IN THE COURT OF APPEAL

AT KISUMU

CORAM: E.M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED, JJA

CIVIL APPLICATION NO. 74 OF 2016

BETWEEN

GEORGE OTIENO GACHE.....1ST APPLICANT

COVENANT OF PEACE CHURCH.....2ND APPLICANT

AND

JUDITH AKINYI BONYO.....1ST RESPONDENT

JUSHUA OMOLLO.....2NDRESPONDENT

RICHARD OTIENO.....3RD RESPONDENT

JAMES OTIENO.....4TH RESPONDENT

THE CHIEF LANDS REGISTRAR.....5TH RESPONDENT

THE NATIONAL LANDS COMMISSION.....6TH RESPONDENT

(Being an application for injunction and stay of proceedings pending the determination of an intended appeal from the Ruling made by the High Court at Kisumu (the Honourable Mr. Justice S.M. Kibunja) dated and delivered on12th November 2015)

in

ELC CASE NO. 3 OF 2014)

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RULING

[1] By a Notice of Motion dated 22nd September, 2016 **George Otieno Gache** and **Covenant Peace of Church** (hereinafter referred to as "the 1st and 2nd applicants" respectively), have moved the Court under **Rule 5(2)(b), 42(1)** and **47(1)&(2)** of the **Court of Appeal Rules** and **Order 40 Rules 1,2,3(3),&.4** of the **Civil Procedure Rules** seeking an order of injunction restraining the respondents and their servants/and or agents from occupying, continuing to occupy or doing any act on land parcel known as

L.R. No. 15155 Kanyakwar Kisumu (hereinafter referred to as the suit land), pending the hearing and determination of an intended appeal; and also an order staying all proceedings pursuant to the ruling of Hon. Justice SM Kibunja dated 12th November, 2015 in Kisumu High Court Land Case No. 3 of 2015 during the pendency of the appeal. The respondents to the motion are Judith Akinyi Bonyo, Joshua Omollo, Richard Otieno, and James Otieno (herein the 1st 2nd 3rd and 4th respondent respectively).

[2] The application is premised on five grounds that are set out on the face of the motion and an affidavit sworn by the 1st applicant. The application is opposed by way of a replying affidavit sworn by the 1st respondent on behalf of the 2nd, 3rd and 4th respondents. With leave of the Court, the 1st applicant swore a further affidavit in response to the replying affidavit.

[3] The background to the application is evident from the applicants' affidavits and annexures thereto. The 2nd applicant by way of a letter of allotment dated 15th May 1991 beneficial ownership of the suit land and proceeded to comply with the terms of the letter by paying land rates to the Municipal Council of Kisumu (*as it was known then*). The 2nd applicant took possession of the suit land and obtained authority to develop the said parcel of land. However title to the suit property was subsequently issued to 1st to 4th respondents who claimed ownership of the suit land. The applicants contended that the 1st to 4th respondents obtained the title to the suit land fraudulently. The applicants therefore filed HC Land Case No. 3 of 2014 against the 1st to 2nd respondents seeking declaratory orders that the 2nd applicant is the legal registered owner of the suit land and also an order to rectify the register and a permanent injunction against the 1st to 4th respondents from interfering with the suit land.

[4] Before the suit was heard, the 1st to 4th respondents raised a preliminary objection seeking to have the suit struck out on grounds: that the suit was bad in law for offending the provisions of Sections 24, 25, 26 and 35 of the Land Registration Act that the suit did not raise a reasonable cause of action against the 1st to 4th respondents; and that the suit was misconceived, scandalous, vexatious and an abuse of the process of the Court.

[5] In his Ruling delivered on 12th November, 2015, the learned judge dealt a death blow to the applicant's suit by upholding the preliminary objection and striking out the applicant's plaint and notice of motion. The ruling of the learned Judge was based on his findings that the 1st applicant lacked the capacity to institute a suit on behalf of the 2nd applicant as the 2nd applicant had no capacity in law to institute the suit; that the 1st to 4th respondents were the registered proprietors of the suit land and entitled to enjoy their rights as owners of the suit land until their title is successfully challenged; and that the existence of the title issued in favour of the respondents had not been disclosed to the court. Being aggrieved by ruling of the E&L Court the applicants filed a Notice of Appeal and also filed the motion that is the subject of this court's determination.

[6] In the affidavit sworn by the 1st applicant in support of the motion, it is deponed that the applicants were never issued with a notice of delivery of the ruling and were surprised when the 1st to 4th respondents moved onto the suit land, declared the property as their own and proceeded to construct a sign board and locked the gate, preventing the adherents of the 2nd applicant from accessing the property. The 2nd applicant urges that it is at the brink of losing the suit land that it had legally acquired and that the loss cannot be compensated by an award of damages hence the prayers in the motion.

[7] In the replying affidavit, sworn by the 1st respondent it was averred that the 1st to 4th respondents are the registered proprietors of the suit land as tenants in common; that the applicants were trespassers who unlawfully occupied the suit land; that the applicants declined to vacate the suit land thus violating the respondent's right to peaceful enjoyment; that the 2nd applicant could not be the legal allottee of the suit land as it only came into existence on 21st September, 2010; and that the 2nd applicant's claim of ownership and the purported allotment is fraudulent.

[8] The application was orally argued in Court on 6th June 2017 between the applicant and the 1st to 4th respondents. There was no appearance on behalf of the 5th and 6th respondent. Learned counsel Mr. Omondi T appeared for the applicants. In arguing the application Mr Omondi pointed out the two tests to be considered for grant of orders under Rule 5(2) (b) of the Court Rules. First the applicant needs to demonstrate an arguable appeal and, second, that the appeal will be rendered nugatory unless the orders of injunction are granted.

[9] On whether the appeal is arguable, Mr Omondi pointed out three arguable points raised in their memorandum of appeal. These were that the learned Judge: failed to consider substantive issues; erred in dismissing the entire suit for misjoinder and non-joinder of parties notwithstanding the fact that the defect was curable by amendment of pleadings; failed to consider the authorities that were submitted by the appellant opposing the preliminary objection. In his view these were issues that rendered the appeal arguable with high chances of success.

[10] On the nugatory aspect, Mr Omondi submitted that the respondents were currently in occupation of the suit property and unless the Orders sought were granted, the respondents could have the applicants evicted at any moment, and may dispose of the property or alter its character.

[11] Learned counsel Ms. Maumo who appeared for the 1st to 4th respondents during the hearing of the motion, submitted that there was no arguable appeal before the Court as the applicants have no locus to bring the suit. She pointed out that the 2nd applicant was registered as a society on the 21st September, 2010 and therefore, there was no way the 2nd applicant could have been allotted the suit land in the year 1991 when it did not exist. Ms Maumo argued that the defects in the applicants' plaint could not be cured by an amendment as proposed by the applicants. She urged the Court that there was no proper reason to justify the granting of the orders sought.

[12] As rightly noted and argued by both counsel, the principles relating to the exercise of this Court's jurisdiction under Rule 5(2)(b) is now well settled. Firstly, the intended appeal should be arguable or put another way, the applicants must show that they have an appeal that is not frivolous and that merits to be heard. Secondly, this Court should ensure that the appeal, if successful, should not be rendered nugatory. For instance in **Githunguri v Jimba Corporation Limited** ***(1988) KLR 838)***; the Court stated:

> ***"Accordingly, we put to ourselves these two questions namely, first, on the material made available to us, is the intended appeal frivolous or has the applicant shown, prima facie, that he has substantial points to present to the Court on this appeal, and second if he has, would his appeal be nugatory if we denied him the interim relief sought"***

[13] In **Northwood Development Company Limited v Husein Alibhai Pirbhai & 2 others [2015] eKLR** the Court held: -

> ***"The principles which guide the Court in considering applications made under that rule are now well settled and we need only restate them from Reliance Bank Ltd (In Liquidation) vs. Norlake Investments Ltd – Civil Appl. No. Nai. 93/02 (UR), thus: -"Hitherto, this Court has consistently maintained that for an application under rule 5(2) (b) to succeed, the applicant must satisfy the court on two matters, namely:-***
>
> ***1. That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal,***
>
> ***2. That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction."***

[14] In addition, both limbs must be demonstrated to exist before one can obtain relief under rule **5(2) (b).** In the case of **Emirates Airline Limited v Stephen Chase Kisaka [2015] eKLR,** the Court addressed itself as follows:-

"The first is that the appeal is arguable, and the second is that if the orders sought are not granted, then the appeal would be rendered nugatory. It falls upon the applicant to satisfy the twin principles. See Republic v Kenya Anti-Corruption Commission & 2 others (supra) where the Court rendered itself thus:

"The applicant needs to satisfy the court, first, that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds, the result or the success would be rendered nugatory. In order that the applicant may succeed, he must demonstrate both limbs and demonstrating only one limb would not avail him the order sought if he failed to demonstrate the other limb."

[15] As was held in ***Cooperative Bank of Kenya Limited v Banking Insurance and Finance Union (Kenya) [2014] eKLR***, it is sufficient that the point or issues raised in the appeal is arguable, and this does not necessarily mean the appeal must succeed.

[16] From the draft memorandum of appeal, the applicant raises several issues which include: whether the ELC failed to appreciate that a court of justice should aim at sustaining rather than terminating a suit by summary dismissal based on grounds of irregularities and procedural defects before the suit proceeded on merit; whether the 1st applicant lacked capacity to bring the suit as a representative of the 2nd applicant, and if so whether this was a fundamental and fatal defect to warrant the dismissal of the suit on a preliminary point of law; whether the ELC was right in upholding the respondents' preliminary objection to have the suit struck out.

[17] In our view, the applicants have demonstrated that they not only have arguable issues for purposes of appeal but also that the issues raised are not frivolous. At this stage the Court is not expected to inquire into the merits of the arguments and whether they will succeed or not, it suffices that the applicant has met the requisite threshold as the existence of a single *bona fide issue is sufficient*.

[18] Turning to the second limb requiring proof of the nugatory aspect, counsel for the applicants submitted that the respondents were currently in occupation of the suit land, as the interim orders that had been issued by the ELC restraining the respondents from engaging in any activities over the suit land were vacated when the ELC struck out the applicants' suit. The applicants argued that they will suffer irreparable loss if the respondents continued to occupy the suit land as the respondents have denied them access to the suit land and members and congregants of the 2nd applicant cannot access the suit land.

[19] In ***Hashmukhlal Virchand Shah & 2 others v Investment & Mortgages Bank Limited [2014] eKLR),*** the Court held;

"As for the second requirement, we have to ensure that the word "nugatory" has been given its full meaning, namely that the appeal will not be rendered worthless, futile; invalid or even trifling (Reliance Bank Ltd versus Nor Lake Investment Ltd [2002] IEA 227. Secondly we have to consider whether what has been sought to be stayed is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved."

[20] Thus in determining whether an appeal will be rendered nugatory or not the Court must consider what is sought to be stayed and whether if allowed to happen the situation is reversible; or if it is not reversible whether damages will reasonably compensate the aggrieved party.

[21] It is apparent that the ownership of the suit land is disputed with both parties claiming to be the legal and beneficial owners. The applicants had filed a suit seeking to be declared the legal owners of the suit land. They challenged the respondents' certificate of title and sought to have the title declared fraudulent. Although the ELC has struck out their plaint, they have initiated the appeal process against that decision. With the respondents being currently in possession of the suit land, there is nothing to prevent them from disposing of the suit land, or using or developing the suit land in a way that may change the character of the property. Should this happen the applicants' appeal if successful will be no more than an academic

exercise as the situation may be irreversible and an award of damages may not be adequate.

[22] We are therefore satisfied that the applicant has satisfied both limbs for grant of relief under Rule 5(2)(b) of the Court Rules. However, as the orders made on 12th November 2015 have had the effect of vacating the interim orders that were issued by the ELC, and the respondents have already taken possession of the suit property, an order restraining the respondents from occupying the property will only cause confusion.

[23] We believe that the interests of both parties will be served by orders restraining the respondents from parting with possession of the suit property or developing the suit property or in any way changing the character of the suit property pending the hearing of the appeal. This order will last for a maximum period of 12 months unless otherwise extended. The applicants must therefore take appropriate action to have their appeal heard and disposed of. We allow the motion to this extent and make orders accordingly.

DATED and delivered at ELDORET this 5th day of October, 2017

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

……...

JUDGE OF APPEAL

J. MOHAMMED

…….....

JUDGE OF APPEAL

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

DEPUTY REGSITRAR