



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 490 OF 2016

RUNDA WATER LIMITED.....1ST APPELLANT/APPLICANT

RUNDA ASSOCIATION.....2ND APPELLANT/APPLICANT

VERSUS

TIMOTHY JOHN NICKLIN.....1ST RESPONDENT

ANNE CHRISTINE NICKLIN.....2ND RESPONDENT

RULING

1. The Applicants filed a Notice of Motion application dated 27th March, 2017 for orders that, pending the hearing and determination of the applications dated 22nd November, 2016 and 20th March, 2017, this Honourable Court be pleased to conduct a site visit of the location of the barrier in dispute and that the cost of and incidental to this application be costs in the Appeal.
2. The grounds of the Application are set out on the body of the same and on the Supporting Affidavit of SANJEEV SHARMA, the current Vice Chairman of the 2nd Applicant. Amongst the grounds advanced by the Applicants are that the issue in dispute is the removal of the security barrier on Ruaka Road, Runda Estate and that its removal will be a direct infringement to the constitutional protection of the life and properties of the residents who number about 1000 households in Runda Estate, that the original trial magistrate visited the site but the magistrate who wrote the judgment declined to visit the site when the oral application was made to him on 13th June, 2016.
3. The Respondents filed a Replying Affidavit dated 27th March, 2017 sworn by the 1st Respondent. The application is opposed under Order 42 Rule 27 of the Civil Procedure Rules and the Respondents state that the Appeal filed is yet to be taken for directions before the judge as to the mode of hearing hence the application for taking additional evidence is premature. That at the time of the previous site visit, the trial magistrate had taken notes hence there is no need for a second site visit. The Respondents further state that this being an application for stay of execution pending the determination of the Appeal herein, the Appellants should confine themselves to the provisions of Order 42 Rule 6 of the Civil Procedure Rules and not to argue their grounds prematurely.
4. The application was canvassed by way of oral submissions in court on 4/4/2017. Even though the parties' respective advocates dwelt alot on the merits and demerits of the stay of execution applications pending before this court, counsel for the applicant Mr. Gachuhi submits that there are three principles

that a court of law should observe in any matter before it which are ;

- a. A Court of law is a court of justice,
- b. It is a court that upholds the constitution and reference was made to article 29 of the Constitution on freedom and security of the person, and
- c. When a court has before it an application of stay pending appeal, it ensures that an appeal is not rendered nugatory.

5. In a quick rejoinder to the Applicants' submissions, Mr. Mungai, Counsel for the Respondents submitted that since the trial magistrate had visited the site, the Applicants have not explained to the Court why they are again requesting for another site visit and that they have not demonstrated what prejudice they will suffer if the application is not granted.

6. I have read the Affidavits filed herein and considered the oral submissions vis-a-vis the orders being sought in the Applicants application. The Respondents oppose the application on the ground that the appellants are not allowed to adduce additional evidence in appeal under Rule 27 Order 42 of the Civil Procedure Rules which provides that;

“(1) the parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the court to which the appeal is preferred; but if—

(a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or

(b) the court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the court to which the appeal is preferred may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by the court to which the appeal is preferred the court shall record the reason for its admission”

7. The gist of the above provision is that the law can only allow parties in appeal to produce additional evidence only if the same evidence was disallowed in the trial court and ought to have been admitted or when the appellate court considers the evidence necessary in making its judgment. Therefore adducing additional evidence in appeal is not entirely prohibited but can be allowed under exceptional circumstances. A strict reading of the provision will lead to a reasonable conclusion that such evidence can only be entertained during the hearing of the appeal on its merits but not at preliminary stage as this one. The court finds that this application is premature.

8. Notwithstanding the foregoing, I have considered the Applicant's submissions and arguments and I take note that the trial court visited the site of the barrier. I am also aware that whether or not to conduct the site visit is a matter within the Court's discretion to decide which discretion is to be exercised judiciously considering the circumstances of the case and in the interest of justice to the parties as well as in the interest of disposing matters before the court timeously and without undue delay.

9. Where a trial court has conducted a site visit it might not be necessary for an appellate court to conduct a second visit unless there are compelling reasons to do so. This position was observed by the Court of Appeal in **Makupa Transit Shade Limited & Another v Kenya Ports Authority & Another** [2015] eKLR thus;

“...the trial court did pay a visit to the site and made a finding that the area that the 2nd respondent was permitted to work on was not the same part of the plot destined for the appellants in 2002. This Court is bound by this finding of fact and should not interfere unless there are

irrelevant facts considered or the relevant facts have been left out. See Peter v Sunday Post Ltd. [1958] EA 424.

10. The upshot of the foregoing is that I find no merits in the application and the same is hereby dismissed. Each party to bear its own costs of the application.

Dated, signed and delivered at Nairobi this 14th day of July, 2017.

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L. NJUGUNA

JUDGE

In the presence of

..... ***for the 1st Appellant/Applicant***

..... ***For the 2nd Appellant/Applicant.***

..... ***For the 1st Respondent.***

..... ***For the 2nd Respondent.***