



**Kigundu & 6 others v Ali & another (Civil Application
E253 of 2021) [2022] KECA 459 (KLR) (18 March 2022) (Ruling)**

Neutral citation: [2022] KECA 459 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E253 OF 2021
DK MUSINGA, W KARANJA & AK MURGOR, JJA
MARCH 18, 2022**

BETWEEN

**PATRICK KIGONDU 1ST APPLICANT
LIVINGSTONE OOKO 2ND APPLICANT
JOHN KYALO 3RD APPLICANT
STEPHEN MBITHI 4TH APPLICANT
PETER KARANI 5TH APPLICANT
BENARD MWANGI 6TH APPLICANT
CHARLES WAWERU 7TH APPLICANT**

AND

**HAMIDA ALI 1ST RESPONDENT
NAIROBI CITY COUNTY 2ND RESPONDENT**

(An application for injunction of the judgment and decree of the Environment and Land Court at Nairobi (Bor, J.) dated 9th October 2018 in ELC Case No. 817 of 2014)

RULING

1. Hamida Ali (1st respondent herein) is the registered lessee from the City Council of Nairobi (2nd respondent) of L.R. Nos. 209/4401/408 and 409 (the suit properties). By the time the lease was transferred to her, the applicants were living on the dilapidated properties as tenants and had lived there for decades. It is averred that some of them had stopped paying rent and had not paid rent for many years, but that is neither here nor there for purposes of this ruling. After the 2nd respondent sold the suit properties to the 1st respondent, the applicants were issued with notices to vacate the premises but they resisted, giving a host of reasons. The 1st respondent therefore moved to the Environment and



- Land Court (ELC) seeking, inter alia, an order of eviction, damages for trespass and costs of the suit against the applicants.
2. The 1st to 6th applicants filed defences denying the claim. They averred that to the best of their knowledge, the suit properties are owned by the City Council of Nairobi in trust for the residents of Nairobi. They claimed that the City Council of Nairobi leased the suit properties to their family members or relatives at a rent of Kshs. 290.00 way back in 1953 and 1960. They contended that if the 1st respondent was indeed registered as the owner of the suit properties, then the lease lapsed for failure to meet the conditions of the grant of the lease requiring the 1st respondent to complete a building approved by the Council within 2 years from the date of the lease; and failure to pay rent, rates, taxes and other dues to the Council. They urged the court to dismiss the suit and order that the 1st respondent is not entitled to ownership, occupation or possession of the suit properties as she claimed and further that the transfer of the properties to the 1st respondent was fraudulent and it ought to be cancelled. The trial Judge upon considering the matter by a Judgement dated 9th October 2018, allowed the 1st respondent's suit against the applicants, dismissed the 7th applicant's counterclaim and proceeded to grant an order of eviction of the applicants from the suit properties.
 3. Aggrieved, the applicants filed a Notice of Appeal and also filed this motion on notice dated 16th July 2021, brought under Section 3A and 3B of the Appellate Jurisdiction Act, CAP 9 Laws of Kenya, Rules 5(2)(b) of the Court of Appeal Rules, 2010 seeking inter alia: an order of injunction to restrain the respondent either by herself or servants and or agents from evicting the Applicants from all those premises known as land reference no's 209/4401/408 and 209/4401/409, Nairobi pending the hearing and determination of the intended appeal.
 4. The motion is premised on the grounds on its face and supported by the affidavit of Charles Waweru sworn on 15th July 2021. Among the grounds raised in support of the motion are that; the applicants filed a notice of appeal against the judgment dated 9th October 2018 on the 19th July 2018; the said judgement allowed the respondent's claim and dismissed the applicant's counterclaim of asserting their tenancy in the City Council of Nairobi, their right not to be denied the option to purchase and the fraud committed in the transfer and the conveyance of the premises to the 1st respondent; the Court issued orders of eviction and the Deputy Registrar on 14th June 2021 issued warrants of eviction rendering this application necessary; the respondents herein have visited the suit properties and stated that they seek vacant possession to therefore embark on redevelopment meaning their premises will be demolished to give way to the intended exercise; if this is left to occur the applicants will suffer serious prejudice, the intended appeal will be rendered nugatory and the substratum of this case will be lost. The applicants aver that their appeal is arguable and if the orders sought are not granted, the appeal will be rendered nugatory.
 5. The application is opposed through a replying affidavit sworn on 10th August 2021, by the 1st respondent who contends that the Motion is an abuse of the court process and is thus unmerited. In her further affidavit dated 17th June, 2021, the 1st respondent deposes that the ELC issued warrants of execution to the applicants from the said properties after a notice to show cause was issued on 14th June, 2021 and eviction of the applicants was effected. The applicants are no longer on the said parcel of land; she has already demolished the structures they had put up and therefore the motion is without basis and should be dismissed with costs. Both parties, through learned counsel filed submissions in support of their rival positions.
 6. At the plenary hearing of the application, we sought confirmation from learned counsel for the parties as to whether the premises had already been demolished, as that would render this application moot. While Mr. Maina, learned counsel for the 1st respondent confirmed that all the structures had been demolished and none of the applicants were on the suit properties, Ms. Theuri learned Counsel



appearing for the applicants, though conceding that the doors and windows had been removed and some tenants had left, was shy of admitting that their application had been overtaken by events.

7. We have considered the application before us. We have a deposition on oath that the premises have been demolished and that has not been controverted on oath. Even assuming that the houses have only partially been demolished, it is not practical to assume that the applicants are still on the premises. This application has, therefore, been overtaken by events and is otiose. Even on merit, even assuming that the applicants have at least one arguable point on appeal, and as severally held by this Court, an arguable appeal is not necessarily one that will succeed but rather one that deserves consideration and determination by this Court (See *Stanley Kangethe Kinyanjui vs Tony Ketter & 5 Others [2013] eKLR*) the nugatory aspect has not been demonstrated. As the appellants are supposed to demonstrate both arguability and the nugatory aspect, having failed to demonstrate one limb renders this application a good candidate for dismissal.
8. Accordingly, we dismiss this application, but given the disparity in the financial standing of the applicants vis a vis the respondents, we order that each party bears its own costs.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF MARCH, 2022.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

