IN THE COURT OF APPEAL

AT NAIROBI

CORAM: MAKHANDIA, KIAGE & M'INOTI, JJ.A)

CIVIL APPLICATION NO. 294 OF 2017

IN THE MATTER OF THE APPLICATION UNDER RULE 5(2)(B) OF

THE COURT OF APPEAL RULES 2010

BETWEEN

P K A.....APPLICANT

AND

K P A.....RESPONDENT

(An application for injunction pending the hearing and determination of an appeal from the judgment and decree of the Environment and Land Court at Nairobi (Okongo, J.) dated 3rd November 2017

in

ELC Suit No. 157 of 2015)

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RULING OF THE COURT

The applicant **P K A** seeks against the respondent **K P A** an order of injunction restraining the respondent or her servants and/or agents from evicting, threatening to evict, harassing or in any way interfering with her quiet possession of a residential house on **L.R. NO. 3734/943** situate at Riverside Drive Nairobi (the suit property). The application is brought under **Rule 5(2)(b)** of the Court of Appeal Rules as an interim measure pending the hearing and determination of an intended appeal by the applicant against the judgment and decree of the Environment and Land Court (Okongo, J) delivered on 3rd November 2017.

The application is founded on grounds appearing on its face as follows;

> ***"1. That the applicant has an arguable appeal with high chances of success.***
>
> ***2. That if an injunction is not granted, the applicant will suffer irreparable loss and the intended appeal will be rendered nugatory for reasons set out in the supporting affidavit.***
>
> ***3. That the imminent eviction of the appellant from the suit property will render the appellant destitute as she has no alternative accommodation and has known the suit property as her only home for the past twenty two (22) years."***

It is supported by the applicant's affidavit sworn on 14th December 2017. She swears that she is a British Citizen who got married to one **M S A**, who is a son of the respondent, on 25th September 1993 in London. The couple came to Kenya and were housed by the respondent and her late husband Harbans Singh Amrit in the suit property. The suit property was registered in the joint names of those parents-in-law and it is not in dispute that it belongs to the respondent by survivorship, absolutely.

The applicant and her husband were blessed with a son named **A S A** born on 18th June 1995 but, about a decade later, the marriage ran into serious problems and irretrievably broke down in 2006 with the husband filing for custody of the child. The High Court granted him full custody with the applicant having only limited access. She successfully appealed to this Court vide *Civil Appeal No. 20 of 2010* and was

granted joint custody. The Court also ordered that;

> ***"The mother shall continue occupying the matrimonial home at Riverside Drive where the child will reside whenever he is with the mother."***

The applicant thus continued to reside in the suit property until January 2013 when she received a telephone call from her ex-husband instructing her to vacate or be evicted. The marriage had by then long been annulled upon the husband's petition on the basis that the applicant at the time of getting married to him had no capacity, as she was still married to someone else. That judgment nullifying the marriage was delivered on 3rd July 2009 by Onyancha, J. and the applicant's appeal against the nullification was dismissed by this Court.

By a letter dated 20th January 2015, the applicant's ex-husband through his advocates gave the applicant a 30-day notice to vacate the suit property. The reasons proffered were set out as follows;

> ***"Subject to the above order 4, you were to continue occupying the guest wing at LR [particulars withheld] Riverside Drive, where the child, A S A, was to reside whenever he was with you.***
>
> ***A S A is now over eighteen (18) years old and the above order has automatically lapsed. Further A S A now resides and studies in the United Kingdom, our client is desirous of handing over possession of the Guest House on LR. [particulars withheld] Riverside Drive to his father and mother in a proper state of repair."***

The applicant swears that she has been informed that the son is still a dependant and a student and that parental responsibility can be extended by virtue of **section 28** of the Children Act, 2001. She did not indicate whether any such application was ever made. It is indisputable that as at now the son is older than 21 years of age. The applicant swore that she has resided at the suit property virtually alone for over a decade, her husband having left on 23rd May 2007. She swore further that she at the time weighed her options but the respondent and her late husband with promises and entreaties prevailed upon her to stay despite job offers in Dubai. They also induced her to remain in Kenya with the promise that the suit property would be hers and that she would not be evicted despite the nullification of her marriage to their son. She "*spent considerate (sic) time, money and effort in improving the property*" only to learn upon being asked to vacate that the promises made to her were "*false and untrue*". This prompted her to file the suit leading to the impugned judgment in which she sought a declaration of entitlement to a beneficiary interest in the suit property as well as an injunction in terms similar to what she seeks before this Court. The suit was dismissed but the learned Judge, cognizant of her over two-decades occupation of the suit property, allowed her 90 days post-judgment, to voluntarily vacate.

The applicant states that her intended appeal "*raises serious arguable points with very high chances of success*" and mentions some six such grounds. She also states that being a British Citizen with no steady income and/or relatives in Kenya, she is unable to find alternative accommodation and would be rendered destitute and unable to see her son should she be evicted, hence the application for injunction.

The respondent swore a replying affidavit on 19th January 2018 by which she opposed the application. She swore that following her husband's death the suit property devolved upon her absolutely. She and her late husband had allowed their son **M S A** to reside in the suit property as a licensee with the applicant as his purported wife. The marriage was problematic resulting in several court cases, which the deponent listed. The applicant continued to stay in the suit property courtesy of court orders imposed or consented to between her and the respondent's son. She was at all time a guest of a licencee in the suit property and could not have acquired any proprietary interest in the same.

The respondent categorically denied that her husband or herself ever represented to the applicant, that the suit property did or ever would belong to the applicant with whom they never enjoyed a cordial relationship, anyway. She swore at paragraphs 14 and 15 as follows;

> ***"14. That it is odd and ridiculous that anyone should turn down job offer after job offer on the strength of a promise of a house from parties who have no contractual, moral or filial relationship with her.***
>
> **15. That the assertions made by the applicant, to the effect that we represented to her that the property belonged or would belong to her, are fallacious and are aimed at defrauding me of my property rights (sic) enshrined and decreed by *Article 40 of the Constitution of Kenya, 2010."***

The respondent reiterated that the applicant's continued stay in the suit property was on account of court orders and not any promises from respondent and her late husband. She swore further that the grandchild, ***A S A***, was now over 18 years old and residing in the United Kingdom with no extension of parental responsibility having been sought or granted. She dismissed the application as no more than an attempt by the applicant to defraud and extort her in abuse of the court process. She denied knowledge of any improvements on the suit property and asserted that she neither authorized nor endorsed any such improvements. She also swore that the applicant's appeal is unsustainable and unarguable. It is, moreover, contrary to public policy and the laws of Kenya. The suit property is in fact her matrimonial home where she lives with other members of her family so that she can neither demolish nor sell it as alleged by the application. She protested against the applicant's continued stay in the respondent's house and termed the application "a conspiracy to extort and blackmail" the respondent's family.

Those are the rival affidavits that **Mr. Gomba** and **Mr. Ochieng Oduol** learned counsel for the applicant and respondent, respectively, relied upon when they appeared before us. They had also filed lists and bundles of authorities.

Going first, **Mr. Gomba** sought to persuade us that the applicant's intended appeal is arguable because she was induced to remain in the country and in the suit property by representations and promises made by the respondent and her husband on the strength of which she incurred expenses on the property. He urged that the learned Judge misapplied the law on proprietory estoppel as enunciated in the English

case of ***THORNER vs. MAJOR & OTHERS*** **[2009] UKL 18, 1 WLR 776.**

On the nugatory aspect, it was counsel's submission that at the expiry of the 90 days given by the learned Judge, the respondent would evict the applicant and "*this would prejudice the applicant.*"

Opposing the application, **Mr. Oduol** charged that the intended appeal has nothing arguable in law and is instead frivolous and an abuse of process for the simple reason that the title to the suit property is in fee simple and by law a non-citizen cannot acquire an interest in fee simple. Moreover, under the Law of Contract Act, any disposition of an interest in land must be evidenced in writing and the applicant has not exhibited any such written disposition of the suit property to herself. He went on to assert that the proceedings that led to the residency order made under **section 114** of the Children Act in favour of the applicant were between her and her husband respecting their child and had nothing to do with the respondent. Further, that order did not decree that the respondent's property was matrimonial property between the applicant and her husband. At any rate, the owners, of the property being the respondent and her late husband, were never heard in those proceedings.

Mr. Oduol urged that the marriage between the applicant and the respondent's son having been declared null and illegal, the applicant could lay no claims against the respondent. As to the residency order, it lapsed by effluxion of time upon the child's attainment of maturity. He alone could apply for it to be extended but he never did. Counsel pressed that the application must fail for the reasons that;

> ***"(1) The marriage was held invalid***
>
> ***(2) The learned Judge found there was no promise of the property***
>
> ***(3) The applicant's continued occupation was as a licencee***
>
> ***(4) The respondent asked her to leave***
>
> ***(5) There was no proof of contribution to construction costs as alleged-only renovation costs.***
>
> ***(6) There is no legal right to be protected by injunction."***

Citing this Court's decision in ***NGURUMAN LIMITED vs. JAN BONDE NIELSEN & 2 OTHERS*** **[2014] eKLR**, counsel submitted that the applicant is absolutely without an arguable appeal and proceeded to urge that this Court need not in those circumstances consider the nugatory aspect. He urged us to be consistent by upholding the precedents set by this Court on the subject. He rested by submitting that the learned Judge granted the applicant a 90 day extension out of sympathy but she had been required to vacate for over five years.

Making a brief reply, Mr. Gomba stated that all the applicant seeks is "*a beneficial life interest*" in the suit property but not a freehold interest. He protested that as **section 3(3)** of the Law of Contract Act was not raised at the High Court, we should not consider it. He then made the bold submission that a statute should not be used as an engine of fraud, by which we understood him to mean that the respondent's raising of the legal objection amounted to defrauding the applicant and that "*he who seeks equity must do equity*." He conceded that no extension of the residency order had been made by the applicant's son or on his behalf.

We have given due consideration to the application, the affidavits for and against it, the submissions of counsel and the authorities cited before us. At this stage and in an application such as is before us, we are not called upon to make concluded findings on the merits of the appeal intended to be filed by the applicant. On a **5(2)(b)** application, as has been stated in cases too many to count, an applicant must satisfy the Court on both of two limbs, namely, that he has an arguable appeal, and that if the injunction or other relief sought is not granted, the said appeal would be rendered nugatory. An arguable appeal is not one that will or must necessarily succeed, but rather one that raises a *bona fide* point worthy of urging, which merits a response from the other side and ought therefore to be considered by the bench that will hear the appeal or intended appeal. One such arguable point is sufficient to trigger the Court's **rule 5(2)(b)** jurisdiction so that an applicant need not raise a multiplicity of points.

As to the nugatory aspect, the applicant must demonstrate that unless the order sought is granted she is likely to suffer such loss and prejudice that is grave, irreversible or irreparable as to make any success on the appeal merely academic or pyrrhic and illusory, the apprehended harm having in the meantime occurred and said harm being incapable of monetary compensation. The cases cited by the parties herein including ***NATIONAL BANK OF KENYA LTD & ANOR vs. GEOFFREY WAHOME MUOTIA*** **[2016] eKLR; *NGURUMAN vs. JAN BONDE NIELSEN & 2 OTHERS*** (supra) and ***RELIANCE BANK vs. NORLAKE INVESTMENTS LTD*** **[2002] 1 EA 227** speak to these principles. See also ***EQUITY BANK LTD vs. WEST LINK MBO LTD*** **[2013]eKLR** and ***STANLEY KANGETHE vs. TONY KETTER & 5 OTHERS*** **[201] eKLR.** The grant of relief of course lies in the discretion of the Court which will at all times consider each case on its own merits bearing in mind its factual peculiarities but cognizant of the need to do justice between the parties.

Is the applicant's intended appeal arguable? As we interrogate this issue we remind ourselves that we are not here dealing with the appeal itself. We are deliberately slow to make concluded findings at this stage lest we should embarrass the bench that will eventually hear the appeal though it is not bound to consider, less still is it bound by, whatever we may say. That is not the same as saying that we need to shy away from making a finding on arguability as it is our duty on authority to do so. It cannot be presumed that every intended appeal is arguable. An applicant bears a duty to satisfy the Court on the point or else it would render the first limb irrelevant. Looking at the application, the supporting affidavit and the submissions made by counsel, it would seem the applicant's intended appeal revolves around a challenge to the learned Judge's failure to be satisfied that the applicant had established a proprietory estoppel in the suit property.

Our understanding of this subject, which is consistent with the authorities cited by counsel for the applicant, is that the implicated principle is an equitable one that lies in the discretion of the learned trial judge. To succeed on appeal, one would have to demonstrate that the learned Judge exercised his discretion perversely and where such exercise flowed from his persuasion as to the credibility of the witnesses who

appeared before him, the task becomes even tougher.

There is no dispute that in the case before us the respondent is the registered owner of the suit property. The applicant came onto the suit property initially by virtue only of her being the supposed wife of the respondent's son. That son had neither title nor other interest in the suit property. It is wholly inconceivable that the applicant, his supposed wife, could have an independent and greater interest than his, and his was that of a licensee or invitee of the respondent and her late husband. On that score alone, the applicant could not, without more, have mounted any claim that could defeat the rights of the respondent. Her position, already weak, became much weaker when the initial basis of her being in occupation, namely marriage to the applicant's son, disappeared with the nullification of that marriage. The record is quite clear that her continued stay is attributable to court orders the main one being the residency order to enable her to be with her son whenever he was in the suit property. That basis also disappeared in law when that son turned 18 years old. There was no extension of parental responsibility beyond that age and it is clear from the record that he has now reached the age of 21 years.

Much as we are not deciding the intended appeal we really cannot shut our eyes to the legalities involved herein. We think that in the face of an unchallenged and indefeasible title to the property held by the respondent, it would be a grave and serious thing to order an injunction and thereby perpetuate an unwelcome and rent-free occupation of the suit property by the applicant. Equity must follow the law and the legal title herein belongs to the respondent and must be given effect to. The applicant has not satisfied us that she has an arguable appeal.

Having so found, we need not consider whether or not the intended appeal, such as there is, would be rendered nugatory if the injunction sought is not granted. On this point the applicant's only plea seems to be to this Court's sympathy based on the sentimental attachment to the property which she terms as her "matrimonial home" though, as is plain from the record, there never was any lawful matrimony between herself and the respondent's son. And even if there had been, the couple would at best have been licencees of the respondent amenable to be asked to vacate at will. Given that set of facts, we do not see how the appeal would be rendered nugatory were the applicant to be required to vacate the premises. She was gratuitously given 90 days by the learned Judge and she ought to have made arrangements to vacate. From the record the requirement for her to vacate was made known to her years back and has never been rescinded. We see from the passage in Halsbury's Laws of England 4th Edn. Vol. 16(2) para 1092, cited by the applicant's counsel, that in terms of reliefs for a successful litigant in a claim under proprietary estoppel, "*the court has a very wide discretion in satisfying [the] equity"* including "*by granting him what was promised or its monetary equivalent.*" The relief may also take the form of "*requiring repayment of the money laid out in reliance of the promisor's assurances,*" among others.

Given that state of the law, we are fortified in our assessment that even were the intended appeal arguable, and we are not satisfied that it is, it would not be rendered nugatory as monetary compensation would be an appropriate remedy.

In sum, therefore, we do not find this application to be meritorious and it fails. It is accordingly dismissed with costs.

Dated and delivered at Nairobi this 27th day of April, 2018.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR