



REPUBLIC OF KENYA



KENYA LAW

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Okoth & 18 others (Suing as Owners of Units in Hawi (Apartments on LR No 209/14990/4)) v Jaybinx Investments Ltd & 3 others (Civil Application E430 of 2021) [2022] KECA 431 (KLR) (4 March 2022) (Ruling)

Neutral citation: [2022] KECA 431 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E430 OF 2021
S OLE KANTAI, K M'INOTI & A MBOGHOLI-MSAGHA, JJA
MARCH 4, 2022

BETWEEN

SULEIMAN NYAMWAYA OKOTH 1ST APPLICANT
ANTHONY MUHIA NGANGA 2ND APPLICANT
AWLYIN JONES 3RD APPLICANT
CATHERINE OOSTEWRWIJK 4TH APPLICANT
MWIRERI INVESTMENT COMPANY 5TH APPLICANT
JOHN NJORA NDIRITU & JANE WANGU 6TH APPLICANT
NJORA MOHAMMED HASSAN ABDULLAHI 7TH APPLICANT
RESILIENT INVESTMENT LTD ABDUL HAJI 8TH APPLICANT
JANET MUSYA 9TH APPLICANT
DANIEL ISHMAEL OPANDE 10TH APPLICANT
JACOB OMBONGI 11TH APPLICANT
GLADYS JEPKOECH BIY 12TH APPLICANT
VIKRAM INDUBHAI DAVE 13TH APPLICANT
MATHEW GITONGA NTUARA 14TH APPLICANT
IAN GORDON STAMP 15TH APPLICANT
EDWARD MUNGATANA 16TH APPLICANT
ANGELA DUSABIMANA 17TH APPLICANT
MONICA ODEDE 18TH APPLICANT



RACHEL ODEDE 19TH APPLICANT
SUING AS OWNERS OF UNITS IN HAWI (APARTMENTS ON LR NO
209/14990/4)

AND

JAYBINX INVESTMENTS LTD 1ST RESPONDENT
HAWI DEVELOPERS LIMITED 2ND RESPONDENT
DIRECTOR OF SURVEY 3RD RESPONDENT
COMMISSIONER OF LANDS 4TH RESPONDENT

(Application for injunction pending the hearing and determination of an intended appeal against the ruling and orders of the Environment and Land Court at Nairobi (Komingoi, J.) dated 25th November 2021 in ELCC NO. 1151 of 2005 Application for injunction pending the hearing and determination of an intended appeal against the ruling and orders of the Environment and Land Court at Nairobi (Komingoi, J.) dated 25th November 2021 in ELCC NO. 1151 of 2005)

RULING

1. In their Motion on Notice dated 2nd December 2021, the applicants seek, under Rule 5(2) (b) of the *Court of Appeal Rules*, an order of injunction to restrain the 1st respondent, Jaybinx Investments Ltd, from interfering with their possession, occupation or enjoyment of the property known as LR No. 209/14990 (the suit property), pending the hearing and determination of an appeal which they have already filed against the ruling and order of the Environment and Land Court at Nairobi (Komingoi, J.) dated 25th November 2021. By that ruling, the learned judge dismissed the applicants' application to be made parties to ELCC No. 1151 of 2005 and to set aside a consent order entered therein on 4th December 2009 between the respondents. The effect of the consent order was to create a road of access measuring 4.5 meters through the suit property to another property, LR No. 209/12288. In turn, the effect of creation of the road of access was the demolition of the suit property's main gate, the guard house, perimeter wall, and part of the car park.
2. The applicant's contention was and remains that they are registered owners, by way of long-term subleases registered against the grant, of apartments erected on the suit property. They add that they were not parties to the consent judgement which adversely affects them, that they were not heard on the matter, and that they only came to learn of the existence of the consent order on 14th September 2021, some 12 years later, when the respondents demanded execution of the decree arising from the consent judgment.
3. The applicants have duly filed a notice of appeal, and indeed have filed their appeal in this Court. They contend that they have an arguable appeal because the learned judge erred by, among others, failing to find that joinder and amendment of pleadings was permissible post-judgment, failing to hold that as owners of apartments on the suit property the applicants were adversely affected by the consent judgment to which they were not parties and therefore entitled to be joined in the suit to agitate their rights, by holding that the applicants were guilty of unexplained delay in the face of uncontroverted evidence that the applicants came to know of the consent order only in September 2021 and moved to court to set it aside within ten days of getting the information, and by failing to hold that the



consent judgement was null and void because it adversely affected third parties who were not afforded an opportunity to be heard.

4. Although duly served with the application, a hearing notice and a request to file written submissions, the 1st respondent did not file any and also did not attend the virtual hearing of the application on 28th December 2021. On their part, the 2nd, 3rd and 4th respondents did not oppose the application.
5. Having carefully considered the application and the applicants' submission, we are satisfied that the applicants have demonstrated that their appeal is not frivolous. It raises issues that deserve to be considered fully by this Court, and to that extent their appeal is arguable. We are also satisfied that the appeal will be rendered nugatory, should it succeed and in the meantime the applicants' main gate, guard house, perimeter wall, and part of the car park have been demolished or expropriated to a third party.
6. Accordingly, we allow the application and grant an order of injunction restraining the respondents from interfering with the applicants' possession, occupation or enjoyment of the suit property on the basis of the impugned consent judgment, until the hearing and determination of the appeal. Costs of the application to abide the outcome of the appeal. It is so ordered.

DATED AT NAIROBI THIS 4TH DAY OF MARCH, 2022

K. M'INOTI

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

A. MBOGHOLI MSAGAH

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

