THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, GATEMBU, SICHALE, JJA)

CIVIL APPLICATION NO. 216 OF 2018

BETWEEN

CROSS CURRENT INDIGENIOUS NETWORK.....APPLICANT

AND

COMMISSIONER OF LANDS.....1ST RESPONDENT

AFRICAN INLAND CHURCH (KENYA).....2ND RESPONDENT

(Application for stay/injunction from the Judgment of the Environment and Land Court of Kenya at Nairobi (Milimani) (Mutungi, J.) dated 4th April, 2018

in

ELC NO. 535 OF 2000)

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RULING OF THE COURT

1. In its application presented to the Court on 25th July 2018, under Sections 3A and 3B of the Appellate Jurisdiction Act and Rule 5(2)(b) of the rules of the court, among other provisions, the applicant seeks an order of injunction to restrain the second respondent from evicting it from L. R. No. 209/11635 (the property) and/or from interfering with its occupation or the occupation of the premises by its tenants by alienating, leasing, transferring, selling, or disposing of the property pending the hearing and determination of an intended appeal from the judgment of the Environment and Land Court (Mutungi, J) delivered by Okongo, J on 19th April 2018 declaring the 2nd respondent to be the owner of the property and ordering the applicant to hand over possession of the same to the 2nd respondent within 30 days of service of the decree.

Background

2. In its suit before the High Court, the applicant averred that the property was allotted to it by the 1st respondent by a letter of allotment dated 15th May 1992; that it took possession of the same and developed it; that in March 2000 the 2nd respondent began to threaten it with eviction from the property after which it established that the 2nd respondent had been issued with a title on 15th February 1998. The applicant contended that the 2nd respondent's title to the property was fraudulently procured. It prayed for judgment for a declaration that it is "the lawful allotee" of the property and a permanent injunction to restrain the 2nd respondent from interfering with or selling or disposing or transferring the property or from interfering with the applicant's possession of the property. As against the 1st respondent, the applicant sought an order compelling it to register it as the owner of the property.

3. In its defence, the 1st respondent denied that it illegally or fraudulently issued a title in favour of the 2nd respondent. It contended that it issued the title to the 2nd respondent in good faith following advice that the applicant was a department of the 2nd respondent's church.

4. On its part, the 2nd respondent averred that it is the leasehold owner of the property and is therefore entitled to possession of the same having been lawfully registered as the owner; that the developments on the property, erected for the purpose of the propagation of the Gospel and the instruction of the believers in the word of God, were funded by Cross Currents International Ministries USA in conjunction with Cross Currents International Ministries in Canada and UK; it denied that it obtained the title unlawfully or fraudulently and asserted that the

applicant is a trespasser on the property; it counterclaimed as against the appellant seeking judgment for an order for possession and damages for trespass.

5. After a protracted trial, partly conducted before Ojwang, J(as he then was) and ultimately before Mutungi, J whose judgment (the subject of the intended appeal) was delivered by Okongo, J on 19th April 2018, the court held: that the letter of allotment on the basis of which the applicant was laying claim to the property was not issued to it as it did not exist when that letter of allotment was issued on 15th May 1992; that the applicant has no legal interest in the property and did not have the *locus standi* to institute the suit; that a letter of allotment issued to the 2nd respondent had the effect of cancelling the letter of allotment on the basis of which the applicant was laying claim to the property; that the property was allocated for charitable purposes and the request by the 2nd respondent to be allotted the property was consistent with the property continuing to be held for charitable purposes; and that the allegations of fraud leveled by the applicant against the respondents were not proved.

6. In the result, the trial court concluded that the applicant had not established its case on a balance of probabilities and dismissed its claims. At the same time, the court found in favour of the 2nd respondent and ordered the applicant to vacate the property within 30 days from the date of service of the decree upon it. In that regard, the Judge stated:

> ***"I accordingly find no merit in the plaintiff's*** [applicant's] ***suit against the defendants*** [respondents] ***and the same is hereby ordered dismissed with costs to the defendants***[respondents]***. Further, I enter judgment in favour of the 2nd defendant*** [2nd respondent] ***on the counterclaim and order and direct that the plaintiff*** [applicant] ***vacates LR No. 209/11635 and delivers vacant possession thereof to the 2nd defendant*** [2nd respondent] ***within 30 days from the date of service of the decree herein upon them."***

7. Aggrieved, the applicant lodged a notice of appeal with the lower court on 3rd May 2018 on the basis of which the present application to stay execution of that judgment is premised.

Submissions

8. Urging the application before us, learned counsel, Mr. Paul Amuga holding brief for Mr. F. Wasuna for the applicant referred to the grounds in support of the application, the affidavit in support sworn by Boaz Okul Omondi, and the draft memorandum of appeal, and submitted that the applicant has been in possession of the property for 27 years and is now threatened with eviction following the judgment of the trial court; that the intended appeal is arguable; that the finding by the Judge that the 1st respondent was right to change or substitute the name of the applicant with that of the 2nd respondent as the allotee of the property cannot be correct; that the Judge failed to appreciate that the change in the name of the allotee from that of the applicant to that of the 2nd respondent was done without the knowledge of the applicant; that the lease issued to the 2nd respondent is in the circumstances impeachable and the Judge should have so determined.

9. As to whether the intended appeal will be rendered nugatory unless the orders sought are granted, counsel submitted that the answer is obviously in the affirmative considering that the 2nd respondent has demanded possession of the property and that the applicant stands to lose possession unless the stay is granted. Citing the decisions of the Court in ***Mugah vs. Kunga [1988] KLR 748***; ***Grace Wairimu Sorora vs Chaka Limited & 7 others [2015]eKLR***; and ***Malcolm Bell vs. Daniel Toroitich Arap Moi & another [2006]eKLR*** counsel urged that the practice of this Court in cases involving land is to maintain the status quo in order that the parties may have an opportunity to have the appeal heard and that in appropriate cases the Court may also grant orders restraining disposal of the subject matter until the appeal is heard.

10. Mr. E. Masika learned counsel for the 2nd respondent referred to the replying affidavit sworn by Rev. Dr. Silas Yego in opposition to the application and submitted that the prayers in the applicant's application are incapable of being granted; that the application has been overtaken by events in that the 2nd respondent is already in exclusive possession of the property and has rented it out to various tenants under fresh lease agreements as exhibited in the affidavit; that in any event, the intended appeal is not arguable; that the applicant cannot lay claim to the property on the basis of a purported letter of allotment, issued to a different entity, and which was issued prior to the existence of the applicant.

11. Furthermore, counsel argued, in view of the 2nd respondent having already taken possession of the property pursuant to the judgment of the lower court, the question of the intended appeal being rendered nugatory does not arise; that as the 2nd respondent has title to the property the question of ownership of the property does not arise; and that the tenants on the property are already paying rent to the 2nd respondent on the basis of the lease agreements entered into with the 2nd respondent.

12. Counsel for the 2nd respondent submitted further that the conduct of the applicant is such as to disentitle it to the discretionary remedy that it seeks; that the applicant deliberately refrained from extracting the decree from the lower court in order to perpetuate its occupation of the property; and that the present motion was not filed promptly.

13. Despite notice of the hearing of the application having been served, there was no appearance for the 1st respondent.

Analysis and determination

14. We have considered the application, the affidavits and the submissions by learned counsel. To succeed in an application of this nature, the applicant must satisfy us that the intended appeal is arguable and that if we do not accede to its request and grant the orders it seeks the intended appeal will be rendered nugatory. In ***Ishmael Kagunyi Thande vs. Housing Finance of Kenya Limited [2007] eKLR*** this Court stated:

"The jurisdiction of the court under rule 5(2)(b) is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. These principles are now well settled. For an applicant to succeed he must not only show his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of the appeal will be rendered nugatory."

15. As to whether the intended appeal is arguable Mr. Amuga pointed to the draft memorandum of appeal contained in the record of the application and submitted that during the hearing of the appeal the applicant will demonstrate that the finding by the learned Judge that the 1st respondent was justified to change the name of the allotee from that of the applicant to the 2nd respondent without the knowledge of the applicant is flawed; that if that argument is upheld, the title issued to the 2nd respondent will be impeached. At this juncture, the less we say on the matter the better lest we prejudice the appeal. Suffice to state that bearing in mind, as held by the Court in ***Dennis Mogambi Mong'are vs. Attorney General & others [2012] eKLR***, that an arguable appeal is not one that must necessarily succeed, but simply one that is deserving of the Court's consideration, we are reluctant to declare at this point that the intended appeal is frivolous.

16. As to whether the intended appeal will be rendered nugatory unless the orders sought are granted counsel for the 2nd respondent submitted that the judgment of the lower court has already been executed and the 2nd respondent is exclusively in possession. Counsel for the applicant on the other hand submitted that the applicant remains in exclusive possession and that all the 2ndrespondent has purported to do is to 'take over' the applicant's tenants by entering into lease agreements with them.

17. In his affidavit in support of the application, Boaz Okul Omondi addressed the question of possession in this way: He deposed that the applicant was served with the decree on 4th July 2018 "*and there is a threat that the applicant and its tenants will be evicted on or soon after 3rd August 2018 except for the intervention of this court*." He went on to depose that the applicant has been in occupation for over 27 years and has erected elaborate, expensive and expansive structures and developments…during its period of occupancy; that the applicant has engaged and retained several tenants on the property some of who have been in occupancy for several years. He exhibited to the affidavit a copy of a lease dated 22nd November 2016 by which the applicant granted to a company known as Hardwood Furnitures (EA) Limited a lease "*for part of the property*" for a term of 15 years 3 months from 1st January 2015. He did not indicate who the other tenants on the property are.

18. On the other hand, Rev. Dr. Silas Yego on behalf of the 2nd respondent deposed in his replying affidavit that "*the 2nd respondent obtained vacant possession of the premises and entered into fresh tenancy agreements with the tenants who were in the premises and the said tenants are now paying rent for the suit premises to the 2nd respondent*." In support, he exhibited an executed letter of offer of lease to Hardwood Furnitures (EA) Limited (the same tenant having an agreement with the applicant) dated 14th August 2018 for a term of 6 years commencing 1st August 2018 over 3,326 square feet of the property. Also exhibited is a copy of a temporary occupation licence dated 1st August 2018 issued by the 2nd respondent to Interways Works Ltd to occupy a part of the property, identified as vacant plot of approximately 1.5 acres, for purposes of a construction site; and a report of payments, including payments of rent, made to the 2nd respondents property agent Regent Management Ltd.

19. Also exhibited to the 2nd respondents replying affidavit are copies of two letters. The first is a letter dated 2nd August 2018 addressed to the 2nd respondent's advocates by the applicant's advocates in which the latter complains that the 2nd respondent had sent a security firm to guard the property who were endeavouring to displace the applicants own guards; that the 2nd respondent had purported to instruct Regent Management Ltd to take over assets of the applicant and to run the businesses that the applicant "*has hitherto been operating*"; that Regent Management Ltd had "*purported to instruct*" the applicants tenants "*to pay them rents*" and that the 2nd respondent cannot purport "*to forcibly take possession of the property*." That letter ended with a demand that the 2nd respondent should "*vacate the property*" and to "*stop interfering with our clients tenants and businesses in the property*" and to "*surrender back any and all assets of our client*" that the 2nd respondent's agent may be holding.

20. The second letter exhibited to the 2nd respondent's replying affidavit is a letter dated 7th September 2018 from the applicant's advocates addressed to Interways Ltd, Hardwood Furnitures (EA) Ltd and to Pastor Oburu, God Heritage Ministries. The subject reference of the letter is "Rent Payment" and begins with the salutation, "Dear Tenants". In that letter, the advocates for the applicant then state: "*we are duly informed that you have been wrongfully advancing rent payments for your stay at our premises to the African Inland Church (Kenya)"* and pointed out that "*rent payments should continue being paid to Cross Current Indigenous Network*."

21. Based on the foregoing and on the correspondence, it would appear that the judgment of the lower court has indeed been given effect and that the premises are under the control of the 2nd respondent. In those circumstances the order for stay of execution that the applicant seeks under prayer 2 of its application, and the order of injunction to restrain eviction that the applicant seeks under prayer 3 of its application are not available and would serve no purpose.

22. However, bearing in mind that the object of Rule 5(2)(b) is the ***"preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals"*** [per Githinji JA, in ***Equity Bank Limited vs West Link Mbo Limited Civil Application No. Nai 78 of 2011***] the order that commends itself to us, and which we hereby grant, is an order in terms of prayer 4 of the application but modified as follows: an order of injunction is hereby issued restraining the respondents from alienating, selling, or transferring the property pending the hearing and determination of the applicant's intended appeal.

23. The applicant shall file and serve its memorandum and record of appeal within 45 days from the date of delivery of this Ruling failing which the order of injunction granted herein shall stand discharged without further ado and the applicant's application dated 24th July 2018 shall in that event stand dismissed with costs to the 2nd respondent.

24. Otherwise, the costs of this application shall abide the outcome of the intended appeal.

Orders accordingly.

Dated and delivered at Nairobi this 9th day of November, 2018.

R. N. NAMBUYE

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR