



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, OKWENGU & KIAGE, J.J.A)

CIVIL APPEAL NO. 162 OF 2020

BETWEEN

TOM OWINY.....APPLICANT

AND

PATEL RAVJI LALJI.....1ST RESPONDENT

DEVRAJ RAVJI LALJI.....2ND RESPONDENT

(Being an application for stay of the Ruling and Order restraining the applicant and his agents, servants or employees from trespassing or interfering with respondent's occupation of LR NO 209/11309 until the intended appeal is heard and determined (Okongo, J.) dated 18th May, 2020 in ELC CASE No. 114 of 2019)

RULING OF THE COURT

1. The 1st and 2nd respondents filed suit before Environment and Land Court (ELC) being **Civil Case No. 114 of 2019** against the applicant seeking several orders. The said suit has not been heard, but contemporaneously with the filing of the suit, the respondents also filed an application seeking interim orders of injunction restraining the applicant, his agents and or employees from trespassing or interfering with the respondents' occupation of **LR No. 209/11309** (the suit premises) until the suit is heard and determined.
2. In the said suit, the respondents claimed that they purchased the suit premises from the applicant and another person for a sum of Kshs. 50 million, the suit property was duly transferred to them and they took possession, erected a perimeter wall developed other infrastructure that they claimed stood at the cost of 300 Million and that they have remained in uninterrupted occupation for a period of five (5) years prior to the events that occurred when they filed suit before the ELC. The respondents complained in the said application that on 23rd March, 2019 the applicant in the company of goons trespassed on the suit premises, broke the padlocks, assaulted the security guards who were manning the suit property thereby causing mayhem and interfering with the respondents' quiet possession.
3. The applicant objected to the said application contending that upon execution of the sale agreement with the respondents over the suit premises, he was paid Kshs. 30 million and was not paid the balance of the purchase price of Kshs. 20 million and therefore he rescinded the sale agreement. The applicant also resisted the application stating that when he executed the transfer documents over the suit premises, it was to assist the respondents obtain a loan to pay the balance of the purchase price which they did not. The applicant faulted the respondents for breaching several clauses of the sale agreement which he termed null and void.
4. The matter fell for hearing before **Okongo, J.** who after considering the affidavits and the rival submissions found that the respondents had satisfied the threshold of granting a temporary order of injunction. This was on account that he found the respondents were the registered proprietors of the suit premises. The Judge was also persuaded by the material presented before the court that the applicant had attempted to take possession of the suit premises from the respondents. The Judge therefore granted the order of injunction in the following terms: -

“I allow the plaintiff's application dated 27th March, 2019 in terms of prayer No. 3 thereof. In order to preserve the suit property, I make a further order that pending the hearing and final determination of the suit or further orders by this court, all the parcel of land known as LR No 209/11309 shall not be sold, transferred, leased charged or developed in any manner whatsoever. The costs of the application shall be in the cause”

5. The applicant was aggrieved by the said orders, he filed a Notice of Appeal and the instant application, where he is principally seeking an order of stay of the said order on the grounds that the Judge made some far reaching conclusions that are prejudicial to him; that the respondents did not complete paying the purchase price over the suit premises and finding that the respondents were entitled to quiet possession are matters that were highly contested and the Judge is faulted for making conclusive findings during an interlocutory stage without hearing evidence. According to the applicant, he has an arguable appeal that will be rendered nugatory should he be kept away from the suit premises where he claims he has a business.

6. The application was supported by the applicant's affidavit where he reiterated the grounds that the respondents had not established a *prima facie* case with a probability of success; that the respondents did not tender any evidence to show the entire purchase price had been paid or any evidence to show **Hezbon Omondi** who was allegedly paid the balance of the purchase price had any authority from the applicant to receive the balance of the purchase price. Further, that the applicant is in occupation of the suit premises where he carries out business activities.

7. This application was opposed by the respondents, relying on the affidavit sworn by the 1st respondent. The applicant is faulted for failing to make material disclosure regarding the status of the suit premises which has been in uninterrupted occupation by the respondents for 5 years before the applicant raided the property and the matter was taken to court. That the Judge properly exercised his discretion to grant the prayers sought as there was sufficient evidence exhibited on record that demonstrated that the respondents had fully paid the purchase price, the suit premises was transferred to them and they were in possession thereof.

8. Both Counsel for the applicant and respondents filed written submissions in support of their respective positions which we have considered within the parameters provided under **Rule 5(2) (b)** of the **Court of Appeal Rules**. An applicant who invokes the aforesaid Rule has to establish that the intended appeal is arguable and that in the event that he/she is not granted orders, the intended appeal would be rendered nugatory. See the case of **Trust Bank Limited and Anor vs. Investech Bank Ltd & 3 Ors, Civil Application Nos. NAI 258 & 315 OF 1999, (Unreported): -**

“The jurisdiction of the Court under Rule 5(2)(b) is original and discretionally and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, or put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case.”

9. Another important aspect to bring to bear is that in granting the interim orders of injunction and by preserving the suit premises until the final determination of the suit, the Judge was exercising discretionary powers. See the case of **Mbogo vs. Shah, [1968] E.A. 93: -**

“....A Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising this discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and as a result there has been injustice.”

10. Applying the above principles to the facts of this case, we find that the issue(s) raised by the applicant are arguable, that is whether the respondents paid the full purchase price of the suit premises and what remedy is available to the applicant in the event. This is obviously with the usual caution that an arguable issue is not one that must necessarily succeed but rather one that raises a serious question of law or a reasonable argument deserving consideration by the Court. In **Dennis Mogambi Mang'are vs. Attorney General & 3 Others, Civil Application No. NAI 265 of 2011 (UR 175/2011)** this Court held that: -

“An arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court's consideration.”

11. On the nugatory aspect, we find that the Judge duly made an order preserving the suit premises that no party should deal with it adversely. Although the respondents are in possession, they were restrained from selling it or altering its character until the suit that is pending before ELC is heard and determined. That order having preserved the property pending determination of the suit is in no way prejudicial to the applicants' rights pending appeal. In fact, it is advantageous to them and we would be remiss to interfere with it. The appeal would not be rendered nugatory.

12. Accordingly, the applicant having failed to satisfy the twin limbs as required by **Rule 5(2) (b)** of this Court's rules, the application must fail and is accordingly dismissed with costs to the respondent.

Dated and delivered at Nairobi this 4th day of December, 2020.

M. K. KOOME

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR