



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ngai & 6 others v Sparkle Properties Limited & 2 others (Civil Application  
69 of 2020) [2021] KECA 65 (KLR) (8 October 2021) (Ruling)**

Neutral citation: [2021] KECA 65 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION 69 OF 2020  
DK MUSINGA, HM OKWENGU & SG KAIRU, JJA  
OCTOBER 8, 2021**

**BETWEEN**

**JOHANA NGAI ..... 1<sup>ST</sup> APPLICANT  
FATUMA MWAMBURI ..... 2<sup>ND</sup> APPLICANT  
SULEIMAN KIBOI MWANYAMBU ..... 3<sup>RD</sup> APPLICANT  
HAMISI KALELA ..... 4<sup>TH</sup> APPLICANT  
ALOIS MWAMBI ..... 5<sup>TH</sup> APPLICANT  
ASHA MWAKE ..... 6<sup>TH</sup> APPLICANT  
FAUMA KODI ..... 7<sup>TH</sup> APPLICANT**

**AND**

**SPARKLE PROPERTIES LIMITED ..... 1<sup>ST</sup> RESPONDENT  
BATA SHOE CO. LIMITED ..... 2<sup>ND</sup> RESPONDENT  
ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

*(Being an application for an injunction pending the hearing and  
determination of Mombasa Civil Appeal No. 42 of 2020, against the  
Judgment and Decree of the Environment and Land Court at Mombasa (A.  
Omollo, J.) delivered on 24th February 2020 in ELC Case No. 265 of 2013.)*

**RULING**

1. By a notice of motion dated 7th September 2020, the 1st to 7th applicants sought an order of injunction to restrain the 1st respondent from evicting them from a property known as Plot No. LR



- 1956/506 Voi, (the suit land), pending hearing and determination of Mombasa Civil Appeal No. 42 of 2020.
2. In the supporting affidavit to the application, the applicants stated that the 1st respondent instituted a suit against the applicants and sought an order to restrain the applicants from interfering with the suit land and an order of mandatory injunction to compel the applicants to demolish and or pull down a structure that they had erected on the suit land. The applicants also filed a counter claim seeking, inter alia, cancellation of the lease in respect of the suit land as well as an order to restrain the 1st respondent from further trespassing, selling, subdividing, surveying or in any way interfering with the suit land.
  3. Following a full trial, the trial court allowed the 1st respondent's suit and granted the orders sought. The applicant's counter claim was dismissed in its entirety.
  4. In their application, the applicants contended that they have an arguable appeal; and that unless the orders sought are granted, the intended appeal, if successful shall be rendered nugatory.
  5. Regarding arguability of the intended appeal, the applicant's contended that it is arguable whether the suit land could be verily transferred without adherence to the applicable special conditions of the lease. The applicants also argued that the learned judge erred in finding that lack of a company resolution did not affect the legality of the purchase and transfer of the suit land by the 1st respondent.
  6. On the nugatory aspect, the applicants submitted that the 1st respondent had already filed an application before the trial court seeking orders directing the officer commanding Voi Police Station to provide security to the 1st respondent while executing the decree of the trial court which includes demolishing and or pulling down the structures erected on the suit land, and that the 1st respondent is likely to demolish the suit structures in which event they would suffer irreparable loss and the same would render the intended appeal nugatory.
  7. In opposing the application, the 1st respondent filed a replying affidavit sworn by Jitendra Popatlal N. Mashru, a director of the 1st respondent. There was also a supplementary affidavit sworn by James O. N. Ajigo, an advocate on the firm of Oloo & Chatur Advocates who are on record for the 1st respondent.
  8. The 1st respondent urged us to find that there is no valid appeal before this Court for the reason that the notice of appeal and the record of appeal were filed out of time without leave of the court. Secondly, the 1st respondent urged that the applicants failed to disclose that they had filed an application for stay of execution before the trial court which was dismissed vide a ruling dated 22nd July 2020.
  9. We have perused the application, the affidavits sworn by the parties and their respective submissions. The principles that guide this Court in its consideration of applications under rule 5(2)(b) of the Court's Rules are well settled. An applicant must demonstrate that an appeal or intended appeal is arguable; and that unless the orders sought are granted the appeal if successful shall be rendered nugatory. See *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR.
  10. On the issue of arguability, the 1st respondent contended that the application before us is incompetent because the notice of appeal and the record of appeal were filed out of time without leave of the court. The impugned judgment was delivered on 24th January 2020 and the applicants filed their notice of appeal on 28th April 2020.



11. Under rule 75(2) of this Court’s Rules, a notice of appeal ought to be lodged within 14 days of the date of the decision against which it is desired to appeal but that is subject to rule 83 and 84 which states as follows: -

“ 83. Effect of default in instituting appeal.

If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time he shall be deemed to have withdrawn his notice of appeal and the court may on its own motion or on application by any party make such order. The party in default shall be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served.

84. Application to strike out notice of appeal or appeal.

A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time. Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of service of the notice of appeal or record of appeal as the case may be.” (underlining added)

12. The 1st respondent did not file an application to strike out the notice of appeal within the prescribed period of 30 days from the date of service of the notice of appeal or at all. In *Agricultural Development Corporation v Richard Kipkoech Aiyabei* [2020] eKLR, this Court commenting on rules 83 and 84 held as follows: -

“Our take on the above rules is that there is no provision in the said rules for an oral application made either orally in Court or through submissions, whether oral or written. No cross application has been filed by the respondent seeking to strike out the notice of appeal on which the application under consideration is anchored in terms of the procedure laid down in either rules 83 or 84 of the rules of the Court as the case may be. The above being the correct position in law for faulting a defective notice of appeal, we decline the respondent’s invitation through his written submissions for us to fault the notice of appeal on which the application is anchored..”

13. We adopt that position in this application and find that in the absence of an appropriate application to strike out the notice of appeal, the 1st respondents invitation for us to strike out the notice of appeal is incompetent.
14. The applicants raised several grounds in their memorandum of appeal lodged in this Court on 26th June 2020. Having perused the memorandum of appeal, we are satisfied that the appeal is arguable it cannot be said to be a frivolous one.
15. On the nugatory aspect, the applicants contend that unless the orders sought are granted, the 1st respondent shall forcefully evict them from the suit land and will also demolish their structures thereon. We agree that if the eviction is carried out and the structures on the suit land are destroyed, the appeal, if successful, would be rendered nugatory.
16. We are therefore satisfied that the applicants have satisfied both limbs for grant of the relief sought under rule 5(2)(b) of this Court’s Rules. Consequently, we grant an order of stay of execution of the



judgment in Mombasa ELC No.265 of 2013 pending hearing and determination of the appeal. The costs of this application shall be in the appeal.

**Dated and delivered at Nairobi this 8<sup>th</sup> day October, 2021.**

**D. K. MUSINGA (P)**

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**JUDGE OF APPEAL**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb.**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

