



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, MUSINGA & KIAGE, J.J.A.)

CIVIL APPLICATION NO. 92 OF 2020

BETWEEN

DISCOVERY TECHNOLOGIES LTD.....APPLICANT

AND

ESTATE OF PIERINNA NYOKABI KINYANJUL.....1ST RESPONDENT

CHARLES PAUL KINYANJUL.....2ND RESPONDENT

PIERA WAITHIRA CESARONI.....3RD RESPONDENT

JORETH LIMITED.....4TH RESPONDENT

MARGARET WAMBUI NGUGI.....5TH RESPONDENT

*(An Application for injunction pending the hearing and determination of an intended appeal from the Judgment and Orders of the Environment and Land Court of Kenya at Nairobi (E. O. Obaga, J.) dated 14th November, 2019 in ELC Case No. 108 of 2019*

\*\*\*\*\*

RULING OF THE COURT

1. At the core of this application is the question as to who between Discovery Technologies Limited (applicant) and the Estate of Pierinna Nyokabi Kinyanjui is the rightful owner of **Land Reference No. 13330/527** (suit property) Nairobi. The applicant claims to have purchased the property from Margaret Wambui Ngugi (5th Respondent) who in turn claims to have bought the suit property from Joreth Limited (4th respondent).
2. On the other had the 2nd and 3rd respondents claim to have inherited the same property from their mother one Pierinna Nyokabi Kinyanjui who was a shareholder of Thome Farmers No. 5. Following a consent entered in Nairobi **HCCC No. 6206 of 1992**, all members of Thome Farmers No. 5 agreed to pay Ksh. 200,000 to Joreth Limited (4th respondent) within specific timelines if they wanted to retain their plots. In default of such payment within the agreed timelines, ownership of the plots would revert to Joreth.
3. A dispute arose as to whether Pierrina Nyokabi's share was forfeited to the 4th respondent following alleged non-payment of the Ksh. 200,000. The 2nd and 3rd respondents maintained that the amount was paid but Joreth claims that the money was not paid; and so the suit property reverted to it and it had every right to dispose of the suit property which it did to Mary Ngugi who sold it to the applicant herein for a sum of Ksh. 48,000,000. The applicant deposes that it bought the property after conducting thorough due diligence.
4. After buying the suit property, the applicant was registered as the sole proprietor and issued with a certificate of Title on 6th August, 2015. It then took possession and started to develop the property and put up a fence and dug a borehole among other developments, but Alas! The 1st, 2nd and 3rd respondents moved in and staked a claim to the property and stopped the applicant from further dealing in the property. They also moved to the Land and Environment Court (ELC) vide **ELC No. 108 of 2019** seeking injunctive orders against the applicant. Contemporaneously, they filed an application under certificate of urgency basically seeking the same orders in the plaint. When the application was placed before Obaga, J for certification, he allowed the prayer for injunction ex-parte on 21st March, 2019 pending inter partes hearing on 3rd April, 2019. Armed with the ex-parte order, the 1st to 3rd respondents went to the suit property and evicted the applicant and stopped him from any further dealings with the land.
5. Upon being evicted, the applicant moved to the same court vide an application dated 1st April, 2019 seeking *inter alia* the setting aside of

the ex-parte orders issued on 25th March, 2019 and also an injunction against 1st to 3rd respondents to be stopped from interfering with his quiet possession. These two applications were heard together and Obaga J rendered the now impugned Ruling on 14th November, 2019.

6. In the Ruling, the learned Judge found in favour of the 1st to 3rd respondents and appears to have made determinative orders in an interlocutory application. The learned Judge pronounced himself thus:-

**“... The deceased took possession of the plot in 1988 and there was no way a person other than the deceased would have again been given title. The injunctive orders which were given therefore based on facts which cannot be said to be misleading.”**

The learned Judge’s conclusion was as follows:-

**“The court cannot order that all the parties keep of the suit property as sought by the applicant. The respondents moved the court and they demonstrated that they have a *prima facie* case. Based on the analysis hereinabove, I find that the applicants’ application dated 1st April lacks merit...”**

7. The applicant has appealed against that order and in the meantime filed the notice of motion dated 23rd March, 2020 which is the subject of this Ruling. In the notice of motion, the applicant principally seeks stay orders against the ruling of Obaga, J and prays for what it refers to as preservative orders to preserve the suit property in its present condition, status and position without any party being allowed to carry out any developments or occupying the same until the appeal is heard and determined.

8. The rival affidavits and submissions filed by the parties herein expound on the history of the matter as we have adumbrated in this ruling. We are alive to the fact that the main suit before the Environment and Land Court has not been determined and also the appeal is yet to be heard. For this reason, we have exercised extreme caution not to delve into issues that can embarrass the courts that will be hearing the appeal and the main suit. The purpose of this application is to ensure that the subject matter is not dissipated pending the hearing of the appeal and also the main suit.

9. It is with that in mind that his Court gave orders of status quo pending the hearing and determination of this application. Has the applicant persuaded the court that the application before us is meritorious? In order for an application under Rule 5(2)b of this Court to succeed, the applicant needs to demonstrate that it has an arguable appeal, and secondly, that if the orders sought are not granted, the appeal, were it to succeed will be rendered nugatory. See **Stanley Kangethe Kinyanjui v. Tony Ketter & 5 others [2013] eKLR.**

10. We have considered the application, the rival affidavits and all the annexures thereto and submissions by both counsel. On arguability, we have no doubt that the appeal is arguable. We say so because as raised by the applicant in the memorandum of appeal, the learned Judge appears to only have applied the principle of “*prima facie case*” to the application dated 22nd March, 2019 and not to the applicant’s application dated 1st April, 2019. We are also of the view that the learned Judge’s observations and order determined ownership of the property before the main suit has been heard and parties allowed to fully canvass their claims. The applicants only need to establish one arguable issue, and it must be borne in mind that 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 v. Pioneer Holdings (A) Ltd. & 2 others.** Civil Application No.124 of 2008. We are persuaded that the appeal is not frivolous and invites this Court to address its mind to it and make a determination.

11. On the nugatory aspect, from the annexures to the affidavit in support of the application sworn by Prince Kinyua Gathuita, a director of the applicant, it is clear that the respondents herein have moved into the suit premises and are carrying out all manner of developments. The applicant also has some developments on the property. If this state of affairs is not controlled or stalled pending hearing of the appeal, the physical status of the property will continue changing and it may not be possible to revert it to its original status after the proper owner is determined by the court.

12. In sum, we are satisfied that the applicant has demonstrated both arguability and the nugatory aspect. We find this application meritorious and stay execution of the orders of Obaga, J delivered on 14th November, 2019 and all consequential orders/decrees emanating from the said order. We further order that the status quo as ordered by the court on 4th June, 2020 be and is hereby extended until the appeal is heard and determined.

13. For avoidance of doubt, neither party should remain in possession of the suit property or carry out any developments thereon pending the hearing and determination of the appeal. We also direct that this appeal be heard on priority basis.

14. Costs of the application will abide the outcome of the appeal.

**Dated and delivered at Nairobi this 9th day of October, 2020.**

**W. KARANJA**

**JUDGE OF APPEAL**

**D. K. MUSINGA**

**JUDGE OF APPEAL**

**P. O. KIAGE**

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**