



**Koinange & another v Royal Gardens Limited; King'ara t/a Gichuki
King'ara & Co Advocates & 3 others (Interested Parties) (Civil Application
E372 of 2023) [2023] KECA 1129 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KECA 1129 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E372 OF 2023
DK MUSINGA, KI LAIBUTA & GWN MACHARIA, JJA
SEPTEMBER 22, 2023**

BETWEEN

BARBARA WAMBUI KOINANGE 1ST APPLICANT

HARRISON KIHARA T/A HARIKI AUCTIONEERS 2ND APPLICANT

AND

ROYAL GARDENS LIMITED RESPONDENT

AND

**PETER GICHUKI KING'ARA T/A GICHUKI KING'ARA & CO
ADVOCATES INTERESTED PARTY**

ROYAL MATTRESSES INTERESTED PARTY

RECON SUPPLIERS LIMITED INTERESTED PARTY

POWER LIFE KARDI EAST AFRICA LIMITED INTERESTED PARTY

*(Being an application for stay of execution against the Ruling and Orders of the
Environment and Land Court of Kenya at Nairobi (Mogeni, J.) dated 30th May
2023 and reviewed on 19th July 2023 in E.L.C Misc. App. No. E273 of 2022)*

RULING

1. The applicants, Barbara Wambui Koinange and Harrison Kihara TA Hariki Auctioneers, moved this Court vide a Motion dated August 2, 2023 seeking stay of execution of the Ruling and Orders of the Environment and Land Court at Nairobi (Mogeni, J.) dated May 30, 2023 and partially reviewed on July 19, 2023 in Nairobi ELC Misc. App. No. E273 of 2022 pending their intended appeal. They also pray that the costs of their application do abide the outcome of the intended appeal. The applicants'



Motion was supported by the 2nd applicant's affidavit sworn on August 2, 2023 deposing to the factual background, which we need not replicate here.

2. The applicants' Motion is opposed vide the replying affidavits of Susan Wanjiku Kihonge (the administrator of the estate of the deceased Francis Kihonge Ng'ang'a, who was the sole director of the respondent company) sworn on August 8, 2023, and of Harishchandra Gupta (a director of the 3rd interested party herein – Recon Suppliers Limited) sworn on August 14, 2023.
3. By her impugned ruling, the learned Judge held the applicants to be in contempt of the orders of the Business Premises Rent Tribunal ("the tribunal") issued on September 2, 2022 and varied on September 6, 2022 whereby the court imposed a fine of KShs. 100,000 on each of the applicants to be paid within thirty (30) days from the date of the order aforesaid, and ordered them to purge the contempt by payment to the 3rd interested party (Recon Suppliers Limited) a sum of KShs.1,095,730 or, failing payment, be imprisoned for a term of six (6) months.
4. The brief background of the applicants' Motion as related in the affidavits in support and in reply is that the 1st applicant's counsel, Ms. Gichuki King'ara & Company (the 1st interested party) instructed the 2nd applicant on July 8, 2022 to levy distress for rent to recover KShs. 4,835,000 allegedly owed to her by the 3rd interested party in respect of the demised premises in Closeburn Estate situate on LR No. 20922 along Ruaka Banana Road, Kiambu. In compliance with the instructions, the 2nd applicant proclaimed the 3rd interested party's motor vehicle Reg. No. KBV 562E together with assorted metals being thereon.
5. By an application dated 1st September 2022, the respondent (Royal Gardens Limited) moved the tribunal in Nairobi BPRT Case No. E781 of 2022 to challenge the attachment whereupon they obtained the following ex parte orders dated September 2, 2022:
 - “ 1. The Landlady by herself, servants and or agents including but not limited to the 2nd Respondent Hariki Auctioneers be and are hereby prohibited and restrained from harassing the Tenant, unlawfully levying distress or further interfering with his tenancy activities of the Tenant herein and the interested parties herein in whatsoever manner at the demised premises known as L.R No. 20922 pending the hearing of the application inter-parties.
 2. The instructed Agent Auctioneer, the 2nd respondents herein Hariki Auctioneers be and hereby restrained or stopped from auctioning and or selling motor vehicle registration no. KBV 562E pending hearing of the application inter- parties.
 3. The 2nd respondent Hariki Auctioneers to release the said motor vehicle registration no. KBV 562E back to the 2nd interested party and all the other property goods if any has been attached from the auctioneer's premises pending hearing of the application inter-parties.
 4. The OCS Runda Police Station or any other Police Station that is nearer to the demised premises do assist in compliance of the orders and ensure peace prevails.
 5. Application be served for hearing inter-parties on September 30, 2022.”
6. Prior to hearing inter parte of the respondent's application dated September 1, 2022, the applicants hastily moved the tribunal ex parte on September 6, 2022 seeking “stay set aside the execution of the



ruling delivered on September 2, 2022”. They also sought similar orders “... pending hearing and determination of the appeal in Nairobi ELCA No. E076 of 2022” whereupon they obtained the following orders:

- “ 1. A stay of execution of order no. 3 of the orders issued on September 2, 2022 be and are hereby stayed pending hearing of the application inter- parties.
 2. The Auctioneer is further ordered not to dispose of the motor vehicle KBV 562E in any manner pending further orders of the tribunal in that respect.
 3. The application be served for hearing before Hon. P. May (Vice Chair) on September 14, 2022.”
7. Our reading of the tribunal’s order No. 1 issued on September 6, 2022 is that order No. 3 issued on September 2, 2022 was stayed to the effect that the motor vehicle aforesaid and “all other properties goods if any has been attached” were not to be released until hearing inter partes and determination of the applicants’ application scheduled for September 14, 2022. In the two orders made on 2nd and September 6, 2022, the tribunal specifically restrained sale of the motor vehicle. However, it did not authorise sale of the other attached properties or goods.
 8. In apparent disobedience of the orders of the tribunal issued on September 6, 2022 staying release of the attached properties as ordered on September 2, 2022, the applicants sold the “assorted building steel” materials previously attached. The sale was by way of a public auction conducted on September 10, 2022, four (4) days prior to the scheduled hearing inter partes of the applicants’ application dated September 6, 2022.
 9. The applicants’ action prompted the 3rd interested party’s Motion dated November 23, 2022 in Nairobi ELC Misc. App. No. E273 of 2022 praying that the applicants and the 1st interested party be cited for contempt of court, to wit, willful disobedience of the orders of the BPRT issued on September 2, 2022 and varied on September 6, 2022; that the three be produced before court to show cause why they should not be punished for contempt; that they be committed to civil jail for six months for contempt; that they be condemned to purge the contempt by returning the 3rd interested party’s goods or, in lieu thereof, to pay the 3rd interested party a sum of KShs. 462,530; and that the applicants and the 3rd interested party do bear the costs of the application.
 10. Briefly stated, the 3rd interested party’s case was that the attached motor vehicle and goods were to be preserved pending final orders of the tribunal; and that, in willful disobedience of the two orders of 2nd and September 6, 2022, the contemnors proceeded to have the goods sold by public auction before inter partes hearing of the Motions in the tribunal.
 11. In their defence, the applicants contended that there was no order restraining them from selling the assorted metals, and that they were under no obligation to preserve the attached goods.
 12. In its ruling dated May 30, 2023, the ELC (Mogeni, J.) had this to say:
 - “ 53. ... it is true that the respondents were aware of the orders of stay notwithstanding other orders for release of [the] motor vehicle. By proceeding with the sale of the attached goods, the 1st and 2nd respondents were in contempt of the Tribunal’s orders and I find them so and cite them for contempt accordingly.”



13. In view of her finding, the learned Judge cited the applicants for willful disobedience of the orders of the tribunal and condemned them to purge the contempt by paying to the 3rd interested party a sum of KShs. 462,530 in lieu of the goods sold. She also fined them KShs. 100,000 each to be paid within 30 days from the date of the order and, in default, to serve six months imprisonment.
14. By an oral application made on the same date (May 30, 2023), counsel for the 3rd interested party requested the court to review the value of the goods sold to KShs. 1,095,730 on the ground that the court's computation of the value in question was erroneous and that, a reading of the relevant supplementary affidavit, the goods sold were valued at KShs.1,095,730. The learned Judge considered and granted the request vide her ruling dated July 19, 2023.
15. Dissatisfied with the rulings and orders of the trial court dated May 30, 2023 and July 19, 2023, the applicants moved to this Court on appeal on 13 grounds set out in their draft memorandum of appeal dated August 2, 2023 faulting the learned Judge, inter alia, for: allegedly holding them in contempt of non-existent orders; holding the 1st applicant in contempt of orders not issued against her; excess of jurisdiction; failing to consider the applicants' documents and submissions; failing to strike out the 3rd interested party's supporting affidavit for want of capacity; and for being overly biased against the applicants.
16. In support of the applicants' Motion dated August 2, 2023 for stay of execution pending appeal, learned counsel Ms. Gichuki King'ara & Company filed written submissions and case digest dated August 14, 2023, which Mr. King'ara appearing with Mr. Mirie highlighted orally when the applicants' Motion came up for hearing on the GoTo Meeting virtual platform on August 22, 2023. Counsel cited 8 judicial authorities, including *Evans Thiga Gaturu & another v Naiposha Company Limited & 13 others* [2016] eKLR highlighting the principles applicable in granting orders under Rule 5(2) (b); and *Executive Committee, Kisii County & 2 others v Masosa Construction Company Limited & another* [2016] eKLR on the purpose of the orders sought under rule 5(2) (b), namely to safeguard the subject matter of the appeal.
17. On their part, learned counsel for the respondent Ms. Otwal & Manwa Associates filed written submissions, a list and bundle of authorities dated August 16, 2023, which Mr. Otwal highlighted orally at the hearing. Counsel cited 7 authorities, including the cases of *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR; and *Hadiya Construction and Mineral Limited v Ajabu East Africa Limited* [2018] eKLR highlighting the twin principles for grant of orders under rule 5(2) (b). In addition, learned counsel cited the case of *Rajesh Pranjivan Chudasama v Sailesh Pranjivan Chudasama* [2014] eKLR in support of the proposition that the Susan Wanjiku Kihonge had capacity to swear affidavits on the respondent's behalf.
18. In addition to the foregoing, learned counsel for the 3rd interested party, Ms. Odera Obar & Company filed written submissions dated August 21, 2023 highlighting the factual background leading to the Motion before us. They did not cite any judicial authorities.
19. We have carefully considered the record as put to us, the applicant's Motion dated August 2, 2023 and the affidavits both in support and in reply, the grounds on which the intended appeal is anchored, and the written and oral submissions of learned counsel for the parties. Whether or not to grant orders sought by the appellant pursuant to rule 5(2) (b) of the *Court of Appeal Rules* pending appeal, the court must be satisfied that the applicant has satisfied the immutable twin principle, which has time and again been the subject of this court's pronouncements.



20. The principles that apply in applications under Rule 5(2) (b) of this *Court's Rules* for stay of execution pending appeal or intended appeal have long been settled. To be successful, an applicant must first show that the intended appeal or the appeal (if filed) is arguable, and not merely frivolous.
- Secondly, the applicant must show that the appeal, or the intended appeal, if successful, would be rendered nugatory if execution or further proceedings in the impugned judgment, decree or order were not stayed. These principles were enunciated in, among others, the following judicial pronouncements of this court, including those cited by the parties: *Anne Wanjiku Kibeh v Clement Kungu Waibara and IEBC* [2020] eKLR; *Kenya Tea Growers Association and another v Kenya Planters Agricultural Workers Union* [2012] eKLR; and *Abmed Musa Ismail v Kumba Ole Ntamorua and 4 others* [2014] eKLR.
21. Two questions beg our determination, namely: whether the applicants have an arguable appeal; and whether their intended appeal, if successful, would be rendered nugatory absent stay.
22. The record comprised of the BPRT's orders of 2nd and September 6, 2022, the impugned orders of the ELC dated May 30, 2023 and July 19, 2023 are in no uncertain terms. Having carefully considered those orders, we have no doubt in our minds that, on September 6, 2022, the tribunal stayed its order No. 3 dated September 2, 2022. That order had directed release of the motor vehicle in question and the distrained goods. In its order No. 1 dated September 6, 2022, the tribunal stayed execution of order No. 3 of September 2, 2022 pending hearing inter partes of the applicants' Motion dated September 5, 2022. In effect, the distrained motor vehicle and properties goods were to be preserved until hearing of the applicants' Motion on September 14, 2022. But that was not to be. The applicants had the goods sold on September 10, 2022 in willful disobedience of the orders of the tribunal.
23. The 1st applicant seeks to disclaim liability by arguing that the preservation orders were not directed to her in person. It is indubitable that the 1st and 2nd orders dated September 2, 2022 are directed at the 1st applicant as the landlady and the 2nd applicant as her agent. The fact that the 2nd applicant was expressly directed not to dispose of the motor vehicle, with no mention of the other goods, did not of itself exclude her from liability to have the goods preserved. Neither did it mean that the distrained goods could be sold. Order No. 1 dated September 6, 2022 guaranteed preservation by staying order No. 3 of September 2, 2022. In view of the foregoing, we find nothing arguable on appeal on this score.
24. The other grievance is that the applicants were allegedly held in contempt of non-existent orders. This contention flies in the face of two orders of the tribunal specifically designed to preserve the distrained motor vehicle and other goods pending hearing and determination of the parties' competing applications. We fail to see how the applicants would front such an argument on appeal. Likewise, we do not find it arguable that the learned Judge exceeded her jurisdiction in the absence of any legal basis for such submission. To our minds, it is not arguable on appeal that the learned Judge had no jurisdiction to impose the conditions on which the applicants were required to purge the contempt, including payment of KShs. 1,095,730 to the 3rd interested party, being the value of the property wrongfully sold in breach of express orders of the tribunal.
25. The only other ground worthy of consideration as to whether it is arguable on appeal is the applicants' contention that the deponent to the supporting affidavit on behalf of the 3rd interested party had no capacity to swear the affidavit or institute proceedings in the tribunal. We take to mind the fact that the 3rd interested party is a body corporate whose sole director was her deceased husband. We find nothing arguable on this score merely because she is not a substantive director.
26. Suffice it to say that, having considered the record before us, the applicants' Motion, the respective affidavits in support and in reply, the written and oral submissions and the law, we reach the inescapable



conclusion that the applicants have no arguable appeal. Having reached this conclusion, we need not address ourselves on the second limb of the twin principle for grant of orders under rule 5(2) (b) of this *Court's Rules*. In effect, the applicants' Motion dated 2nd August 2023 fails and is hereby dismissed with costs to the respondent and to the 3rd interested party.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2023.

D. K. MUSINGA, (P.)

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

