



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), MAKHANDIA, & GATEMBU, J.J.A)

CIVIL APPLICATION NO. 95 OF 2018

BETWEEN

CENTER STAR LIMITED.....1ST APPLICANT

HUSEIN HASSAN BOOD.....2ND APPLICANT

AND

HALIMA MAHMOOD ALI (*Suing in her capacity as*

legal representative of the estate of

HAWA HASSAN MOHAMUD).....1ST RESPONDENT

AMAL PLAZA LIMITED.....2ND RESPONDENT

NUH ABDILLE HASSAN.....3RD RESPONDENT

(Being an application for stay of execution and stay of further proceedings pending

hearing and determination of the appeal against the order of the Environment

and Land Court at Nairobi (Bor, J.) issued on 6th September, 2016

in

ELC No. 775 of 2017)

RULING OF THE COURT

Halima Mahmood Ali, “the 1st respondent”, instituted before the Land & Environmental Court at Nairobi, **ELC Case No. 775 of 2017**. The suit was against a sole defendant, **Amal Plaza Limited**, “the 2nd respondent”, and was in regard to a property known as **Plot No. 36/460/VII EASTLEIGH** “*the suit property*”. In the suit, the 1st respondent prayed for an injunction directed at the 2nd respondent restraining it from blocking the access road to the suit property and a mandatory injunction directed at the 2nd respondent to restore the access road situate on the suit property to the condition it was prior to 20th December, 2007. She also prayed for damages and costs of the suit. Contemporaneously with the filing of the suit, the 1st respondent took out an application seeking conservatory orders to the effect that the 2nd respondent be restrained by injunction from blocking its tenants in the suit property, access to their shops and businesses which the ELC court granted *ex parte*. However, the 2nd respondent disobeyed the said orders prompting the 2nd respondent to file contempt proceedings against it that are still pending determination. Whilst that suit was pending, the 3rd respondent approached the Chief Magistrates’ Court, Nairobi and filed **CMCC No. 800 of 2018; Nuh Abdille Hassan v Halima Mahmood Ali** wherein he obtained eviction orders against the 1st respondent on the basis that her continued occupation of the suit property was unlawful and illegal. It is on that premise that the 1st respondent approached the High Court vide the application dated 5th March 2018, from which the present appeal emanates.

Expressed to have been brought under Order 8 rules 3 (1), 5, 7, 8 and Order 40 rules 1 & 2 of the Civil Procedure Rules, sections 3, 3A, 13, 18 and 63 (e) of the Civil procedure Act, *inter alia*, the application sought to temporarily restrain the 2nd respondent and “the intended defendants” from in any manner dealing with the suit property; leave to amend the plaint and further for an order calling for the record of proceedings in CMCC No. 800 of 2018 for review and or setting aside. More relevant to this application, the 1st respondent also sought leave to enjoin the 1st and 2nd applicants as well as the 3rd respondent to the suit. In his determination, the learned judge of the High Court granted, *ex parte*, the following orders;

“1. THAT pending the hearing and determination of this application inter parties, Milimani commercial Courts Chief magistrates Court Case No. 800 of 2018, Abdille Hassan Vs Halima Mahmood Ali is stayed.

2. THAT pending the hearing and determination of this application inter parties, the defendant herein, Amal Plaza Limited, the proposed Defendants, Center Star Limited Nuh Abdille Hassan and Hussein Hassan Bood by themselves, their agents servants or otherwise whatsoever are restrained from selling the good will of the, (sic) leasing, letting, licensing or in any other manner whatsoever alienating the plaintiff’s shops erected on L. R no. 36/460/VII situated in Eastleigh area in Nairobi.

3. THAT pending the hearing and determination of this application, a mandatory injunction is issued compelling the defendant Amal Plaza limited, and the proposed Defendants, Center Star Limited, Nuh Abdille Hassan and Hussein Bood jointly and severally, their servants, agents or howsoever to vacate the shops that were occupied by the by the Plaintiff on L. R No. 36/460/VII prior to her to her forceful eviction on 23rd February, 2018.

4. THAT pending the hearing and determination of this application inter parties, the Defendants, Amal Plaza Limited, the proposed Defendants Center Star Limited, Nuh Abdille Hassan and Hussein Bood jointly and severally, their agents, servants or otherwise howsoever are restrained from interfering with the Plaintiff and the Plaintiff’s tenants occupation and possession of the shops erected on L. R No. 36/460/VII situated in Eastleigh area in Nairobi.

5. THAT the application should be served for mention before Hon. Lady Justice Bor on 14th March 2018 for directions and further orders.”

It is the above orders that were extended by **Lady Justice Bor** on 14th March 2014 and which the applicants seek to stay pending determination of the intended appeal. Noteworthy and is discernable from the paraphrased orders, no leave was granted to the 1st respondent to enjoin the applicants in the suit. Before this Court, the applicants also sought to stay further proceedings in ELC Case No. 775 of 2017.

In their application, supported by the affidavits sworn by **Yusuf Ibrahim Ismail**, on behalf of the applicants, they raise many contentions. For instance, it is contended that they were never served with the application and the orders issued on 7th March 2018 within three days of them being issued, and hence the orders automatically lapsed; that they were not parties to the suit and the orders cannot be enforced against them; that the orders had automatically lapsed on 11th March 2018 and the extension of the said orders by the learned Judge was irregular, unlawful and in breach of order **40** of the Civil Procedure Rules. Of relevance, they aver that the intended appeal is not frivolous and have to that end exhibited a draft Memorandum of Appeal. Learned counsel for the applicants, **Mr Nyangau** submitted during the oral hearing that the 1st applicant was a mere contractor who had moved from the suit property upon being paid for its services. Further, he submitted that there was an application for contempt of court against the applicants pending ruling and unless the stay orders were issued, then the applicants may be found to be in contempt of court and thrown into civil jail. In which event, counsel argued the applicants may have to serve the jail term before the filing, hearing and determination of the intended appeal thereby rendering it nugatory.

The application was opposed by a lengthy affidavit sworn by the 1st respondent. The respondent restates the background facts informing the dispute which are really the preserve of the substantial appeal. However, she contends that the applicants ought to have sought leave to appeal to this Court and denies that the applicants have demonstrated that they have an arguable appeal. She denies further that the intended appeal would be rendered nugatory in the event the stay orders sought are not granted. Learned counsel **Mr. Wandabwa** for the 1st respondent submitted that the orders were issued to last until the hearing of the application *inter partes* and the extension thereof by the Judge was unnecessary. According to counsel, mandatory injunctions do not stem from order 40 of the Rules. Counsel further submitted that section **19** of the ELC Act gives the ELC court powers to act expeditiously, without undue regard to technicalities of procedure. According to counsel, the application was frivolous. He pointed out that the applicant’s pleadings were silent on the nugatory aspect and further that the applicants had not demonstrated that aspect.

For the record, **Mr. Anzala** and **Mrs. Wambugu**, the 2nd and 3rd respondents’ learned counsel respectively, supported the application. Counsel for the applicants in rebuttal submitted that for all intents and purposes, the application was made under Order 40 and therefore there was an automatic right of appeal.

The application before this Court is made pursuant to rule **5 (2) (b)** of this Court’s rules. The Court’s jurisdiction under the said provision is guided by two considerations which must be satisfied by the applicant before grant of the orders sought. The applicant must satisfy the Court that the intended appeal is not frivolous and that unless the Court grants the orders sought, the appeal will be rendered nugatory, be of no consequence or merely academic. See **Patrick Mweu Musimba v Richard N. Kalembe Ndile & 3 Others [2013] eKLR**.

In bid to satisfy the first principle, the applicants have exhibited a draft memorandum of appeal with a raft of grounds of appeal. The applicants intend to fault the learned Judge’s extension of the orders granted on 7th March 2018 on the ground that she erred in extending *ex parte* an order of injunction that had automatically lapsed due to failure to serve the same upon the applicants within 3 days as stipulated under Order 40, rule 4 (3) of the Civil Procedure Rules. The applicants further intend to fault the Judge for purporting to extend an order against a non-party when under Order 40, such an order can only be issued against a party to the suit. Further, the applicants will be challenging the High Court’s decision to make them parties to the suit before the application seeking to enjoin them was canvassed and determined. We do not think that those grounds can be said to be frivolous. They are certainly arguable grounds of appeal.

Moving on to the second limb; will the intended appeal be rendered nugatory in the event that this Court does not grant the stay orders? We agree with the 1st respondent's submission that the application was silent on the nugatory aspect. Indeed the applicants failed to totally address this aspect in their application. During the hearing however, counsel for the applicants did submit that an application for contempt of court was pending ruling as against the applicants and that unless the orders sought were granted, the applicants might serve jail time by the time the intended appeal was filed, heard and determined. The fact that there are contempt proceedings pending against the applicants has not been denied by the 1st respondent. The contempt proceedings the applicants face are the ones set to be impugned in the intended appeal. Indeed, there is a real possibility that by the time the appeal against the said orders is heard and determined, the applicants might have served jail time while there are still questions lingering whether they had been made parties to the suit procedurally or the legality of the orders, *inter alia*, thus rendering the appeal nugatory. Counsel for the applicants stated that the contempt proceedings against the applicants were pending ruling or determination which had not been denied or disputed by the respondent. As observed in **Reliance Bank Ltd v Norlake Investments Ltd (2002) 1 EA 227**;

“To refuse to grant an order of stay to the applicant would cause to it such hardships as would be out of proportion to any suffering the respondent might undergo while waiting for the applicants appeal to be heard and determined.”

In the result, we allow the application and order that there be stay of execution of the order of the Environment and Labour Court dated 14th March, 2018 pending the hearing and determination of the intended appeal. Similarly, the proceedings in **Nairobi ELC Case Number 775 of 2017** are stayed pending the hearing and determination of the intended appeal. We direct further, that the applicants do file and serve memorandum of appeal and the record of appeal within the next 45 days from the date of delivery of this ruling failing which the orders herein will stand discharged. Costs of the application shall abide the outcome of the intended appeal.

Dated and delivered at Nairobi this 20th day of July, 2018.

W. OUKO, (P)

.....

JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb.

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR