Appeal Rules](#) of 2022 to grant an order of injunction pending appeal are well settled. Firstly, an applicant has to satisfy that he or she has an arguable appeal. Secondly, an Applicant has to demonstrate that unless the order of stay sought is granted the appeal or intended appeal would be rendered nugatory. These principles have been restated and amplified by this Court in [Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others](#) [2013] eKLR as follows:
  - i. In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this court. See *Ruben & 9 Others v Nderitu & Another* (1989) KLR 459.
  - ii. The discretion of this court under Rule 5(2) (b) to grant a stay or injunction is wide and unfettered provided it is just to do so.
  - iii. The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. *Halai & Another v Thornton & Turpin* (1963) Ltd. (1990) KLR 365.
  - iv. In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. *David Morton Silverstein v Atsango Chesoni*, Civil Application No Nai 189 of 2001.
  - v. An applicant must satisfy the court on both of the twin principles.



- vi. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised. *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No Nai 345 of 2004.
  - vii. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. *Joseph Gitahi Gachau & Another v. Pioneer Holdings A. Ltd. & 2 others*, Civil Application No 124 of 2008.
  - viii. In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.
  - ix. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 227 at page 232.
  - x. 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.
  - xi. Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecunity, the onus shifts to the latter to rebut by evidence the claim. *International Laboratory for Research on Animal Diseases v Kinyua*, [1990] KLR 403.
12. While Mr. Kinyua and Mr. Kurauka relied on the above principles to urge their respective cases, we note that Mr. Mureithi and Ms. Maina while citing the decisions in *Nguruman Limited vs Jan Bonde Nielsen & 2 others*, CA No 77 of 2012, *Giella vs Cassman Brown Co. Ltd* (1973) EA 358, and *American Cyanamid vs Ethicon Limited* (1975) AC 396 and making lengthy submissions thereon, appeared to have conflated the principles that apply to the grant of an injunction pending appeal under Rule 5(2) (b) of the Court of Appeal Rules, with the principles that apply in the grant of interlocutory injunctions, which are inapplicable in the determination of the instant application.
  13. On the aspect of an arguable appeal, Mr. Kinyua referred to the forty one grounds of appeal in their memorandum of appeal, which revolve around the issue of whether the trial Judge of the ELRC correctly understood and applied the ruling on the Applicants' earlier application dated January 30, 2014, and the decisions in Nairobi Civil Appeal No 314 of 2014, Mombasa ELC Petition No 17 of 2017 and Mombasa High Court Petition No 24 of 2014; and Mombasa High Court Succession Cause No 421 of 2014; whether the trial Judge made correct findings on the legal import and effect of the said decisions on the application that was before the ELRC; and on the legality of the consent on the sale and auction of the suit premises . These in our view are issues directly arise from the ruling appealed from, and are not frivolous, as alleged by the counsel for the Respondent and 1<sup>st</sup> Affected/Interested Party.
  14. In addition, there are separate procedures that apply to address the issues raised by Mr. Kurauka as regards the competence of the Applicants' appeal, and what is relevant for purposes of this application is that a Notice of Appeal was lodged within 14 days of the date of the impugned ruling pursuant to Rule 77 of the *Court of Appeal Rules of 2022*, as prescribed by Rule 5 (2)(b), and held in *Halai & Another vs Thornton & Turpin (1963) Ltd.* (1990) KLR 365.
  15. On the nugatory aspect, it is not contested that the subject matter of the appeal herein are the suit premises, which the Applicants have averred are located on the beach and are therefore not easily replaceable, and that a valuation conducted in 2017 placed the value of the premises at Kshs



420,000,000/=. We also note that the 1<sup>st</sup> Affected Party/Interested Party did not confirm or deny the allegations as regards the charging of the suit premises in their rebuttal, and it is doubtful whether damages can reasonably compensate the Applicants for the reasons they have alluded to, in the event their appeal is successful.

16. We are however alive to the fact the there was no evidence availed by the Applicants as regards the charging of the suit premises, but given the considerable value of the suit premises alluded to by the different parties, and the issues raised by the Applicants in their appeal, the orders that commend themselves to us in the circumstances are as follows:

1. The *status quo* that shall obtain in relation to the suit premises, namely LR 1515/1/MN registered as CR 17731, pending the hearing and determination of the appeal filed by the Applicants herein shall be that Edermann Properties Limited, the 1<sup>st</sup> Affected/ Interested Party herein, shall not deal with the said premises in any manner that will adversely interfere with their current status and title, including registering of a charge on the suit premises.
2. The costs of the Notice of Motion application dated June 17, 2022 shall abide the outcome of the applicants' appeal.

17. Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 9<sup>TH</sup> DAY OF JUNE 2023.**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

**J. LESIIT**

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**JUDGE OF APPEAL**

**G. V. ODUNGA**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

