IN THE COURT OF APPEAL

AT NAKURU

(CORAM: NAMBUYE, SICHALE & KANTAI, JJ.A.)

CIVIL APPLICATION NO. NYR. 25 OF 2018 (UR 20/2018)

IN THE MATTER OF AN INTENDED APPEAL

BETWEEN

JOSEPH WAINAINA KINYANJUI.....1ST APPLICANT

HERMAN KINYANJUI.....2ND APPLICANT

AND

KENYA NATIONAL HIGHWAYS AUTHORITY.....RESPONDENT

(An application for an order of injunction pending the hearing and determination of an intended appeal against the Ruling and Orders of the Environment and Land Court at Nyahururu (Oundo, J.) dated 31st January, 2018

in

E.L.C. Case No. 353 of 2017)

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RULING OF THE COURT

In a plaint filed at the Environment and Land Court of Kenya at Nyahururu being ***E.L.C. Case No. 353 of 2017***, the applicants herein, Joseph Wainaina Kinyanjui and Herman Kinyanjui, sued the respondent, Kenya National Highways Authority, where it was claimed amongst other things that the 1st applicant Joseph Wainaina Kinyanjui was registered as the absolute proprietor of a parcel of land known as ***Land Parcel No. Laikipia/Nyahururu/5970*** measuring 0.048 hectares or thereabouts situated at Losogwa Village, Nyahururu in Laikipia County. It was alleged that the 1st applicant purchased that land in 2002 and that the 2nd applicant Herman Kinyanjui took possession of that land and occupied it. Further that the 2nd applicant with the assistance of his son the 1st applicant had developed the land extensively by constructing a permanent stone building on the land and carried out various other developments on the land. Further, that on the 28th of January, 2016, the respondent had issued to the applicants a "Notice of Intended Demolition/Removal of Encroachment on Classified Road Reserves on ***Class A, B,*** and ***C Roads*** where the respondent claimed that the applicants had encroached on a road reserve. The applicant further stated in the plaint that on 3rd April, 2017 employees of the respondent had entered the land and had taken measurements on the same in preparation for enforcing the demolition notice. For all that a declaration was sought to declare that the 1st applicant is the absolute proprietor of the land and that the applicant had not encroached on any road reserve. It was prayed that the said demolition notice issued by the respondent be declared as illegal null and void and a permanent injunction be issued against the respondent to restrain the respondent from interfering with the applicant's quiet and peaceful possession and occupation of the land.

That suit has not been heard and we have set out some of the averments on the plaint purely for the purposes of laying out the background of the matter leading to this application.

Contemporaneously with the filing of the plaint was filed a motion where various prayers of injunction were sought. In the grounds in support of that motion the matters we have already referred to were set out as were in the supporting affidavits of the 1st applicant and that of the 2nd applicant sworn on the 7th April, 2017 where various annextures were attached.

The application was heard by M. C. Oundo, J., who in a ruling delivered on the 31st January, 2018 found firstly that because the title issued

to the applicants had not been revoked in accordance with the law, a *prima facie* case had been made out. The learned Judge found secondly that if the applicants' properties were demolished, the applicants would suffer damage but the learned judge found that such damage could be compensated for in damages. The learned Judge found finally on the balance of convenience that the public interest outweighed the applicant's private interest and therefore the applicants were not entitled to an injunction. The application for injunction was thus dismissed.

The applicants were dissatisfied with those findings and filed a Notice of Appeal. They have now come before us in a notice of motion brought under ***Rule 5 (2) (b)*** of our rules where we are asked to grant a temporary injunction to restrain the respondent from entering the said parcel of land or interfering with the applicant's quiet possession and occupation of the same pending the hearing and determination of the application and of an intended appeal.

In the grounds in support of the motion it is stated that a Notice of Appeal has been filed and there is imminent danger of the applicant's losing the land and the developments erected thereon. It is also stated that the substratum of the suit should be maintained; that the intended appeal is arguable and unless the orders of injunction sought are granted, the intended appeal will be rendered nugatory. Finally that it is in the interest of justice and fairness that the orders of injunction sought be granted pending the hearing and determination of the intended appeal. The applicants swore an affidavit on 8th April, 2018 where the matters we have discussed above are set out.

The respondent in a replying affidavit sworn by Engineer Isaiah Onsongo, its Deputy Director Road Asset Management, depones that the intended appeal is not arguable; that the learned judge of the High Court did not misdirect himself in arriving at his decision; that the appeal would not be rendered nugatory; that the applicants have not demonstrated that the respondent would be unable to compensate the applicants if the intended appeal succeeded and that the appellants have not shown that the judge acted in excess of her jurisdiction to lay basis for interference by this Court. It is further deponed that the title held by the applicants is illegal as they (the applicants) could not hold title to public land which was not available for alienation. At paragraphs 13-17 (inclusive) of the affidavit:

> ***"13. THAT on the issue whether the appeal would be rendered nugatory and in response to paragraphs 12, 13 and 14 of the affidavit in support of the motion, I wish to state as follows. That the Respondent is responsible for the management, development, rehabilitation and maintenance of national roads as classified under Part A of the first schedule of the Kenya Roads Act No. 2 of 2007.***
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> ***14. THAT further, in line with its mandate under section 4 of the Roads Act, the Respondent set out to expand the old Nakuru – Nyahururu road which forms part of the Nakuru – Nyahururu – Nyeri – Marua road (B12) formerly B5. The structures built by the Applicants have therefore impeded the construction of the said highway whose primary objective is to decongest traffic and thus provide easy access of the towns to the general public.***
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> ***15. THAT when the Respondent determined that it was ready to commence the construction of the said road, it issued a notice dated 28th January, 2016 requiring all persons who had structures encroaching on the road reserve to remove them or risk being forcibly demolished. (Annexed hereto and marked "IO 1" is a true copy of the notice).***
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> ***16. THAT the Respondent duly discharged their constitutional mandate within the purview of the Constitution and all attendant acts, the intention of the notice was to avail an opportunity to the Applicants to voluntarily and in the most economical manner remove the encroaching structures. Additionally, public notification by way of indelible markings to encroaching properties was issued way before implementation of the project. The Applicants therefore had sufficient time to remove the structures but chose to blatantly ignore and/or disregard the markings and notices.***
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> ***17. THAT I am aware that the Environment and Planning department conducted a survey and established that the structures put up by the Applicants had encroached on a road reserve given that; the said road has a reserve width of 120ft (36.8m) and is still listed in the public roads and road Access Act as a dedicated line of public travel. The demolition of the Applicants' structures is therefore necessary for the benefit of the wider public interest. (Annexed and Marked "IO 2" is a copy of the findings of the Environment and Planning Department together with the drawings and designs.)***

The motion came up for hearing before on us on 19th April, 2018 and was urged by learned counsel Mr. Kinyanjui Njogu for applicants but was opposed by Mr. Rotich Kipkorir, learned counsel for the respondent. Learned counsel for the applicants submitted that the applicants have an arguable appeal and that the applicants will suffer irreparable loss if demolition of the developments on the land took place. According to learned counsel, damages suffered could not be compensated in damages because developments were on private land. Learned counsel saw an arguable point on whether the applicant's structures were erected on public or private land.

On the nugatory aspect it was learned counsel's submission that there was imminent danger of demolition and that status quo should be maintained.

Mr. Kipkorir did not agree. According to him the learned Judge was right to dismiss the application for injunction because the applicants could be compensated in damages. According to him the learned Judge was right to find that private rights could not outweigh public rights in a situation where the respondent wanted to construct a public road. On the nugatory aspect Mr. Kipkorir submitted that the respondent is a public body that can pay compensation if ordered to do so. He completed his submissions by informing us that the respondent wanted to construct the Nyahururu – Nakuru Road to decongest the existing road. He urged us to dismiss the application.

We have considered the record, the affidavits and the submissions made. The principles upon which an application for stay of a judgment or order of the High Court by this Court pending appeal are well settled. For an applicant to succeed he must show that there is an arguable appeal. If the applicant passes that test he must in addition show that absent stay, the appeal, or intended appeal, as the case may be, would be rendered nugatory if the appeal succeeds. These principles were considered and well summarized in the case of ***Stanley Kangethe Kinyanjui v Tony Keter & 5 Others [2013] Eklr*** where it was stated that in dealing with **Rule 5(2) (b)** applications the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this Court. It was

further stated that the discretion of this Court under the said rule to grant a stay or injunction is wide and unfettered, provided that it is just to do so. Further, that the court becomes seized of the matter only after a notice of appeal has been filed under **Rule 75** of the **Rules**. 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 as was held in ***David Morton Silverstein v Atsango Chesoni* Civil Application No. Nai 189 of 2001**. ***Damji Pragji Mandaria v Sara Lee Household & Body Care (K) Limited* Civil Application No. Nai 345 of 2004** that, on whether an appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised. In ***Joseph Gitahi Gacheu & Another v Pioneer Holdings (A) Limited & 2 Others* Civil Application No. 124 Of 2008** it was held that an arguable appeal is not one which must succeed, but one which ought to be argued fully before the court – one which is not frivolous. It was recognized in the said ***Damji Pragji*** **(supra)** case that in considering an application under **Rule 5(2) (b)** of our **Rules** 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.

In the case of ***Mrao Limited vs First American Bank of Kenya Limited & 2 Others [2003] eKLR***, the principles governing grants of an injunction by the High Court were fully discussed by this Court. It was held that the power of the court in an application for interlocutory injunction is discretionary. Further, that this Court may only interfere with the exercise of the High Court judicial discretion if satisfied that:

a. the judge misdirected himself on law; or

b. that he misapprehended the facts; or

c. that he took account of considerations of which he should not have taken account; or

d. that he failed to take account of consideration of which he should have taken account; or

e. that his decision, albeit a discretionary one, was plainly wrong.

It was further held that the principles of granting an interlocutory injunction are that:

a. the applicant must show a prima facie case with a probability of success;

b. an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages.

c. if the court is in doubt, it will decide an application on the balance of convenience.

Further, a "*prima facie case"* in a civil application includes but is not confined to a "***genuine and arguable case***". It is a case which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposing party as to call for an explanation or rebuttal from the latter.

These are the principles that must guide the Court where an injunction is sought in considering whether or not to grant an order of injunction.

In the ruling sought to be appealed against the learned Judge recognized the same principles which were also set in the famous case of ***Giella –vs- Cassman Brown & Company Limited (1973) EA 358***, and having done so, the learned Judge found that the applicants held a valid title to the land which although claimed by the respondent as a road reserve had not been revoked or annulled. The learned Judge found that the applicants were entitled to observance of due process to have their title cancelled, revoked or annulled if there was an intention to do so by the respondent or other governmental agency. The learned Judge therefore found that the applicants had established a *prima facie* case.

The learned Judge went further to examine the other limbs that an applicant must satisfy as set out in the ***Mrao case*** (supra) and found that the applicants could be compensated in damages. The learned Judge's view was influenced by the fact that the public interest which was construction of a public road outweighed the private interests of the applicants to occupy the land.

We have perused the draft Memorandum of Appeal which is annexed to the application. We note the grounds set out which include a challenge on whether the applicants stand to suffer irreparable damage or loss and whether the applicants will be greatly inconvenienced if their property is demolished. We have also noted that the applicants intend to argue that the learned Judge erred in fact and in law by introducing and alluding to stalling of road construction and hindering of the completion of the construction of the road where, according to the applicants, there was no material evidence to support such findings. There is no doubt that those are arguable points.

What about the nugatory aspect of the application which an applicant must satisfy in order to be entitled to our use of exercise of discretion in an applicant's favour?

It is the applicants' case that they own the land on which they have erected various structures and undertaken other developments. The respondent contends however that the applicants have encroached on public land and that the encroachment interferes with a road reserve which is hindering the respondent from building and expanding the Nyahururu – Nakuru Road.

Considering the two contradictory positions taken by the adverse parties in that motion before us, the balance of convenience favours a holding in favour of the respondent. The respondent is a public body and has the mandate to build and protect public roads and highways and should not be hindered through injunction from carrying out public duties through injunctions granted to private citizens. Although the applicants hold a title to the land the respondent was able to show before the High Court that there was encroachment on to a road reserve by the applicants and such encroachment was hindering expansion of the Nyahururu-Nakuru road, to the detriment of the public. We are

satisfied, like the learned judge, that the applicants would adequately be compensated in damages should the intended appeal succeed. The applicants have therefore failed to satisfy the 2nd limb of the principles on which we grant relief in an application for stay of execution of a judgment or order of the High Court. The applicants can be compensated in damages if the intended appeal succeeds. In the event the application has no merit, and it is dismissed with costs to the respondent.

Dated and delivered at Nakuru this 23rd day of May, 2018.

R. N. NAMBUYE

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR