IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, JJA.

CIVIL APPLICATION NO. 21 OF 2018 (UR 17/2018)

BETWEEN

HADIYA CONSTRUCTION & MINERAL LIMITED.....APPLICANT

AND

AJABU EAST AFRICA LIMITED.....RESPONDENT

(Application for an order of injunction pending the hearing and determination of an intended appeal from the decision of the Environment & Land Court at Kakamega, ***(Matheka, J.)*** *dated the 7th March, 2018*

in

KAKAMEGA ENVIRONMENT & LAND CASE NO. 196 OF 2016)

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RULING OF THE COURT

[1] By a suit initiated through a plaint filed in the Environment & Land Court, Hadiya Construction & Minerals Limited (applicant) sued Ajabu East Africa Limited (respondent). The suit was for a permanent injunction restraining the respondent from accessing and or interfering with several identified pieces of land belonging to members of the Municipal Housing Co-operative Society Limited (Society). The applicant had entered into an agreement with the society for a leasehold interest in the identified properties. By a notice of motion filed contemporaneously with the plaint, the applicant sought an order of interlocutory injunction restraining the respondent from accessing and or interfering with the identified properties pending the hearing of the suit. That application was heard by the court (Matheka J) and in a ruling delivered on 7th March, 2018, the learned judge held that the applicant had failed to establish a *prima facie* case with a probability of success, and had failed to show that they will suffer irreparable injury that cannot be compensated by award of damages. The learned judge therefore dismissed the applicant's motion with costs.

[2] Being aggrieved, the applicant has filed a notice of appeal and a draft memorandum of appeal in the Environment & Land Court. The applicant has also moved this Court by way of a notice of motion dated 14th March, 2018, under **Rule 5(2)(b)** of the **Court of Appeal Rules** for a temporary injunction restraining the respondent, in similar terms as sought in the High Court, but pending the hearing and determination of the appeal that the applicant intends to file against the judgment of the Environment & Land Court.

[3] The application is supported by an affidavit sworn by Mohammed Hassan Maalim, a Director of the applicant who depones that the applicant has an agreement with the society whose members own the identified parcels of land; that the respondent has moved into the suit land with every machinery and has commenced excavation of the mineral soils; and that unless the respondent is restrained it will cart away all the valuable mineral soils thereby rendering the applicant's intended appeal nugatory. The applicant maintains that the learned judge erred in dismissing their application as the applicant had demonstrated their interest in the suit land but the learned judge instead considered extraneous issues thereby arriving at a wrong decision.

[4] The applicant has filed written submissions in which it maintains that it has satisfied the two principles for granting orders under Rule 5(2)(b). In regard to the arguability of the appeal, the applicant relies on the case of ***Ahmed Musa Ismail vs Kumba Ole Ntamorua & 4 others [2014] eKLR,*** contending that the decision of the learned judge was wrong, as the judge applied the principles of grant of injunction wrongly. On the nugatory aspect, the applicant cited ***Kenya Airports Authortity vs Mitu-Bell Welfare Society & another*** C.A. No. 114 of 2013 for the proposition that whether the appeal was nugatory dependent on the peculiar circumstances of each case.

[5] The Court was urged to grant the injunctive relief as the subject matter of the dispute is mineral ore which is located inside the identified properties. The applicant pleaded that it had leased the suit property to excavate the mineral ore and if the respondent excavates the same, the subject of the litigation will be compromised.

[6] The respondent objects to the application through a replying affidavit sworn by Boniface Mutisya (Mutisya), a Director of the respondent company. Mutisya depones that the applicant has not established a *prima facie* case; that the lease agreement that the applicant relies upon was entered into with a non-existent entity that is not registered; that neither the applicant nor the society have any *locus standi* over the identified parcels of land; that the applicant has never been in occupation of the identified parcels of land; that the respondent has the permission of the County Government of Kakamega in whom all rights on natural mineral vests, to survey and investigate the contents of soil from the identified land parcels; and that in any case, loss or injuries suffered by the applicant can be adequately compensated by an award of damages.

[7] Learned counsel, **Mr. Atulo,** who appeared for the respondents submitted that the applicant's motion was incompetent and mischievous. He pointed out that the purported lease agreement between the applicant's and the Society was not admissible in evidence, as the lease is neither registered nor was stamp duty paid; that in any case, the purported lease has expired and there is no evidence of renewal.

[8] We have considered the application before us, we note that there is attached to the notice of motion, a notice of appeal that was lodged in the Environment & Land Court on 8th March, 2018. This notice is sufficient to anchor the applicant's notice of motion that invokes this Court's powers under Rule 5(2)(b) of the Court Rules.

[9] As was stated by this Court in ***Nelson Andai Havi vs Law Society of Kenya & 3 others [2018] eKLR***, the applicant is before us:

> ***"… Under Rule 5(2)(b) of the Court of Appeal Rules, seeking an injunction whose effect is to stop pending the hearing and determination of his intended appeal …***
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> ***It is trite that at this stage our remit does not extend to determining the merits or otherwise of the applicant's intended appeal (see Njuguna S. Ndungu vs EACC & 3 others [2015] eKLR), it is restricted to determining on the basis of the material on record, first, whether his intended appeal is arguable, and second, whether, absent an order of injunction, that appeal will be rendered nugatory if it succeeds. (See Jaribu Holding Limited vs Kenya Commercial Bank Limited [2008] eKLR."***

[10] In determining whether this appeal is arguable, we revert to the draft memorandum of appeal that was annexed to the notice of motion by the applicant. In essence, the applicant's main contention is that the learned judge erred in arriving at his findings based on no evidence or misapprehension of evidence. We are alive to the fact that at this stage we are not dealing with the appeal. However, the arguability of an appeal can only be determined by the seriousness of the issues raised or intended to be raised. If the issues intended to be raised are frivolous, it cannot be said that the appeal is arguable. The appeal must raise *bonafide* issues.

[11] We reiterate what was stated by this Court in ***Stanley Kang'ethe vs Tony Keter & 5 others [2013] eKLR,*** that:

> ***"(vi) On whether the appeal is arguable it is sufficient if a single bonafide ground of appeal is raised. (Damji Pragji Mandavia vs Sarah Lee Household & Body Care (K) Limited C.A. 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 Gachiu & Another vs Pioneer Holdings (A) Limited & 2 others C.A. No. 124 of 2008)."***

[12] Thus, where the issues intended to be raised on appeal have no basis or foundation, they cannot be said to be arguable. The applicant before us is seeking an interlocutory injunction. It is therefore important that he satisfies the Court *prima facie* that he has a *bonafide* interest that ought to be protected. In this regard, the applicant has exhibited an agreement that it has entered into with Municipal Housing Cooperative Society Limited. As it was pointed out by the respondent, that agreement is neither registered nor has the stamp duty been paid. This means that the agreement may not be admissible in evidence. Further, the leasehold interest which was for three years expired on 31st July, 2018, and nothing has been exhibited to demonstrate that it has been extended. In the circumstances, on the material before us, the agreement may not be relied on to demonstrate any *prima facie* interest that ought to be protected. The applicant has also not exhibited anything to counteract the respondent's contention that Municipal Housing Co-operative Society is not a registered entity. Thus, there is doubt about the legal status of that Society. For these reasons, we are not satisfied that the applicant has established an arguable appeal, upon which an order of interlocutory injunction can be anchored.

[13] With regard to the nugatory aspect, it is evident that the cause of action concerns the carting away of soil for purposes of mineral extraction for commercial purposes. The applicant has not satisfied this Court that its loss if at all, cannot be compensated by an award of damages. The applicant is not in possession of the suit property and the land parcels are not in the name of the applicant or the name of the Municipal Housing Co-operative Society with whom the applicant purportedly entered into an agreement. In the circumstances, it cannot be said that the intended appeal will be rendered otiose if the orders of injunction are not issued.

[14] For these reasons we find that the applicant has not laid any basis upon which the orders of interlocutory injunction can be granted nor has the applicant satisfied the requirements of Rule 5(2)(b) of the Court Rules. The notice of motion has no merit. It is accordingly dismissed with costs.

DATED and delivered at Kisumu this 11th day of October, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.