IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIAGE, GATEMBU & MURGOR, JJ.A.)

CIVIL APPLICATION NO. NAI 276 OF 2018

BETWEEN

DEEPAK HARAKCHAND DODHIA.....APPLICANT

AND

ANMOL LIMITED.....1ST RESPONDENT

SUPERFIT STEELCON LIMITED.....2ND RESPONDENT

AND

DIRECTOR PHYSICAL PLANNING.....1ST INTERESTED PARTY

NATIONAL ENVIRONMENT AND MANAGEMENT AUTHORITY.....2ND INTERESTED PARTY

NATIONAL CONSTRUCTION AUTHORITY.....3RD INTERESTED PARTY

(An application injunction pending the hearing and determination of an intended appeal from the Ruling and order of the High Court of Kenya at Nairobi (Environment & Land Division (B.M. Eboso, J.) dated 17th July 2018 in ELRC No. 3 of 2017)

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RULING OF THE COURT

This Notice of Motion dated 11th January 2019 is made under ***rules 5***

2. **(b), 20 (2), 42 and 47 (1), (2) and (4)** of the ***Court of Appeal Rules*** and seeks orders that;

i)…

ii)An injunction do issue restraining the respondent whether by themselves their servants and agents, from proceeding in any manner whatsoever with construction of the residential development on the parcel of land known as Plot L.R. No. 1870/1/303 General Mathenge Drive, Westlands (the property*) pending the hearing and determination of the intended appeal against the order of Honourable Justice B.M. Eboso, J. given on 17th July 2018.*

iii) Alternatively the Court be at liberty to make any further orders in the interest of justice;

The application was brought on the grounds that the construction of residential apartments on the property which was adjacent to the applicant's house was being carried out rapidly and in violation of the law; that the development caused massive structural damage to his house such as cracks, glaring floor tilt due to excavation, falling debris, seepage on the upper ceilings, unstable structure of the house, and weak foundations, which damage was hazardous to the applicant and caused his family to be displaced.

Further, the respondents had violated and threatened the appellant's fundamental rights to a clean and healthy environment as required by the Environmental Management and Co-ordination Act, which arose when the respondents deviated from the strictures of the approved

plans. It was asserted that if the injunction was not granted the applicant would suffer substantial loss and irreparable damage, which would render the appeal nugatory.

The motion was supported by the affidavit of the applicant which was sworn on 25th September 2018 wherein it was deposed that his family and he were residing adjacent to the property in peace and tranquility, when they were informed that the proprietor of the adjacent property had engaged the services of a contractor to construct residential apartments on their property; that upon consultations with his advocate, he was informed that a construction of that magnitude would require to be registered by the National Construction Authority, the 3rd Interested Party, who would monitor the construction processes adopted; that in accordance with the Physical Planning Act and the Environmental Management and Coordination Act, the respondents owed a duty of care to the applicant, the neighboring properties, and to the general public to take such precautionary measures as would be necessary to protect the applicant's property from being damaged by the ongoing construction.

It was averred that as a result of the construction, the appellant's property had been subjected to massive structural damage. In addition, several stones had fallen from the construction site onto the applicant's house damaging the roof extensively, while other falling debris had broken several window panes and damaged fittings in the house all of which rendered it unfit for occupation.

The applicant further averred that despite several letters to the respondent seeking redress for the damage suffered, no response was received, and that as a consequence, the applicant informed the 3rd Interested

Party of his grievances, which in turn informed him that the concerns were legitimate as the construction project had not been registered with them. The applicant's further complaint was that though the respondents had initially obtained the requisite consents to construct the apartments, they had made several alterations to the building plans without obtaining the requisite consents and approvals, and without securing public participation; so that, the construction did not conform to the requirements of the law, and was an infringement of his rights.

It was deposed that the construction was in breach of the planning and development guidelines in that it was i) built without the requisite approvals, impact assessment report and public participation; ii) encroaching on the applicant's privacy; iii) a detriment to the environment; iv) a breach of his right to clean air and healthy environment; v) unlawful; iv) negatively impacting the neighborhood; and vii) it failed to conform to safe building practices and therefore the provisions of *Article 42, 69*, and *70* of the Constitution had been violated.

The applicant averred that he was displeased with the decision of the trial court because the learned judge was wrong in concluding that the applicant was guilty of laches in failing to seek redress under the Environmental Management and Coordination Act.

In a replying affidavit sworn on its behalf on 25th April 2019, by its Director, *Sunit Shah*, the 1st respondent deposed that, it obtained all the necessary approvals required by law prior to ground breaking for development of the apartments and that the applicant's allegations that the approvals and authorities were not obtained were false; that the construction works were not carried out arbitrarily, negligently, un-procedurally as the designated authorities carried out regular monitoring of the development works as required by law, and at no time were the construction works halted for reasons of non-compliance.

It was averred that the 1st respondent could not have occasioned any structural damage to the applicant's house as it was not located on either side of the development, but only shared a connecting corner. It was further averred that the applicant's complaints were malicious, and vexatious as the owners of the properties immediately adjacent to the construction had not complained of the construction works.

The 1st respondent contended that, since the applicant's complaint emanated from an alleged infringement of his right to a clean healthy environment, he should have sought redress under the provisions of the Environment Management and Co-ordination Authority; that as a consequence, the learned judge could not be faulted for concluding that the threshold requirements for the injunction order sought were not being met. It was finally asserted that the applicant's injunction application was overtaken by events as the apartments are completed, and were in the process of being occupied, as a consequence of which, the orders sought would not be rendered nugatory.

On his part, Ashwin D. Madhapaira the 2nd respondent's director in a sworn affidavit of 3rd May 2019 supported the averments in the 1st respondent's affidavit save to add that, there is no appeal on the record and therefore this Court lacked jurisdiction to entertain this motion. The 2nd respondent reiterated that the development works were completed, and therefore this application was overtaken by events; that the applicant had not demonstrated any ownership or interest in the property in which he was alleged to reside, and nor has it been demonstrated that it was as a result of the development that he had moved out.

Stephen Mwilu, the 3rd Interested Party's Manager, Regional Offices also swore a replying affidavit on 21st June 2019, where he deposed that the 3rd Interested Party was established by law to oversee the construction industry and to coordinate its development; that it is also mandated to promote and ensure quality assurance to the construction industry; that an approval for the respondents' development works was issued on 4th August 2016 that is, Certificate of Compliance for Project Registration Number 531011560327; that thereafter the authority reviewed the Nairobi County Authority Approval dated 10th November 2015 for 48 units, and the 2nd Interested party's Environment Impact Assessment dated 23rd October 2015 and registered the project thereby approving the commencement of the construction works.

It was further deposed that following the applicant's complaint of 30th March 2017, of damage to his house, due to the development works, the 3rd Interested party undertook a visual site inspection of the applicant's property on 17th May 2017, and compiled a report dated 17th May 2017, which concluded that the development had affected the house as substantial cracks, floor tilt damage, seepage in the upper ceiling and interference with structural strength of the foundation of the house was observed; that the 3rd Interested Party's Investigation Officer issued a Suspension Notice Due to Non Compliance dated 8th June 2017 as it found to be non-compliant due to lack of safety signage; that in a further inspection on 8th June 2017, the respondents were directed to affix wire meshing and other safety mechanisms to block falling debris on the adjacent properties, including the applicant' house, which directives were complied with by the 1st respondent; that thereafter approval

was granted for the continuation of the construction works. With regard to the accident of falling stones, it was averred that following investigations, the 1st respondent put measures in place to prevent other occurrences.

It was averred that the 3rd Interested Party had discharged its mandate in the issuance of the Certificate of Compliance and quality assurance mandate; the allegation that the issuance of approvals and authorities were with the connivance with the 2nd and 3rd Interested Parties was denied, and the application herein was frivolous and malicious.

Learned counsel ***Mr. J. Singh*** appearing for the applicants submitted that the Court had jurisdiction to hear the motion in view of the Notice of Appeal filed on 26th July 2018. It was submitted that for any construction works to commence, it was mandatory for building plans to be submitted and approved by the 2nd Interested Party; that an initial approval for 24 apartments had been obtained, but though the Impact Assessment specified that the number of apartments to be constructed was 22, five months later, the number of apartments was increased to 48 and later to 51 apartments; that there were no approvals for the increase of the number of apartments from 24 to 48 and then to 51. It was the applicant's case that in the event the approvals were not provided, the development was illegal and should be demolished.

With regard to the complaint regarding damage to the applicant's house, counsel asserted that the learned judge found that the complaint ought to have been brought under the Planning Act, but the court failed to appreciate that the damage was a tort and under the principles set out in the case of ***Rylands vs Fletcher, (1861-73) ALL ER REP 1,*** and since the 3rd

Interested Party had confirmed that the applicant's property was damaged, the applicant was entitled to be compensated. On whether the motion was overtaken by events as the construction works were complete, counsel was of the view that the works were still ongoing.

Learned counsel, ***Mr. H. Shah*** for the 1st respondent opposed the application and stated that no Notice of Appeal had been filed, and nor was there any intention to appeal, as the proceedings had not been requested. Counsel cited the case of ***Mae Properties Limited vs Joseph Kibe & another, Nbi***

Civil Appeal (Application) No. 201 of 2016, for the proposition that a notice of appeal dies a natural death after the expiry of sixty (60) days unless extended by a record of appeal having been lodged within 60 days or such period as has been extended under the rules

It was contended that the court had considered all the issues before it, and was satisfied that the construction works were regularly supervised, the approvals obtained and the necessary rectifications undertaken, and that public participation had been carried out. That furthermore, the construction was now complete, and there was nothing left to contest. As a consequence, the motion was overtaken by events, and no orders that the court could grant stopping the construction works; that in the circumstances, the two criteria for obtaining an injunction had not been fulfilled.

Mr. Isindu, learned counsel for the 2nd respondent also opposed the motion and associated himself entirely with the contents of the 1st respondent's replying affidavit and submissions.

Mr. N. Maina, learned counsel for the 3rd Interested Party also associated himself with the respondents' submissions, and went on to assert that all the approvals had been obtained including those that were concerned with the increase of the number of apartments, and stated that the building was ready for occupation and therefore the application had been overtaken by events.

We have considered the pleadings and the submissions of the parties. In the case of ***Stanley Kang'ethe Kinyanjui vs Tony Keter & 5 Others***, ***Civil Application No. NAI. 31/2012***, this Court stated *inter alia:*

> **"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."**

It is therefore well established that, two principles guide the Court. First, an applicant is required to demonstrate that the appeal or intended appeal is arguable, or in other words, that it is not trifling or frivolous. Secondly, that unless he is granted a stay of execution or injunction as the case may be, the appeal or intended appeal, if successful, will be rendered nugatory.

We would also add that in dealing with applications under ***rule 5 (2) (b),*** the court exercises a jurisdiction which does not constitute an appeal to this Court from the trial judge's exercise of discretion. See ***Ruben & Others vs Nderitu & Another (1989) KLR 459***.

We will begin by considering whether we have jurisdiction to determine this application. This is dependent on whether the applicant has filed a Notice of Appeal. The record shows that a Notice of Appeal was lodged in the Environment and Land Court on 26th July 2018, and in this Court on 8th August 2018. Therefore, since a Notice was filed in accordance with the rules of this Court, we are satisfied that we have the requisite jurisdiction to hear and determine this motion, which we shall now proceed to address.

In considering whether the appeal is arguable, the applicant has together with the application filed a draft memorandum of appeal. Central to the intended appeal is the complaint that the learned judge concluded that the applicant ought to have sought redress under the provisions of the Environmental Management and Co-ordination Act, since one of the orders the applicant sought was concerned with the violation of its rights to a clean and healthy environment and the right to privacy. The applicant's further complaint is that the court ignored the principles of law set out in the case of ***Rylands vs Fletcher*** thereby leaving the applicant without redress for the damages he had sustained from the

construction works. Whether the applicant should have brought the injunction application under the Environment Management and Coordination Act, to the exclusion of the principles of law expounded in the case of ***Rylands vs Fletcher***, is a matter that we think, should be determined by this Court. We are of the view that the applicant does have an arguable complaint that it intends to raise before this Court, which we do not find to be frivolous.

With regard to the second limb, whether the appeal would be rendered nugatory if it were to succeed, in his motion, the applicant has sought an injunction to restrain the respondents from proceeding with construction of the apartments on the property, and though he has asserted that the construction works are still ongoing, the respondents' rejoinder is that the construction works were completed, and the apartments are in the process of being leased to tenants. This was made clear by the 2nd respondent's replying affidavit which stated; *"…the subject construction project/development has since been completed in accordance with the relevant law…"* and annexed to the replying affidavit were copies of photographs of the Building and Occupation Certificate dated 28th March 2019.

Without any evidence to support the contention that the construction works are ongoing, we are satisfied that the order stopping the works has indeed been overtaken. In which case, the second limb having failed, we have come to the conclusion that the application is not merited and is dismissed. We order that costs do abide the outcome of the intended appeal.

It is so ordered.

Dated and delivered at Nairobi this 25*th* day of October, 2019.

P. O. KIAGE

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR