



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, OKWENGU & J. MOHAMMED, JJA)

CIVIL APPLICATION NAI. 28 OF 2019

BETWEEN

DEVIKA SHAILESHKUMAR PATEL.....FIRST APPLICANT

SHAILESHKUMAR NATAVERBHAI PATEL.....SECOND APPLICANT

SHANIL VIRAJ PATEL.....THIRD APPLICANT

AND

SHILPAN PATEL.....FIRST RESPONDENT

(Suing as the Executor of the Estate of Nataverbhai Prabhai Vallabhai Patel)

THE CHIEF LAND REGISTRAR.....SECOND RESPONDENT

(An application seeking stay of proceedings and/or barring the trial court from delivering it

ruling on the 1st respondent's application dated 22nd November, 2017 pending the hearing

and determination of an intended appeal against decision of the Environment and Land

Court (ELC) (Komingoi, J.) dated 1st November, 2018 in ELC No. 721 OF 2017)

RULING OF THE COURT

The application before us is rather unusual. It seeks to arrest mid- stream, the delivery of a ruling scheduled to be delivered by the Environment and Land Court (ELC) (L. Komingoi, J.) on an application for injunction. The motion is couched as injunctive relief under **Rule 5(2) (b)** of the rules of this Court, for the following orders:

“1. THAT this Honourable Court of Appeal be and is hereby pleased to issue Orders barring the trial court from delivering its ruling on the 1st respondent's application dated 22nd November, 2017 which is now set for ruling on 26th March, 2019 or on any other day thereafter pending the hearing and determination of the intended appeal.

2. THAT this Honourable Court of Appeal be and is hereby pleased to issue Orders staying further proceedings in Nairobi ELC No. 721 of 2017 pending the hearing and determination of the intended appeal.”

The notice of appeal filed to confer jurisdiction on the Court is dated 6th November 2018 and was filed on 12th November 2018. It refers to a decision of the trial court made on 1st November 2018, but the record shows that there was no "Ruling" delivered by the court on that day. What the court did was to give directions, as sought by one of the parties, on the filing of an affidavit, and then proceeded to hear the application for injunction to finality. Objection has been taken on whether or not leave was required to appeal the directions given by the trial court and we shall deal with that issue shortly.

The dispute raging before the ELC is on the true ownership of a half acre developed plot in Spring Valley, Nairobi, known as **LR. NO.**

15005/5, but renamed LR. NO. 15005/33 after issuance of a new title (**the disputed plot**). The real combatants (except the Chief Land Registrar, who did not even show up 2 before us despite service) are members of the same family: the applicant (**Devki**), is the wife of the 2nd respondent (**Shailesh**), and the mother of the 3rd respondent, (**Shanil**). She is the current registered owner of the disputed plot as a trustee for **Shailesh** and **Shanil**. On the other side is the 1st respondent (**Shilpan**) who is the brother-in-law of **Shailesh**, by marriage to his sister, one **Usham Patel**.

Shilpan contends that the disputed land was purchased in the year 2011 by **Nataverbhai Prabhudas Vallabhai Patel (the deceased)** who died on 25th May 2014. The deceased left a Will appointing **Shilpan** as the Executor, and the grant of probate issued to **Shilpan** on 24th March 2015 was confirmed on 22nd February 2016. Under the Will, the disputed land is bequeathed to the deceased's grandchildren. When **Shilpan** moved in to have the disputed plot transferred in accordance with the deceased's last will, lo and behold, the original Title, which was in the custody of **Shailesh**, was not only unavailable, but when it was found in June 2014, it had been surrendered to the Chief Land Registrar and a new Title issued in the name of **Devki** on 18th November 2016. **Shilpan** filed suit on 10th November 2017 pleading fraud, illegality and irregularity in the manner the disputed property changed hands after the death of the deceased and sought an order for nullification of the transaction, as well as orders restraining further transfer, an order for re-transfer to the estate of the deceased, and an order for **Devki** and her family to vacate the land.

In her defence, **Devki** dismissed the allegations of fraud as misguided and asserted her right to the disputed plot through lawful purchase in the year 2011. According to her, the funds necessary for purchase of the property were made available by herself and **Shailesh**, but they used the name of the deceased because he had better negotiation skills and obtained good terms from the sellers who knew him. The deceased had in turn signed a blank transfer form which **Devki** later completed and registered after surrendering the Title to the Chief Land Registrar. Her family has been in possession of the disputed land for a long time and they had no intention of leaving or transferring their investment to anyone else.

Wherever the truth lies between those rival contentions still awaits testing in oral testimony before the trial court. In the meantime, the trial court was on the verge of delivering a ruling on whether temporary orders of injunction should issue pending the hearing of the suit when, as earlier stated, an injunction was sought to arrest the ruling.

The main ground upon which the application before us is based, is that the trial court irregularly admitted into evidence an additional affidavit of **Ushma Patel** sworn on 5th September 2018 in support of **Shilpan's** application. It is asserted that there was no leave sought to file such affidavit, being as it was, the third affidavit in support of the motion. It is also asserted that the admission of the affidavit without corresponding leave to respond thereto was prejudicial to the applicants, hence the reason for stopping the intended ruling.

In submissions before us, learned counsel for the applicants **Mr. Julius Juma** submitted that there was a right of appeal to this Court and referred us to **Order 43 rule 1(j)** of the **Civil Procedure Rules (CPR)**. He then referred us to the record of proceedings before the trial court to confirm that there was no leave sought by **Shilpan** for filing the impugned affidavit. The fear, according to him, was that the ruling of the trial court will be based on the additional facts which had not been responded to. On that ground alone, counsel concluded, the intended appeal had overwhelming chances of success, let alone being arguable. On the nugatory aspect, counsel submitted that if the injunction is not granted, the proceedings in the trial court will continue thus rendering the intended appeal nugatory. The cases of **Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others [2013] eKLR** and **National Bank of Kenya Limited & another vs. Geoffrey Wahome Muotia [2016] eKLR** were relied on for those submissions.

In response, learned counsel for **Shilpan**, **Mr. Wilson Mwhuri**, submitted that the application before us was not only a non-starter but also frivolous. It was a non-starter because the court made no substantive decision, but only gave directions, and therefore, leave to appeal was required. **Order 43 rule 1(j)** was therefore not relevant. According to him, allowing appeals from interlocutory rulings, orders or directions willy nilly would clog the justice system, and thus impeded access to justice. The cases of **Cornel Rasanga Amoth vs. William Odhiambo Oduol & 2 others [2013] eKLR** and **Michael Mungai vs. Housing Finance Co. (K) Ltd & 5 other [2017] eKLR**. were relied on.

As for arguability of the intended appeal, counsel referred us to the replying affidavit which introduced a certified copy of the proceedings before the trial court. The certified copy corrects the proceedings relied on by the applicant which gave the impression that there was no leave granted to the respondent to file a further affidavit. That being the only issue intended to be raised on appeal, counsel submitted, it was not arguable since there is no challenge to the certified proceedings.

Finally, on the nugatory aspect, counsel submitted that all substantive matters of fact still lie before the trial court for agitation and no prejudice will be caused to any party if the injunction and stay sought herein were refused. On the contrary, in his view, granting the orders would unduly prejudice the beneficiaries of the deceased's estate. He relied on the case of **Samken Limited vs. Boniface Kaquo Mwangi & Another [1998] eKLR**.

We have considered the application fully. Both parties are agreed on the guiding principles which were ably summarized by this Court in the **Stanley Kangethe Kinyanjui case** (supra), thus:-

- 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 Ruben & 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. Halai & Another v 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 own facts and peculiar circumstances. David Morton Silverstein v Atsango Chesoni, Civil Application No. Nai 189 of 2001.**

v) *An applicant must satisfy the court on both of the twin principles.*

vi) *On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. Damji Prajji Mandavia v 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. Joseph Gitahi Gachau & Another v. 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. Damji Prajji (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. 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 impecunty, the onus shifts to the latter to rebut by evidence the claim. International Laboratory for Research on Animal Diseases v Kinyua, [1990] KLR 403.*

The genesis of the complaint raised before us is a short record of directions given by the trial court on 1st November, 2018 as follows:-

“DIRECTIONS

I have gone through the court record and confirm that leave was granted to the plaintiff/applicant to file a supplementary(sic) on 12/7/2018. The affidavit of Ushma Patel is therefore properly on record. The objection by the 1st – 3rd defendants' counsel is overruled.”

The directions were given pursuant to an objection raised by counsel for **Devki, Mr. Juma**, that **Shilpan** had filed three sets on affidavits in support of the application for injunction, while **Devki** had filed two sets. According to counsel **Order 51 rule 14** CPR allowed only two opportunities for filing affidavits and requires any further affidavits to be filed with leave of the court. He then sought the striking out of the Affidavit of **Usham Patel** filed on 5th September, 2018, on the ground that it was filed without leave. But the trial court confirmed from the record that indeed leave had been sought and granted before the affidavit was filed, hence the directions.

We have re-examined the certified record of proceedings introduced through the replying affidavit filed herein which is not challenged on authenticity. It shows that after **Devki** responded to the original affidavit on 22nd January, 2018, a further affidavit was filed by **Shilpan** on 16th April, 2018 in reply thereto. **Devki** then sought and was granted leave on 12th July, 2018 to file a supplementary affidavit. A further order was then made by the court as follows:

"Court:

The parties do file written submissions. The plaintiff/applicant do have leave to file a further affidavit. [Emphasis added]

L. KOMINGOI JUDGE

12/7/2018”

The proceedings in the main record of appeal show the same record as stating:

"Court:

The parties do file written submissions. The defendant/applicant do have leave to file a further affidavit. [Emphasis added]

L. KOMINGOI JUDGE

12/7/2018”

It is obvious to us that the order made in the proceedings relied on by the applicant herein was erroneous and was properly rectified. With that rectification, the applicants' main reason for the intended appeal dissipates. We would on that basis alone find that the intended appeal is largely frivolous and that the applicant has not surmounted the first principle.

Even if we were to give the benefit of doubt and find that there was an arguable appeal, we are not satisfied that if we do not stop the delivery of the ruling or stay the proceedings before the trial court, the success of the appeal or intended appeal would be rendered nugatory. In our view, any orders given by the trial court in the pending ruling are reversible, so long as a proper basis is laid for their challenge. At any rate, neither the trial court in dealing with the application for injunction, nor this Court in considering an application under **rule 5(2)(b)** can make

definitive or final findings of either fact or law. The parties will have their day in court when their evidence will be tested in cross examination and it will not matter how many affidavits are filed on record. The final decision will be based on hard evidence.

We are satisfied that the circumstances of this case dictate the expeditious hearing of the suit on merits and the earlier the parties heed that course, instead of concentrating on costly and time-consuming sideshows, the better for them. The second limb of the principles fails too, and we so find.

The upshot is that the application lacks in merit and we order that it be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 6th day of August, 2019.

P. N. WAKI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR