IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, MUSINGA & GATEMBU, JJ.A)

CIVIL APPLICATION NO. 222 OF 2017 (UR 171/2017)

BETWEEN

1. MR. JOHN MURIITHI

2. BRIG. (RTD) BERNARD KILLU

3. MRS. ROSE MURIITHI

4. MRS. BRIDGET KILLU

5. CAPT. JOE GATHECHA

6. MRS. SOPHIA GATHECHA

7. MR. STEVE KABII

8. ENG. ALBERT MUGO

9. REV PHOEBE MUGO

10. HON. KIPRUTO ARAP KIRWA

11. DR. CHARLES CHUNGE

12. MRS. RUTH CHUNGE

13. DR. WARUGONGO KIONI

14. MRS. ALICE WARUGONGO

15. MR. MOSES KANENE

16. MR. SAMUEL ABANGA

17. MRS. MICHELLE ABANGA

18. MR. PETER MAINGI REGISTERED AS

OLESHUA COMMUNITY ORGANISATION.....APPLICANTS

AND

HON. GEORGE NYANJA.....RESPONDENT

(An application under Rules 5 (2) (b) and 42 of the Court of Appeal Rules for an injunction pending hearing and determination of an intended appeal from the Ruling and Order of the High Court of Kenya at Milimani, Nairobi (E. O. Obaga, J) dated 20th September, 2017

in

ELC Case No. 774 of 2015)

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RULING OF THE COURT

1. The matter before us seems to have raised more heat than light. It appears to be a village neighborhood quarrel that is capable of discussion and settlement by elders, some of whom are related, but it has defied that approach. That is not to say the parties had no right to go to court. The Constitution guarantees access to justice in our courts but also encourages alternative dispute resolution mechanisms.

2. What is before us is an application under ***Rule 5 (2) (b)*** of the Rules of this Court seeking the following order:-

> ***"3. THAT this Honourable Court be pleased to order that pending hearing and final determination of the intended Appeal the Defendant/Respondent by himself, servants and/or agents be restrained by temporary injunction from continuing with pulling down the perimeter fence, cutting down trees, uprooting tree stumps, levelling and creating an illegal road of access at the end of Ololua Close Karen in between the Plaintiff/Applicants' properties known as LR. No. 3994/9 and LR No. 3994/10.***

3. A short background to the application will bring the matter into focus.

The 18 applicants own and reside in properties abutting Ololua Close, off Ngong road in Karen, Nairobi. They have a self help group registered as Oleshua Community and share a common interest in preserving security, peace and general welfare in their neighborhood. Ololua Close which ends in a *cul de sac* is the access road to the applicants' properties.

4. To their horror and surprise, they woke up on 29th July, 2015 only to find a large group of workmen with assorted tools and power saws pulling down a perimeter wall, cutting down trees and digging up Ololua Close in order to create a road of access to the respondent's property. They tried to seek an explanation from the respondent and the matter was discussed in a meeting where parties on both sides attended. But no agreement was reached. The respondent was intent on proceeding with the works and the applicants were suspicious that he wanted to subdivide his land for sale or create a road for his lorry transport business which would compromise the applicants' security by exposing them to *'unidentified, uncontrolled and unknown vehicular and human traffic'*.

5. They proceeded to the High Court on 6th August, 2015 and filed a civil suit seeking, among others, an order for restoration of the demolished wall and a permanent injunction to restrain the respondent from:

> ***"..continuing with pulling down the perimeter fence, cutting down trees, uprooting tree stumbs, levelling and creating an illegal road of access at the end of Ololua Close Karen in between the Plaintiff/Applicants' properties known as LR No. 3994/9 and LR No.3994/10."***

Contemporaneously with the suit, the applicants filed a motion seeking the same orders on a temporary basis pending the hearing of the suit.

6. The respondent's property also abuts Ololua Close. But it also abuts another road, Mwitu road, which he used as the road of access to the property since he bought it in 1984. He says, however, that in 1991, he was sued in the High Court by the Mwitu road community who asserted that the road was private and they sought to stop him from using it to access his property. The court found that the road was indeed private and the respondent had no right of way. A permanent injunction was issued against him. Thereafter he was only allowed to access his property upon payment of a monthly fee which he had been doing for more than 30 years. According to the respondent, the cost to himself and his visitors was prohibitive and he saw no reason why he should continue paying for a private road when there was a public road of access to his property through Ololua Close. He had received confirmation from the Nairobi City County to that effect. That is why he found it necessary to create another gate to his property through Ololua Close. He denied that he needed the road for any purpose alleged by the applicants, other than for access to his residence.

7. The application for a temporary injunction fell before **Obaga, J.** for hearing and determination. In a considered ruling made on 20th September, 2017, the learned judge rejected it upon making a finding that the applicants had not made out a *prima facie* case with a probability of success. The court reasoned thus:-

> ***"The Respondent has provided evidence that Ololua Close starts at Ngong Road and ends at his property. This is as per letter from Nairobi City County. This being the case, the Respondent is free to access his property through the Ololua Close. The Respondent has allayed the Applicants' fears of insecurity by stating that he will erect a gate at the area where the road in contention touches his plot. The road will not be a throughfare. I therefore do not see what case the applicants have to warrant grant of injunction."***

The court further rejected the contention by the applicants that the respondent had an alternative road of access in view of the findings made by the High Court in the earlier suit with Mwitu road community.

8. Those are the findings the applicants seek to challenge on appeal and have filed a notice of appeal which confers jurisdiction on us to deal with the application. In order to succeed in the application, the applicants must satisfy the twin principles, firstly, that the intended appeal is not frivolous or is arguable; and secondly, that if the orders sought are not granted, the success of the intended appeal will be rendered nugatory. Those are the age-old principles which were ably summarized in the case of ***Stanley Kang'ethe Kinyanjui vs Tony Keter & 5 Others [2013] eKLR*** as follows:

> ***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 vs Nderitu & Another* ***(1989) KLR 459.***
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> ***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.***
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> ***iii) The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75.*** *Halai & Another vs Thornton & Turpin (1963) Ltd.* ***(1990) KLR 365.***
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> ***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 vs Atsango Chesoni,* ***Civil Application No. Nai 189 of 2001.***
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> ***v) An applicant must satisfy the court on both of the twin principles.***
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> ***vi) On whether the appeal is arguable, it is sufficient if a single*** **bona fide** ***arguable ground of appeal is raised.*** *Damji Pragji Mandavia vs Sara Lee Household & Body Care (K) Ltd***, *Civil Application No. Nai 345 of 2004.***
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> ***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 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.

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 vs 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 impecunity, the onus shifts to the latter to rebut by evidence the claim. *International Laboratory for Research on Animal Diseases vs Kinyua,* ***[1990] KLR 403.***

9. In an effort to satisfy us on those principles, learned counsel for the applicants, **Mr. Nyareru Bosire,** opened by conceding, as contended by the respondent, that the ground had shifted since the decision of the trial court was made and that the road of access had already been opened up by the respondent. The application had thus largely been overtaken by events. In those circumstances, Mr. Bosire abandoned the prayer reproduced above except that the road of access, though opened, was yet to be used. He urged us to issue a temporary order maintaining the *status quo,* in effect, restraining the respondent from using the road. Counsel made no reference to any intended grounds of appeal, either in the affidavit in support of the application or in a draft memorandum of appeal. The nearest he came was the complaint that the trial court did not consider part of the applicants' written submissions which drew its attention to an expert/consultant's report in which the expert had enquired into the history of the acquisition of the respective properties and established that Ololua Close was not available for use by the respondent as a road of access to his property. The expert had also expressed the view that an access road with a *cul de sac*, such as Ololua Close, had a limited meaning as a public road and is designed to enhance security and privacy for the beneficiaries. According to counsel, if the expert's report was considered, the result of the application would have been different.

10. On the nugatory aspect, counsel harped on the issue of security as a mortal danger to the lives and the property of the applicants which will be irreversibly compromised if the orders sought are not granted.

11. In response, learned counsel for the respondent, **Mr. Kabue Thumi**, referred us to the affidavit in reply to the motion which confirms that the application was not only overtaken by events, but also that the respondent was already using the road of access. He contended that Ololua Close was a public road which the respondent had a right to use for access to his property, asserting that his property was land locked and the applicants were aware of that fact since some of them had participated in the suit relating to the alternative road of access but had failed to disclose it to the trial court. In counsel's view, there was no arguable appeal, and nothing was shown to demonstrate that the success of the intended appeal would be rendered nugatory.

12. We have considered the application, the submissions of counsel and the principles cited above. As regards the first of the twin principles, it will be upon the appellate court to decide whether or not the trial court correctly applied itself to the guiding principles in the *locus classicus* case of ***Giella vs Cassman Brown & Co. Ltd (1973) EA 358*** when it considered the application for temporary injunction. It will also be a matter for the trial court ultimately to decide, on the basis of evidence tested in cross examination, whether the main suit was meritorious. For those reasons, any comments on the merits or otherwise of the intended appeal or the main suit would be prejudicial and the less we say about those matters the better. Suffice it to say that we are satisfied that the intended ground that there was an omission by the trial court to consider a crucial part of the submissions of the applicants is not an idle or frivolous one. Our concern

is the admitted fact by the applicants that the intended appeal has been overtaken by events and therefore the question of the utility of the intended appeal arises. As was emphasized by this Court in ***Cyrus Nyaga Kabute vs Housing Finance Co. of Kenya Ltd & Another [2009] eKLR,*** where a public auction which was intended to be stopped by an order of injunction had already taken place, it would be pointless to restrain a sale which had already taken place. The Court reiterated the fundamental principle that a court of law never acts in vain.

13. Even if the applicants had succeeded in establishing the first principle, it is our view that the second limb was not surmounted. That is because in the event of success of the intended appeal or the main suit, it will be possible to close the road of access and consider the prayer for damages. As for security which is the mainstay of the application, the affidavit evidence was not controverted that the road will be used by the respondent purely for access to his property where it terminates. It is not demonstrated or apparent that the respondent will be a security risk on his own.

14. For those reasons, we find no basis for granting the prayer sought in this application and we order that it be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 23rd day of February, 2018.

P. N. WAKI

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR