



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MUSINGA, MURGOR, J.J.A.)

CIVIL APPEAL (APPLICATION) NO. 120 OF 2020

BETWEEN

**GULF AFRICAN BANK LIMITED.....APPELLANT/APPLICANT
AND
TEJPRAKASH SEHMI1ST RESPONDENT
PETROAFRIC COMPANY LIMITED.....2ND RESPONDENT
LAND REGISTRAR, NAIROBI.....3RD RESPONDENT**

(Being an appeal against the ruling of the Environment and Land Court

(Hon. K. Bor, J.) dated 3rd February 2020

in

Nairobi ELC No. 703 of 2011)

REASONS FOR THE RULING OF THE COURT

On 30th July 2020, the Notice of Motion dated 7th May 2020 filed in the main appeal file came before us for hearing and determination. The motion is brought under **sections 3A and 3B** of the **Appellate Jurisdiction Act** as well as **Rule 5(2)(b)** of the Court of appeal Rules 2010. The motion substantively sought

orders that:

“2. Pending the hearing and determination of the appeal, there be a stay of execution of the entire judgment and decree of the Environment and Land Court in Nairobi ELC Case No. 703 of 2011 Tejprakash Sehmi vs. Petroafric Company Ltd & Others (Hon. Kossy Bor) delivered on 8th August 2019 affecting the appellant’s legal charges over Nairobi Block 55/78.

3. That pending the hearing and determination of the appeal, an injunction be granted restraining the respondents from executing the judgment of Lady Justice Kossy Bor delivered in Nairobi ELC Case No. 703 of 2011 Tejprakash Sehmi vs. Petroafric Company Ltd and Others on 8th August 2019 affecting the appellant’s legal charges over Nairobi Block 55/78.

4. The 3rd respondent be restrained from interfering with the appellant’s applicant’s legal charges registered against the land known as Nairobi Block 55/78 and be ordered to reverse any rectification and cancellation over the charged property Nairobi Block 55 if the process had commenced or been concluded pending the hearing and determination of the appeal.”

The application is supported by grounds on its body and a supporting affidavit sworn by **Lawi Sato** together with annexures thereto. The respondents filed no replying affidavits in opposition to the motion. The application was canvassed by the applicant’s sole pleadings, written submissions of the applicant, and 1st respondent and legal authorities relied upon by the applicant and 1st respondent in support of their opposing positions without oral highlighting. The set for the applicant is dated 10th July 2020, while that for the 1st respondent is dated 27th July 2020. On 30th July 2020, we considered the applicant’s pleadings, rival submissions, and legal authorities relied upon by the respective parties in support of their opposing positions at the conclusion of which we granted orders as follows:

“1. Prayers 2, 3 and 4 are granted as prayed.

2. Reasons for the ruling to be delivered on 6th November 2019.

3. Costs of the application to abide the outcome of the appeal.”

We reserved reasons for the ruling which we now proceed to render as hereunder.

The background to the application albeit in a summary form is that the 1st respondent filed Civil Case No. 703 of 2011 in the High Court of Kenya at Nairobi against the 2nd, 3rd respondents and the Nairobi City Council as it was then known (now County Government of Nairobi) contending, *inter alia*, that: land parcel **LR No. 209/4844/1** (the suit property), fully developed with rental units thereon bequeathed to his mother, **Mrs. Joginder Kaur**, was held under leasehold effective June 1956 and subsequently extended by the 3rd respondent for a further fifty (50) years effective 20th June 2006; the 3rd respondent's action of purporting to convert the suit property's original title to **LR No. Nairobi Block 55/78** and purporting to transfer it to the 2nd respondent with full knowledge of the 1st respondent's proprietary interest thereon were not only fraudulent but also malicious, both particulars of which were given as indicated in the plaint. On the basis of the above averments, the 1st respondent who sought a declaration that him and his family were the rightful legal and lawful leasehold proprietors of the suit property, prayed for the cancellation of title **No. Nairobi/Block 55/78** (the subject title) fraudulently and maliciously registered in favour of the 2nd respondent, and the restoration of the suit property to its former registration number and a permanent and perpetual injunction to issue restraining the 2nd and 3rd respondents from interfering with the 1st respondent and his family's quiet enjoyment of the suit property.

In rebuttal, the 2nd respondent filed a defence dated 16th July 2014 contending, *inter alia*, that: it is the registered lessee of the subject title formerly **LR No. 209/4844/1** pursuant to a lease dated 21st January 2010, duly registered with the 3rd respondent on or about 5th February 2010 and that any of the 1st respondent's alleged fixtures and or developments on the suit property were thereon illegally. The 2nd respondent denied the allegations of fraud and malice attributed to it and put the 1st respondent to strict proof of the same; that it undertook due diligence which disclosed no rival or better title to what it had already acquired before acquiring the suit property, and lastly that as at the time of the institution of the suit, the subject title had already been charged to **M/s Gulf African Bank Limited** (the applicant) to secure a facility of Kshs. 30,000,000.00 that was granted to develop the property.

The cause was canvassed by rival oral testimony from the 1st and 2nd respondents' witnesses and submissions, at the conclusion of which the learned Judge identified only one issue for determination, namely, whether the 1st respondent had a superior claim to that of the 2nd respondent over the suit property which the learned Judge resolved in favour of the 1st respondent's claim over the suit property.

The applicant filed a Notice of Motion dated 24th September 2019 before the trial court citing provisions of law indicated in the heading of that motion substantively seeking: an order staying the execution of the trial court's judgment dated 8th August 2019; to restrain the 1st respondent, his servants or agents and the chief land registrar from interfering with the legal charges of the applicant registered against the subject title; leave to be joined as the 4th defendant to the suit; unconditional setting aside of the judgment dated 8th August 2019; and leave to file its intended defence annexed to the supporting affidavit within 14 days of the order of the Court and for the suit to be heard *denovo*. Also prayed for was an order for costs.

The applicant's complaint albeit in a summary manner was that: it was condemned unheard; it has valid legal charges over the subject title, and the interests of justice demanded that they be joined to the proceedings, and heard on their intended defence before any adverse orders could be issued against them. The applicant also pleaded want of jurisdiction in the ELC to entertain the cause and grant the reliefs forming the substratum of the Court's judgment of 8th August 2019.

The application was opposed by the 1st respondent's replying affidavit deposed on 17th January 2020 contending, *inter alia*, that the application did not meet the threshold for review and setting aside of the judgment under the provision of law cited. Second, the judgment of the Court dated 8th August 2019 was well founded both in law and facts. Third, the Court had jurisdiction to entertain the matter.

The application before the High Court was canvassed by written submissions orally highlighted by learned counsel for the respective participating parties resulting in the impugned ruling dated 3rd February 2020, dismissing the applicant's application for reasons, *inter alia*, that the applicant was aware of the proceedings and ought to have taken steps to be joined as a party to those proceedings. Second, there are other avenues for seeking recourse for whatever infringements of rights the applicant intended to accomplish through the concluded proceedings and the matter need not be reopened for them to be heard on their intended defence.

The applicant was aggrieved and timeously filed a notice of appeal dated 4th February 2020. The record of appeal was also timeously filed on 13th March 2020. The application under consideration is filed in the appeal file. The applicant avers and submits that the grounds in the memorandum of appeal filed in the record of appeal all raise arguable points with high chances of success. The appeal will be rendered nugatory if the orders sought were refused and the appeal were to ultimately succeed, because the 1st respondent may dispose of the suit property before the appeal is heard and determined. Second, the applicant is a total stranger to the 1st respondent and therefore has no knowledge of the 1st respondent's assets that can be attached if the appeal succeeds when the suit property is already disposed of.

To buttress the above submission, the applicant relied on the cases of **Sicpa Security Sol Sa vs. Okiya Omutatah Okoiti & 2 Others [2018]eKLR**; **Damji Pragji Mandavia vs. Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004**; **Githunguri vs. Jimba Credit Corporation Limited (No. 2) [1988] KLR 888**; **Kenya Pipeline Company Limited vs. Stanley Munga Githunguri [2011]eKLR**; **Co-operative Bank of Kenya Limited vs. Patrick Kang'ethe Njuguna & 5 Others [2017]eKLR**; and **Kiai Mbaki & 2 Others vs. Gichuhi Macharia & Anothers [2005]eKLR**; all in support of the submission that: (i) the stay of orders sought is warranted since the appeal is arguable; (ii) the loss likely to be suffered by the applicant will be irreversible and that neither is it capable of compensation by way of damages; (iii) their right to be heard is well founded on the charges executed between the applicant and the 2nd respondent, and that was sufficient basis for the ELC to reopen the matter for them to be heard on their intended defence before any adverse orders could be sustained against them notwithstanding their assertion of want of jurisdiction in the ELC both to entertain the 1st respondent's claim and grant reliefs they sought to set aside the judgment.

In rebuttal, the 1st respondent contended that the impugned ruling was well founded both in law and facts and is therefore unassailable as the

applicant failed to lay any new evidence before the learned Judge to demonstrate that the 2nd respondent was the legitimate owner of the suit property; no prejudice will be suffered by the applicant as correctly found by the trial judge that there are other means and methods through which the applicant can realize its debt from the 2nd respondent other than through the realization of the suit property as security; granting the relief sought will be highly punitive to the 1st respondent who is an innocent party; the appeal is also not arguable as the applicant was aware of the ELC proceedings as they filed a notice of appointment of advocate but chose not to enter appearance and file a defence; that there was therefore no basis to warrant review as any prejudice allegedly suffered by them and which is denied by the 1st respondent was as a result of their own indolence and lack of due diligence on their part, for which the 1st respondent should not be penalized by curtailing his enjoyment of the fruits of the judgment granted in his favour.

To buttress the above submission, the 1st respondent relied on the case of **Shah vs. Mbogo [1968] E.A 93; Mohamed Salim t/a Choice Butchery vs. Nasserpuria Memon Jamat [2013]eKLR; Machira t/a Machira & Co. Civil Application No. 120 of 2020 Reasons for the Ruling of the Court delivered on 30th July 2020 Advocates vs. East African Standard [2002]eKLR; and Co-operative Bank of Kenya Limited & Another (Garnishee) [2019]eKLR**; all in support of his submission that the reasons the learned Judge gave when she declined to exercise her discretion to review and set aside the judgment of 8th August 2019, were well founded both in law and on the facts. Second, the applicant's right of appeal has to be balanced against the 1st respondent's equal right to enjoy the fruits of the judgment granted in his favour. Third, the applicant is disentitled to the relief sought for the failure to offer any security for the performance of the decree should the appeal ultimately fail.

Our invitation to intervene on behalf of the applicant has been invoked under **sections 3A and 3B of the Appellate Jurisdiction Act** as well as **Rule 5(2)(b)** of the Court of Appeal Rules. **Sections 3A and 3B of the Appellate Jurisdiction Act** enshrine the overriding objective principle of the Court. The principles that guide the Court on the invocation and application of this principle have been crystallized by numerous case law. For instance, in the cases of **City Chemist (NBI) Mohamed Kasabuli suing for and on behalf of the Estate of Halima Wamukoya Kasabuli vs. Orient Commercial Bank Limited Civil**

Appeal No. Nai 302 of 2008 (UR No. 199 of 2008); and Kariuki Network Limited & Another vs. Daly & Figgis Advocates Civil Application No. Nai 293 of 2009, which all support the proposition that the purpose of the overriding objective principle is first, to enable the court achieve fair, just, speedy, proportional, time and cost-saving disposal of cases before it. Secondly, to embolden the court to be guided by a broad sense of justice and fairness.

Thirdly, to give the court greater latitude to overcome any past technicalities which might hinder the attainment of the overriding objective.

The substantive provision for accessing the relief sought is **Rule 5(2)(b)** of the Court of Appeal Rules. It provides:

“5(2)(b) in any civil proceedings, where a notice of appeal had been lodged in accordance with rule, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the court may think just.”

The principles that guide the Court on the parameters for exercise of the Court's mandate under the said provision now form a well trodden path. We take it from the case of **Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others [2013] eKLR**, wherein the guiding principles were summarized as hereunder;

- (i) *in dealing with Rule 5(2) (b) the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this court. See **Reuben & 9 Others v Nderitu & Another** (1989) KLR 459;*
- (ii) *the discretion of this court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so;*
- (iii) *the Court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. See **Halai & Another vs. Thornton & Turpin (1963) Ltd.** (1990) KLR 365;*
- (iv) *in considering whether an appeal will be rendered nugatory the Court must bear in mind that each case must depend on its facts and peculiar circumstances. See **David Morton Silverstein vs. Atsango Chesoni**, Civil Application No. Nai 189 of 2001;*
- (v) *an applicant must satisfy the Court on both of the twin principles;*
- (vi) *in whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised. See **Damji Pragji Mandavia vs. Sara Lee Household & Body Care (K) Ltd**, Civil Application No. Nai 345 of 2004;*
- (vii) *an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous. See **Joseph Gitahi Gachau & Another vs. Pioneer Holdings (A) Ltd. & 2 others**, Civil Application No. 124 of 2008;*
- (viii) *in considering an application brought under Rule 5 (2) (b) the Court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal. See **Damji Pragji (supra)**;*
- (ix) *the term “nugatory” has to be given its full meaning. It does not only mean worthless, futile, or invalid. It also means trifling. See **Reliance Bank Ltd v Norlake Investments Ltd [2002] 1 EA 227** at page 232;*
- (x) *whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved;*

(xi) where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impunity, the onus shifts to the latter to rebut by evidence the claim. See International Laboratory for Research on Animal Diseases v Kinyua, [1990] KLR 403.

We have considered the record in light of the above threshold and the rival positions taken by the respective parties both in the applicant's pleadings and the respective parties' submissions as assessed above and proceed to make findings thereon as follows: the memorandum of appeal on record raises nine (9) grounds of appeal. In summary, the applicant intends to argue that: their right to be heard was infringed; the 1st respondent had no *locus standi* to champion the claim as laid; the ELC had no jurisdiction to entertain the 1st respondent's claim. Also that the learned Judge erred when she: granted relief affecting title to the suit property without calling for the original title to be surrendered to court for cancellation; granted judgment in respect of a non-existent property; failed to order the cancellation of the subject title; and lastly the learned judge also erred when she failed to properly appreciate that the applicant could not be restrained from exercising its statutory power of sale over the suit property. We find all the above grounds of appeal arguable notwithstanding that they may not ultimately succeed.

Turning to proof of the second prerequisite under this rule, it is undisputed that the property over which the 2nd respondent executed a charge in favour of the applicant for a colossal amount of money under the subject title is the same property that the trial judge adjudged in favour of the 1st respondent who had claimed it under the original title number. The applicant has pleaded apprehension of ultimately suffering great prejudice and irreversible substantial loss should the appeal succeed after the suit property would either have disappeared or changed hands or character, rendering it out of reach of the applicant. Neither the 1st nor the 2nd respondents have put forth any proposal to allay the applicant's above highlighted apprehension. The 2nd respondent did not even file any papers either in support of or in opposition of the application. The applicant also pleaded lack of possession of sufficient assets by the 1st respondent as the beneficiary of the trial court's decree to meet the applicant's apprehended loss should the appeal ultimately succeed in the event the 1st respondent dealt with the suit property in any manner it deemed fit. Apart from submitting that the applicant's fears have no basis, the 1st respondent neither controverted the applicant's assertion by way of a replying affidavit nor demonstrated by whatever other acceptable mode that he had sufficient assets to meet the applicant's loss should the appeal ultimately succeed after dealing with the suit property.

In light of the above assessment and reasoning we make orders as follows;

- 1. We affirm the interim orders we issued on 30th July 2020. We also direct the registry to liaise with the parties with a view to processing the appeal for speedy hearing and disposal.**

- 2. Costs of the application to await the outcome of the appeal.**

Dated and Delivered at Nairobi this 23rd day of October, 2020.

R. N. NAMBUYE

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR