



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), WAKI & MAKHANDIA JJ.A) CIVIL APPLICATION NO. NAI 55 OF 2018 BETWEEN

ATTAIN ADVISORY CONSULTANTS..... APPLICANT

AND

NAIROBI CITY COUNTY 1ST RESPONDENT

MUMTAZ HAWA d/o ABDUL MOHIDIN HAWA.....2ND RESPONDENT

AMINA HAWA d/o ABDUL MOHIDIN HAWA.....3RD RESPONDENT

MOHIDIN s/o ABDUL MOHIDIN HAWA.....4TH RESPONDENT

(An Application for stay of the Ruling and Order of the High Court of Kenya at Nairobi (Obaga, J.) dated the 22nd day of February 2018, adopting the consent dated 20th December 2017 as an order of the Court

in

ELC Misc. No.144 of 2014)

RULING OF THE COURT

On 28th August, 2013 the Acting Principal Magistrate of the City Court ordered that **LR No. 209/403/3**, situate at Adams Arcade in Nairobi and owned by the 2nd, 3rd, and 4th respondents be offered for sale in a public auction by the 1st respondent for the formers' failure to settle arrears of land rates due to the latter.

Subsequently and pursuant to those orders, the property was sold and an order vesting it to the applicant as purchaser at the auction was made by the High Court.

On 22nd February, 2018, a consent dated 20th December, 2017 made between the respondents themselves was presented to the High Court to be adopted. The effect of the consent was to vacate the orders of the Acting Principal Magistrate and the vesting orders of the High Court, divesting the ownership of **LR No. 209/403/3** from the applicant, and instead vest it in the 2nd, 3rd and 4th respondents. For its full tenor and extent the said consent order is reproduced herein below as follows:

“By consent the Plaintiff/Respondent and the 2nd, 3rd and 4th

Defendants/ Applicants hereby agree that:

1. The proceedings before Nairobi 1st Class Magistrates Court Case No. 7 of 2013 between County Council of Nairobi and Habiba Abdul Herman Hawa and subsequent instructions to P.G Waweru T/A Ideal Auctioneers to sell L.R No. 209/403/3 situate in the City of Nairobi (Ngong Road) by public auction was irregular and are hereby withdrawn by the Plaintiff and all consequential processes arising therefrom set aside.

2. Ownership and title to L.R. No. 209/403/3 situated in the city of Nairobi (Ngong Road) should and hereby reverts back to Habiba Abdul Herman, daughter of Abdulrehman Mohidin Hawa and Mohidin son of Abdulrehman Mohidin Hawa as the lawful registered proprietors of the property as tenants in common in equal shares.

3. Any monies paid by Attain Advisory Consultants Limited in Purchase of L.R. No. 209/403/3 situated in the city of Nairobi (Ngong Road) following the public auction conducted by P.G. Waweru T/A Ideal Auctioneers will be refunded back to Attain Advisory Consultants Limited upon satisfactory proof of payment to the Plaintiff.

4. The 2nd, 3rd and 4th Defendants/Applicants Amended Notice of Motion Application dated 19th October, 2017 is hereby marked as settled between the Plaintiff/Respondent and the 2nd, 3rd and 4th Defendants/ Applicants with no orders to costs.”

We have observed already that the applicant was not involved in the negotiations leading to the framing of the consent even though it was the purchaser of the property. In adopting the consent, the court (Obaga, J.) found that the auction and proceedings in the lower court which resulted in the decree were irregular and were for setting aside; that the consent was meant to resolve a process which was irregular *ab initio*; that there would be no basis for the applicant to oppose the adoption of the consent; that the proceedings in the lower court were filed against a person who was deceased hence any judgment flowing from it was null and void; and that the applicant moved the court *ex parte* to amend the decree to include the 2nd, 3rd and 4th respondents who were not given an opportunity to be heard before the lower court.

With the adoption of the order and due to its obvious effects on the applicant, the applicant was aggrieved and has evinced an intention to challenge it on appeal to this Court by the lodgement of Civil Appeal No. 94 of 2018. In the meantime, it has taken out a motion for an order of “*stay of the ruling and orders ...adopting the consent*”; and an order of injunction against the respondents to restrain them “*from selling, transferring, alienating, charging, sub-dividing or doing anything that would change the character*” of the property pending the hearing and determination of the appeal.

Mr. Wagara learned counsel representing the applicant seeking to persuade us that the appeal is arguable, submitted that the applicant was not a party to the consent and did not execute it and therefore, the learned Judge acted in error by adopting it. He also submitted that, if the orders sought herein are not granted, the appeal will be rendered nugatory; that the applicant was apprehensive that should the consent order be executed in favour of the respondents, the character of the property would be changed to the detriment of the applicant; that with the adoption of the consent as an order of the court, the way has been paved for the respondents to proceed with registration as the owners of the property; that during the pendency of this application, the respondents have applied to the Registrar to cancel the applicant’s title; and that no prejudice will be suffered by the respondents who are in possession of the property if the orders of stay are granted.

Both Mr. Litoro for the 1st respondent and Mr. Ochieng for the 2nd, 3rd and 4th respondent, for their part maintained that the appeal was frivolous and that it would not be rendered nugatory should we reject the motion. According to them, the consent order took into consideration all the parties’ interests and was intended to restore all the parties to the position they were in before the irregular proceedings before the Acting Principal Magistrate; that the application for stay is premature because the transfer lodged by the applicant on 31st July, 2014 against its title to the property still stands until the High Court directs the Chief Lands Registrar to cancel that transfer; that judgment in the matter would be due on 10th May, 2018 (now past); that the appeal is not arguable in view of the finding by the learned Judge that the proceedings in the lower court were null and void, left only for the setting aside *ex debito iustitiae*. On the nugatory aspect, counsel submitted that the applicant has not been divested of the property as the 1st respondent has offered, in the impugned consent to refund the purchase price; that the applicant has never stayed, utilized and or improved the property to undermine the substratum of the appeal as any loss to the applicant is purely pecuniary, quantifiable and can be compensated in damages. But if the orders sought were to be granted, counsel submitted that the 2nd to 4th respondents will be deprived of their only home in contravention of **Article 43** of the Constitution.

Under **Rule 5(2) (b)** of the Court of Appeal Rules, the Court can grant an order of stay of execution, a stay of further proceedings or an injunction. The decision of the Environment and Land Court being challenged here did not make orders capable of being stayed after dismissing the applicant’s objection to adoption of the consent as an order of the court. That may explain why the applicant has also prayed for an order of injunction.

The jurisdiction of this Court, whether or not to grant an order of stay or injunction under the aforesaid rule, is guided by the very well-known twin principles; arguability and the nugatory aspects the appeal, succinctly summarized in **Stanley Kangethe Kinyanjui V. Tony Ketter & 5 Others** [2013] eKLR.

An application for stay must satisfy the court on both of the twin principles. Because an application under **Rule 5(2)(b)** is not an appeal, the Court considering it must not make definitive or final findings of either fact or law at that stage as to do so may embarrass the ultimate hearing of the main appeal.

The applicant has exhibited a draft memorandum of appeal in which it has enumerated eight grounds upon which the appeal is premised. Those grounds can broadly be condensed into one; that it was in error for the learned Judge to adopt a consent whose effect would affect the applicant’s proprietary rights over the property in question without its involvement. It is settled that even a single *bona fide* arguable ground of appeal is sufficient. An arguable appeal is not one which must necessarily succeed, but one which is not frivolous and ought to be argued fully before the Court. That single issue that we have identified above is, in our considered opinion, an arguable point.

Whether or not an appeal will be rendered nugatory is a matter that will depend on the facts and peculiar circumstances of each case. It will depend 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.

The purpose of granting a stay or an injunction is to preserve the subject matter of the dispute pending the determination of the appeal. The applicant is apprehensive that should the respondents proceed to execute the terms of the consent, the ownership and character of the property will change; that with the adoption of the consent as an order of the court, the respondents are effectively declared the owners of the property and may at any time proceed with the transfer and registration. We are again persuaded that these are not idle speculations but real apprehension that the appeal will become otiose if the respondents are registered in place of the applicant and the purchase price refunded to the applicant before the appeal herein is heard and determined.

The applicant has satisfied the two limbs and is entitled to an order of injunction. Pending the hearing and determination of the appeal, the respondents are restrained in terms of **prayer 3** of the notice of motion dated 2nd March, 2018. Costs of this application shall be in the appeal.

Dated and delivered at Nairobi this 8th day of June, 2018.

W. OUKO, (P)

.....

JUDGE OF APPEAL

P.N. WAKI

.....

JUDGE OF APPEAL

ASIKE – MAKHANDIA

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR