



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, ASIKE-MAKHANDIA & MUSINGA, JJ. A.)

CIVIL APPLICATION NO. 22 OF 2020

BETWEEN

JAMES H. ARCHER.....1ST APPLICANT

JOANNA TRENT.....2ND APPLICANT

AND

INGER CHRISTINE ARCHER.....1ST RESPONDENT

ANNELISE ARCHER CLARK2ND RESPONDENT

HELEN KAY HARTLEY.....3RD RESPONDENT

(An application for an order of injunction arising from the judgment of the Environment & Land Court at Mombasa (C.K. Yano, J.) dated 26th November, 2019 in ELC Case No. 345 of 2017)

RULING OF THE COURT

Before us is a motion on notice dated 11th March, 2020 in which the applicants pray for a temporary injunction restraining the respondents and or their assignees, lessees, agents, servants, representatives, employees or any other person from disposing, assigning, transferring, leasing, charging or dealing with the properties known as Title Nos. Kwale/Diani Beach Block/1745, 1746, 1747, 1748, 1749, 1750, 1751 and 1752 (together formerly known as Kwale/Diani Beach Block/ 806, 807 and 808) hereinafter, "the suit properties," pending the hearing and determination of this application and the intended appeal arising from the judgment of the Environment & Land Court, (C.K. Yano, J.) delivered on 26th November, 2019. The applicants also pray that this Court be pleased to order the respondents to deposit half of the purchase price they received from their transferee, Anne Vaughn with respect to Kwale/Diani Beach Block/1745 and 1747 assessed at Kshs. 10,000,000.00 into court. They also pray that the court orders the respondents to deposit half of the monthly rent they continue to receive from their lessee, Hannah Wambui Gatundu, from January 2020 with respect to Kwale/Diani Beach Block/1746, 1748, 1749, 1750, 1751 and 1752 assessed at Kshs. 250,000.00 into court.

The application is brought under Rules 5(2) (b) and 47 of the Court of Appeal Rules, Sections 3A and 3B of the Appellate Jurisdiction Act and Article 50(1) of the Constitution. It is premised on the grounds that: the applicants were dissatisfied with the impugned judgment and more particularly the finding by the trial court that they had failed to prove that there was a constructive trust between them and the respondents pertaining to the ownership of the suit properties; that the intended appeal raises arguable grounds such as, that the learned Judge, misapprehended and misapplied the law on trusts by holding that there was no constructive or resulting trust between the parties, holding that the applicants were guilty of laches in spite of overwhelming evidence to the contrary, holding that the applicants lacked any beneficial interest in the suit properties when indeed evidence showed that their father had contributed part of the monies for the acquisition of the suit properties and ignoring the written submissions by the applicants demonstrating that the suit properties were jointly owned in equity by the applicants' and the respondents' father; that the respondents had begun to lease and transfer significant portions of the suit properties to third parties and in the event the applicants succeed in the intended appeal they will be denied the fruits of their victory as the suit properties would have been wasted and dissipated by the respondents; the intended appeal if successful shall also be rendered nugatory in that the respondents will have appropriated the suit properties to potential third parties and in the circumstances the order of injunction pending appeal is germane to protecting the applicants from suffering immense and irreparable loss.

The application was further supported by the applicants' affidavit sworn by the 1st applicant in which he reiterated and expounded on the aforesaid grounds.

The application was opposed. In a replying affidavit sworn by Helen Kay Hartley, the 3rd respondent, deposed that the application was lodged after more than three (3) months which delay was inordinate and not explained by the applicants; the applicants were guilty of deliberate and material non-disclosure for failing to disclose the existence of a pending application for injunction before the trial court filed on 6th December, 2019 upon which the trial court issued status quo orders pending the disposal of the said application, meaning that their interests, if any, are not under threat; the said application was heard and is pending determination; the applicants are thus enjoying the existing status quo; the deliberate misstatement of well-known facts is meant to mislead the court; the dismissal of the suit gave rise to a negative order which is incapable of execution.

By way of written submissions the applicants reiterated the principles upon which an application under Rule 5(2) (b) of this Court's Rules can be granted and relied on the case of **AG v Okiyah Omtatah & Another, Civil Application No. 331 of 2018**. They submitted that the applicant must demonstrate an arguable appeal that will be rendered nugatory should the order sought not be granted. It was their case before the trial court that their father provided the purchase price for the suit properties but the same was registered in the respondents' father's name in trust for the other four siblings. However, the respondents' father in breach of their trust started to treat the suit properties as his own. They maintained that their appeal is arguable because the trial court misapprehended the law on resulting trusts and mistakenly held that they did not have beneficial interest in the suit properties contrary to the clear evidence adduced. They further argued that unless the orders sought are granted, by the time the appeal is heard and determined the respondents will have appropriated the suit properties to third parties as they have already caused it to be registered and disposed of some of the suit properties to third parties. They insisted on being paid half of the rent collected since they had a beneficial interest in the suit properties.

The respondents on the other hand were of the view that the application and the intended appeal had been overtaken by events since the suit properties have since been merged and subdivided into eight (8) distinct parcels and the suit properties no longer exist. That there already exists third parties with registered interests over the 8 parcels. They argued further that it was misleading for the applicants to claim that the money used by the respondents' late father to purchase the suit properties was also applied to the applicants. They insisted that they did not transfer or dispose of the eight parcels until after the determination of the suit in the trial court. They further submitted that the third parties whom they have since transferred the properties to are not party to these proceedings and the grant of an injunction will affect their rights and interests. They contended that the applicants had not demonstrated that the intended appeal would be rendered nugatory since there was no allegation that the respondents would be unable to pay damages in the unlikely event that the intended appeal succeeds. They relied on the case of **Stanley Kang'ethe Kinyanjui v Tony Keter & 5 Others [2013] eKLR** in support of this proposition and urged that the application be dismissed with costs.

Having considered the application, the grounds in support thereof, the rival affidavits, submissions by counsel and the law, we note that in the case of **Stanley Kang'ethe Kinyanjui v Tony Keter & 5 Others (supra)** this Court stated thus with regard to applications under rule 5(2) (b) of this court's rules:

“That in dealing with Rule 5(2) (b), the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the judge’s discretion to this Court.” The first issue for our consideration is whether the intended appeal is arguable. This Court has often stated that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous; a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable.”

See also the case of **Okiya Omtata & Another (Supra)**.

For the applicants to succeed in this application therefore, they must demonstrate that they have an arguable appeal, that is, the intended appeal is not frivolous. Upon satisfying that principle, they have the additional duty to show that the appeal, if successful, would be rendered nugatory in the absence of an order of injunction.

In determining whether the appeal is arguable or not, it is trite that by arguable it does not mean the appeal or intended appeal must be one that ought to succeed but rather one that raises a serious question of law or a reasonable argument deserving consideration by the court.

On whether the applicants have established an arguable appeal, we have considered the applicants' draft memorandum of appeal. The applicants' main contention is that they have beneficial interests in the suit properties by way of resulting or constructive trust. This is an issue which can only be determined at a full hearing of the intended appeal. Therefore, these and the other issues raised in the memorandum of appeal are in our considered view not frivolous.

On whether the appeal will be rendered nugatory should the prayers sought not be granted, we take note that factors which can render an appeal nugatory are to be considered within the circumstances of each particular case. The applicants are apprehensive that the suit properties are being transferred and disposed to third parties. The respondents on their part acknowledge that the suit properties have already been transferred to third parties and that they are capable of compensating the applicants in damages. There is no doubt that there is no imminent risk of execution as the application herein has been overtaken by events and the suit properties are in possession of innocent third parties who are not parties to these proceedings. Further, there is an order for the maintenance of the status quo issued by the trial court pending ruling on a similar application filed by the applicants before the trial court. This deposition has not been controverted by the applicants. In that event the appeal will not be rendered nugatory. Further, the respondents have deposed that they are in a position to make good the loss that may be occasioned to the applicants in the event they succeed in their appeal. This assertion has not been countered by the by the applicants either. In the circumstances it is not possible for the intended appeal to be rendered nugatory.

The applicants having failed to demonstrate the existence of both limbs as required by Rule 5 (2) (b) of this Court's Rules, we decline to grant any of the prayers sought in the application. The application is accordingly dismissed with costs to the respondents.

Dated and delivered at Nairobi this 29th day of January, 2021.

M. K. KOOME

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR