



**Marriot Africa International Ltd v Marigu & 4 others (Civil Application
E152 of 2022) [2023] KECA 396 (KLR) (31 March 2023) (Ruling)**

Neutral citation: [2023] KECA 396 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E152 OF 2022
K M'INOTI, KI LAIBUTA & PM GACHOKA, JJA
MARCH 31, 2023**

BETWEEN

MARRIOT AFRICA INTERNATIONAL LTD APPELLANT

AND

MARY WANJIKU KANYOTU 1ST RESPONDENT

MARGARET NYAKINYUA MARIGU 2ND RESPONDENT

WILLY KIHARA 3RD RESPONDENT

KANGAITA COFFEE ESTATES 4TH RESPONDENT

UKOMBOZI HOLDINGS LTD 5TH RESPONDENT

(Application for stay of further proceedings pending appeal from the ruling and order of the Environment and Land Court at Nairobi (Oguttu Mboya, J.) dated 10th March 2022 in ELCC No. 4 of 2021 (formerly Thika ELCC No. 115 of 2019))

RULING

1. The Applicant, Marriot Africa International Ltd, seeks stay of further proceedings in Environment & Land Court (ELC) Case No 4 of 2021 pending appeal from the ruling and order of Oguttu Mboya, J dated March 10, 2022. On March 14, 2022, the applicant lodged a Notice of Appeal evincing its intention to appeal the said ruling. Subsequently, the applicant took out, under rule 5(2)(b) of the [Court of Appeal Rules](#), the notice of motion now before us, supported by the affidavit of its director, Abdul Dawood Hassan, sworn on May 10, 2022.
2. By way of brief background to the application, the applicant avers that at all material times it was the registered proprietor of the property known as LR No 11262/76 in Ruiru, Kiambu County, measuring in area approximately 700 acres (the suit property). The applicant purchased the suit property from Trendsetters Investments Ltd, which in turn had purchased the suit property from the



- 4th respondent, Kangaita Coffee Estates. In exercise of its proprietary rights, the applicant subdivided the suit property into more than 500 plots most of which it sold and transferred to third parties.
3. However, unlawfully and without any colour of right, the respondents, claiming to be beneficiaries of the estate of James Kanyotu (deceased), started interfering with the applicant's possession and enjoyment of the suit property on the allegation that the suit property belonged to the 4th respondent, and thus formed part of the estate of the deceased. To forestall the interference, the applicant filed suit in the ELC at Thika, which was subsequently transferred to Nairobi, seeking a permanent injunction to stop the interference. The applicant obtained an interim injunction against the respondents pending the hearing and determination of the suit.
 4. On June 28, 2021, the applicant, on the one hand, and Mary Wanjiku Kanyotu (the 2nd respondent) and the 4th respondent on the other, entered into a consent order, which was adopted as an order of the court whereby the said two respondents relinquished their claims to the suit property. On September 20, 2021, the 3rd respondent, Willy Kihara, applied to set aside the consent order and a further order compelling the applicant to comply with discovery notices. By the ruling dated March 10, 2022, the ELC allowed the application, set aside the consent order, and ordered discovery, thus provoking an intended appeal and the present application.
 5. The applicant contends that its intended appeal is arguable for, among other reasons, because the learned judge erred by holding that the 3rd respondent, who was not a party to the consent order, had locus standi in the matter; by holding that the 3rd respondent, as a beneficiary of the estate of the deceased, had a claim to the property of the 4th respondent, an independent legal personality; by failing to appreciate that the 4th respondent was distinct from its directors and shareholders; by ignoring the fact that the 3rd respondent was neither a shareholder nor a director of the 4th respondent; by setting aside a consent order which was not challenged by any of the parties to it; by failing to appreciate that the consent order did not affect the suit as regards the parties who were not involved in the consent; by unprocedurally ordering discovery; and by improperly exercising discretion to order discovery.
 6. The applicant further contends that, unless the proceedings in the ELC are stayed, the intended appeal will be rendered nugatory, and that third parties, to whom it has already sold and transferred many plots hived off from the suit property, will be adversely affected. The applicant adds that the hearing of the suit ought not to proceed on the basis of unprocedural discovery orders, and that there is a risk that its suit will be struck out for failure to comply with orders of discovery that it contends were issued unprocedurally and through injudicious exercise of discretion. These contentions were further reiterated and elaborated in the applicant's written submission dated June 3, 2022 and the oral highlights thereof.
 7. The application was opposed by the 1st respondent, Margaret Nyakinyua Marigu, the 3rd respondent and the 4th respondent (through the 1st respondent in her capacity as director). The 1st respondent relied on her written submissions dated August 25, 2022 and, on behalf of the 4th respondent, a replying affidavit sworn on June 7, 2022, as well as the written submissions dated August 26, 2022. On his part, the 3rd respondent relied on his replying affidavit sworn on May 18, 2022 and written submissions dated August 17, 2022. The 2nd and 5th respondent did not file any documents, and did not appear at the hearing of the application.
 8. The substance of the responses by the above respondents is that the intended appeal is not arguable and will not be rendered nugatory if it succeeds. It is contended that the trial court properly set aside the consent order for exclusion of some of the parties to the suit; that the court properly found that the 3rd respondent had locus standi as a beneficiary of the estate of the deceased who was the



majority shareholder of the 4th respondent, the previous owner of the suit property; that the above respondents had filed a counterclaim for revocation of the applicant's title to the suit property for fraud and illegality; that the court properly set aside the consent order because it was intended to destroy the substratum of the suit and counterclaim; and that the consent order was fraudulently procured because even the 2nd and 3rd respondents, who were parties to it, did not defend it.

9. The three respondents further contend that having not complied with the order on discovery, the applicant is in contempt of court and is not entitled to any discretionary remedy; that the applicant is guilty of inordinate delay; and that hearing the case on merit will not render the intended appeal nugatory.
10. We have anxiously considered the application, the written submissions by the parties, the authorities cited, and oral highlights by respective learned counsel during the online hearing of the application. We do not think there is any merit in the argument that the applicant is at this stage guilty of contempt of court. The trial court has not made any such finding.
11. All the parties rightly agree in their written and oral submissions that to entitle the applicant to an order of stay of execution under rule 5(2) (b) of the *Court of Appeal Rules*, it must satisfy the Court that its intended appeal is arguable and that, if the proceedings in the ELC are not stayed, the appeal will be rendered nugatory if it succeeds (See *Githunguri v Jimba Credit Corporation Ltd (No 2) [1988] KLR 838*). We should add that the applicant must satisfy both of those considerations, for it is not enough to satisfy only one of them. (See *Republic v Kenya Anti-Corruption Commission & 2 Others [2009] KLR 31*).
12. In a bid to demonstrate that it has an arguable appeal, the applicant identified some of the ground that it intends to argue on appeal to include whether the learned judge erred by setting aside the consent order for failure to involve all the parties; whether the 3rd respondent had locus standi to move the court to set aside a consent order to which he was not a party, among others. We are satisfied that the intended appeal is arguable. The threshold in this regard is not very high. The applicant does not have to present a multiplicity of arguable grounds. Even one bona fide ground will suffice. (See *Ahmed Musa Ismael v Kumba Ole Ntamoria & 4 others [2014] eKLR*). In addition, an arguable appeal need not ultimately succeed at the hearing. It only needs to raise an issue that is worth of consideration by the Court (*Co-operative Bank of Kenya Ltd v Banking Insurance and Finance Union, Kenya [2014] eKLR*).
13. The real question is whether, without stay of proceedings, the intended appeal will be rendered nugatory if it succeeds after the suit has been heard. We must start by taking note that none of the third parties mentioned by the applicant to be purchasers of subdivisions of the suit property is before us, and no reason has been presented for their absence. We also remind ourselves that what may render an appeal nugatory will depend on the peculiar facts and circumstances of each case. (See *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR*).
14. The applicant readily accepts that the consent order which was set aside did not affect the respondents who were not parties to it, meaning that under whatever circumstances, the suit as regards those respondents and their counterclaim subsists and must to be heard and determined. If the intended appeal succeeds, its effect will be to restore the consent order, which affects only the 2nd and 4th respondents. Indeed, there is nothing that stops these two respondents, at the hearing before the trial court, from compromising the suit as it relates to them, just as they had done in the consent order that was set aside. The court's determination would then be made taking into account the compromise and as well as the case of the non-compromising respondents.



15. Whilst this Court has unfettered jurisdiction to issue an order of stay of proceedings, it must be satisfied that there are genuine and compelling grounds to justify such an order, whose effect may be to undermine one of the fundamental constitutional principles, namely that justice shall not be delayed. As the learned authors of *Halsbury's Law of England, 4th Edition. Vol 37 page 330* state:-

The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”

16. Accordingly, we are not persuaded that the applicant has satisfied the second limb of the test under rule 5(2) (b) of the *Court of Appeal Rules*. Having failed to satisfy both limbs, this application fails and is hereby dismissed with costs to the 1st, 3rd and 4th respondents. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MARCH, 2023

K M'INOTI

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JUDGE OF APPEAL

DR K I LAIBUTA

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JUDGE OF APPEAL

M GACHOKA, CI Arb, FCI Arb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

