



REPUBLIC OF KENYA



KENYA LAW
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**Ndeffo Co. Limited v Kamau and Kamau & 4 others (Civil Application
E032 of 2021) [2022] KECA 446 (KLR) (4 March 2022) (Ruling)**

Neutral citation: [2022] KECA 446 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E032 OF 2021
DK MUSINGA, HM OKWENGU & MSA MAKHANDIA, JJA
MARCH 4, 2022**

BETWEEN

NDEFFO CO. LIMITED APPLICANT

AND

**WACHIRA KAMAU & LUCY WANGARI KAMAU (SUED AS
ADMINISTRATORS OF THE ESTATE OF FLORENCE NYAMBURA
KAMAU) 1ST RESPONDENT**

**M. H. SHAW (ADMINISTRATOR OF THE ESTATE OF THE LATE J.T.
OBERSHOLZER) 2ND RESPONDENT**

**NANCY WAIRIMU & BERNARD GATHIRA KARENJU (SUED AS
ADMINISTRATOR OF PAUL KARENJU WAMBUGU) 3RD RESPONDENT**

SARAH NYAMBURA KARENJU 4TH RESPONDENT

CATHERINE WAMBUI KARENJU 5TH RESPONDENT

(An Application under Rule 5 (2) (b) of the Court of Appeal Rules for orders of injunction against the respondents and their agents and/or servants pending the hearing and determination of the intended appeal against the Judgment and Decree of the Environment and Land Court of Kenya at Nakuru (D. O. Ohungo, J.) dated 3rd May, 2021 in ELC Case No. 75 of 2019 formerly Nakuru HCC No. 26 of 1992)

RULING

1. The applicant's notice of motion dated 31st May, 2021 seeks a temporary order of injunction to restrain the respondents by themselves, their agents and/or servants from trespassing, entering upon, fencing, occupying, surveying, distributing, alienating, invading, disposing of, transferring or evicting the applicant and its members, or in any manner of whatsoever nature, from dealing with parcels



- of land known as L. R. No. 449 and 6501, Nakuru, (the suit properties) pending the hearing and determination of an intended appeal.
2. In an affidavit sworn by Charles Rong'o, a director of the applicant, he deposes that in 1992 the applicant instituted a suit against the respondents seeking among, other declarations, that the applicant is the legal purchaser of the suit properties from the late T. J. Obersholzer. He further states that the applicant subdivided the suit properties and allocated it to its members, who settled there in the 1980s and have developed their respective portions.
 3. However, on 3rd May, 2021 the trial court dismissed the suit with costs to the 1st, 3rd, 4th and 5th respondents. The applicant, being aggrieved by the said judgment, has filed a notice of appeal and applied for certified copies of the proceedings and the judgment with a view to filing an appeal.
 4. The applicant believes that its intended appeal is arguable and has set out at paragraph 8 of its affidavit the issues that it deems arguable.
 5. The applicant further states that following delivery of the impugned judgment the respondents started fencing the suit properties and are intending to evict its members with an intention of disposing of the same, in which event the intended appeal, if successful, shall be rendered nugatory.
 6. The respondents, apart from the 2nd respondent who did not participate in the suit before the trial court, opposed the application. They contended that the intended appeal is not arguable and even if it were to succeed, it shall not be rendered nugatory if the orders sought are not granted. They stated, inter alia, that the applicant has no proprietary interest over the suit properties; that the 1st, 4th and 5th respondents, whose titles were being challenged, never sought in their defences orders of eviction and vacant possession of the suit properties because the applicant and its members were not in actual possession and occupation.
 7. The respondents further submitted that the applicant had not demonstrated that the respondents are in the process of selling, evicting and/or demolishing the applicant's structures in the suit properties; that the applicant had taken possession of the suit properties in contravention of a decree issued on 11th May, 1981; and that even if the applicant and its members are evicted and the intended appeal succeeds, the appeal will not be rendered nugatory because whatever loss they may suffer is quantifiable and they can be compensated in damages. They therefore urged us to dismiss the application.
 8. We have perused the application, the affidavits and submissions filed by all the parties. The principles that guide this Court in its consideration of a rule 5 (2) (b) application are well settled. An applicant must demonstrate existence of an arguable appeal; and that unless the orders sought are granted, the appeal, if successful, shall be rendered nugatory. See *Stanley Kang'ethe Kinyanjui vs Tony Ketter & 5 Others* [2013] eKLR.
 9. An arguable appeal is not one which must necessarily succeed, but one which raises issues that require to be fully argued before the Court, one which is not frivolous.
 10. The dispute over the suit properties between the applicant and its members on the one hand and the respondents and/or their predecessors on the other has existed since the 1980s. Looking at the issues that were canvassed before the trial court and those raised before this Court regarding ownership and occupation of the suit premises, it is obvious to us that the intended appeal is arguable. We need not say more on that first limb.
 11. Secondly, from the photographs that are annexed to the applicant's affidavit, it is evident that there are many people who are in occupation of the suit properties and who have made considerable improvements thereon. If the orders sought are not granted, they may be evicted and their homes



or developments on the suit properties destroyed, in which event the appeal, if successful, shall be rendered nugatory.

12. In the circumstances, we are satisfied that the orders sought by the applicant are merited. Consequently, we grant the orders sought in the notice of motion dated 31st May, 2021. Each party shall bear its own costs of the application.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF MARCH, 2022.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

