Case Number:	Civil Application 66 of 2016 (Ur 35/2016)
Date Delivered:	25 Nov 2016
Case Class:	Civil
Court:	Court of Appeal at Kisumu
Case Action:	Ruling
Judge:	Daniel Kiio Musinga, Agnes Kalekye Murgor, Stephen Gatembu Kairu
Citation:	George Kamau Kimani & 4 others v The County Government Of Trans-Nzoia & another [2016] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Kisumu
Docket Number:	-
History Docket Number:	88 OF 2015
Case Outcome:	-
History County:	Uasin Gishu
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A.)

CIVIL APPLICATION NO. 66 OF 2016 (UR 35/2016)

BETWEEN

GEORGE KAMAU KIMANI.....FIRST APPLICANT

REDEMPTA KIPROP.....SECOND APPLICANT

FRANCIS C. NJUGUNA.....THIRD APPLICANT

PENROSE NDUBI.....FOURTH APPLICANT

STEPHEN YEGO.....FIFTH APPLICANT

AND

THE COUNTY GOVERNMENT OF TRANS-NZOIA.....FIRST RESPONDENT

NATIONAL HOUSING CORPORATION.....SECOND RESPONDENT

(Application for injunction from the ruling of the High Court of Kenya at Eldoret (Ombwayo, J.) dated 12th August, 2016

in

ELC NO. 88 OF 2015)

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RULING OF THE COURT

1. The applicants and the respondents are locked in a dispute relating to the applicants' occupation of five residential houses known as Cherangani Estate, (hereinafter *"the suit premises"),* within Kitale Town. The applicants contend that the suit premises belong to the National Housing Corporation, the 2nd respondent, since they had entered into lease agreements over the suit premises with the 2nd respondent.

2. Sometimes in May, 2013 the 1st respondent served the applicants with notices of termination of tenancy, having taken over the assets of the former Municipal Council of Kitale, the owner of the suit

premises.

3. The applicants moved to court to challenge the said notices and filed **Environment and Land Court Case No. 66** of **2013 (Case No. 66** of **2013)** but the suit was struck out on a point of law vide a ruling delivered by **Obaga, J.** on 4th June, 2014. The applicants did not prefer an appeal against that ruling.

4. On 9th June, 2014 the 1st respondent attempted to forcefully evict the applicants. To forestall the forceful eviction, the applicants executed a written undertaking to move out of the suit premises by 11th June, 2014. But instead of moving out on the due date, the applicants filed **Environment and Land Case No. 88 of 2015** *(case No. 88 of 2015)* at Eldoret, claiming that the earlier suit No. 66 of 2013 was struck out on a technicality; and that they had signed the undertaking under duress.

5. The 1st respondent filed an application to strike out the said suit, No. 88 of 2015, and also prayed for an order to evict the applicants from the suit premises. The application was premised on the argument that the suit was ***res judicata*** in view of the determination by Obaga, J. in case No. 66 of 2013 which was between the same parties, wherein the learned judge held, ***inter alia,*** that the applicants' leases were not registered and were therefore unenforceable; that no appeal had been preferred against the said ruling; and that the suit amounted to violation of the undertaking given by the applicants to vacate the suit premises.

6. The trial judge, Ombwayo, J; in a ruling delivered on 12th August, 2016, allowed the application, agreeing with the 1st respondent, that the subsequent suit was ***res judicata*** as the suit involved the same parties and the same issues as in case No. 66 of 2013, whose ruling had not been challenged by way of an appeal. The learned judge further held that the suit amounted to abuse of the court process, in view of the explicit undertaking that had been given by the applicants to the 1st respondent.

7. Being dissatisfied with that ruling, the applicants filed a notice of appeal, on the basis of which they filed an application before this Court for an interim injunction to restrain the respondents from evicting them from the suit premises, pending filing of the record of appeal, hearing and determination of the intended appeal. That application is the subject matter of this ruling.

8. **Mr. Nyamu**, learned counsel for the applicants, relying on an affidavit sworn by the 1st applicant, which basically narrates the history of the dispute, submitted that the applicants have an arguable appeal; that if the order sought is not granted the applicants will be evicted from the suit premises, in which event the intended appeal if successful will have been rendered nugatory.

9. Regarding arguability of the intended appeal, counsel submitted that existence of lease agreements between the applicants and the 2nd respondent was not in doubt; that the 1st respondent had no locus to contest the existence and/or legality of the leases; and that the undertaking to vacate the suit premises was subject to challenge.

10. The 1st respondent, through **Pius Munialo,** the Acting County Secretary, swore a replying affidavit. He stated, ***inter alia,*** that the applicants were employing litigation to continue occupying the suit premises without valid leases and without paying rent; that Obaga, J. had made a determination about the alleged leases and no appeal had been preferred against that determination; that following the striking out of case No. 88 of 2015 by Ombwayo, J. the applicants had filed another application before the same judge seeking maintenance of the ***status quo*** as they decide whether or not to appeal against his ruling, and the learned judge was yet to give his decision on the subsequent application.

11. **Prof. Sifuna,** learned counsel for the 1st respondent, submitted that the applicants had not

demonstrated that they had an arguable appeal that would otherwise be rendered nugatory, having failed to file a draft memorandum of appeal; that the suit premises were owned by the 1st respondent but were being managed by the 2nd respondent; that a court of competent jurisdiction had determined that the leases that existed between the applicants and the 2nd respondent were not enforceable and struck out the suit that had been filed by the applicants to challenge their intended eviction from the suit premises, that the subsequent suit No. 88 of 2015 had also been struck out; that the applicants were attempting to wriggle out of their written undertaking to vacate the suit premises; and that the application before this Court was sub-judice, in view of the pending ruling seeking maintenance of the status quo before the Environment and Land Court.

12. Prof. Sifuna urged this Court to dismiss the application for interim injunction, saying that litigation must come to an end. He added that the order sought is a discretionary one and the applicants had come to Court with unclean hands, as they had not paid rent since 2013.

13. We have carefully considered all the material filed before us as well as submissions by counsel. This is an application brought under **rule 5 (2) (b)** of this **Court's Rules.** The twin principles that must be satisfied in an application brought under that rule are well settled.

To succeed, an applicant must satisfy the Court that he has an arguable appeal or intended appeal, and that the appeal or intended appeal, as the case may be, if successful, the appeal would be rendered nugatory if the court declines to grant the order sought. See **Republic V Kenya Anti- Corruption Commission & 2 Others [2009] eKLR 31.**

14. Although the applicants contended that they have an arguable appeal, they did not flag out any serious issue that is intended to be raised. Although an arguable appeal is not one that will necessarily succeed, an arguable appeal must elicit at least one cognizable issue, not frivolous ones.

15. The issue of validity of the leases between the applicants and the 2nd respondent was argued and determined in case No. 66 of 2013, way back on 4th June, 2014 and since then no appeal has been raised by the applicants. The issue is clearly res judicata. See **section 7** of the **Civil Procedure Act**. The issue could not be re-opened or re- litigated in case No. 88 of 2015, even if that subsequent case involved a different cause of action, as alleged by the applicants. The doctrine of issue estopped would arise.

16. In **Trade Bank Limited V L Z Engineering Construction Limited [2001] E.A.266,** this Court, adopting the definition of issue estoppel in **Halsbury's Laws of England** (4th edition) at page 861 stated:

"An estoppel which has come to be known as Issue Estoppel may arise where a plea of res-judicata could not be established because the causes of action are not the same. A party is precluded from contending the contrary of any precise point which having once already been distinctly put in issue, has been solemnly and with certainty determined against him. Even if the objects of the first and second actions are different, the finding on a matter which came directly (not collaterally or incidentally) in issue on the first action, provided it is embodgied in a judicial decision is final, is conclusive in a second action between the same parties and their privies. The principle applies whether the point involved in the earlier decision, and as to which the parties are estopped, is one of fact or one of law, or one of mixed fact and law".

17. The principle of res judicata is intended to bring finality in litigation. The learned authors of **MULLA, Code** of **Civil Procedure,** 18th edition [2012] at page 293 states as follows:

“The principle of finality or res judicata is a matter of public policy and is one of the pillars on which a judicial system is founded. Once a judgment becomes conclusive, the matters in issue covered thereby cannot be re-opened unless fraud or mistake or lack of jurisdiction is cited to challenge it directly or at a later stage. The principle is rooted to the rationale that issues decided may not be re-opened and has little to do with the merit of the decision”.

18. Further, following the striking out of case No. 66 of 2013, the applicants unequivocally undertook to move out of the suit premises before 11th June, 2014. The signing of the undertaking was witnessed by their advocate, Mr. Kiarie. On what basis can they now seek to extend their stay"

19. In view of the foregoing, we do not think that the intended appeal is arguable. Having come to that conclusion, we need not consider whether the intended appeal shall be rendered nugatory unless the interim injunction sought is granted.

20. We would also agree with Prof. Sifuna that the applicants, having failed to demonstrate that they had paid rent for the suit premises since 2013, are disentitled to the discretionary remedy sought.

21. All in all, the applicant’s application is devoid of merit. Consequently, it is dismissed with costs. It is so ordered.

DATED and Delivered at Eldoret this 25th day of November, 2016.

D. K. MUSINGA

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

JUDGE OF APPEAL

A.K. MURGOR

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.