IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, KOOME & KANTAI, JJ.A.)

CIVIL APPLICATION NO. NAI 221 OF 2015 (UR 183/2015)

MONARCHS LODGE SAFARI LIMITED.....APPLICANT

VERSUS

MARA NORTH HOLDINGS LIMITED.....1ST RESPONDENT

SANAET OLE MASEK.....2ND RESPONDENT

PARSEEN OLE RAKWA.....3RD RESPONDENT

NAROK COUNTY.....4TH RESPONDENT

MARA NORTH CONSERVANCY.....5TH RESPONDENT

(An application for stay pending the hearing and determination of an intended appeal from the Ruling and Order of the High Court of Kenya at Nakuru (Sila Munyao, J) dated 16th June 2015 in ELC No. 30 of 2015)

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RULING OF THE COURT

Monarchs Lodge Safari Limited (applicant), is a limited liability company, having been duly registered with the Registrar of Companies on 8th October, 2013. All its three directors are of Canadian Nationality. The company is also the holder of an Investment Certificate issued to it under the Investment Promotion Act 2004, for purposes of investing in the business of hotel tourism.

The dispute from which this application arises revolves around the ownership of land parcel **No. C1S–MARA/KOIYAKI–DAGUGURUETI/785 (Land parcel No. 785),** and its subsequent mutations. It is important in order to put this application in its proper perspective, to revisit the history of the said land parcel and its ownership. The history of the land parcel prior to 2012 is not before us. From what we can decipher from the record, the 2nd respondent (**Sanaet ole Masek**) was the lessor of the said property as at 20th March 2012.

On the date in question, he leased the entire land parcel to **Mara North Holdings Limited** (1st respondent). This lease was for a term of thirteen years and four months. Subsequently during the pendency of the said lease, Mara North Conservancy, (the 5th respondent), purported to surrender the lease for the same property to the Land Registrar. Following the said surrender, the 2nd respondent proceeded to sub-divide the same land into three parcels; C1S–MARA/KOIYAKI-DAGURUGURUETI/4316, C1S–MARA/KOIYAKI-DAGURUGURUETI/4317 and C1S-MARA/KOIYAKI-DAGURUGURUETI/4318. Parcel No. 4316 was registered in the name of the applicant herein. Following the purchase of the said property by the applicant, it was issued with a Title Deed and it proceeded to initiate massive construction works on the said property.

It is this surrender of lease by the 5th respondent to the 4th respondent that is said to be fraudulent, and which forms part of the challenge before the ELC Court in Nakuru. Mara North Holdings Limited, who was the lease holder of the said property as at the time Mara North Conservancy purported to surrender the lease, went to court to challenge the said surrender. Its claim before the High Court was that any transaction predicated on, a fraudulent surrender of lease, and fraudulent transfer to Title is illegal, null and void, and should be declared as such by the Court. The 1st respondent therefore, cudgeled ownership of the land in question by the applicant herein, and sought orders of injunction to be issued against the applicant to stop it from any further construction on the said property, pending the hearing and determination of the main suit.

That application was heard by the Environment and Land Court (Munyao Sila, J), who, on 16th June 2015 rendered the ruling giving rise to the notice of appeal dated 16th June 2015.

This application is premised on that notice of appeal. The notice of appeal was challenged by the 1st respondent by way of a notice of preliminary objection filed in this Court on 15th September 2015. The 1st respondent cited non-compliance with several Rules of this Court relating to the filing of appeals, more particularly Rules 2, 10, 74, and 80 and urged us to strike out the notice of appeal, indeed, the entire appeal.

Addressing the preliminary objection, learned senior counsel, Mr. Ahmednasir urged us to find that there is a Notice of Appeal on record, and that the Court of Appeal Rules do not refer to a 'valid' Notice of Appeal, but to a Notice of Appeal. On the preliminary issue, we agree with learned counsel for the applicant. There is no application for striking out the intended appeal before us. We agree that the application before us is one under **Rule 5(2) b of this Court's Rules**.

We have had occasion to deal with this issue on several occasions and our stand has been the same. We have held that this Court does not go behind the Notice of Appeal to see if the same is compliant with the Rules or not when dealing with a 5(2)b application. (See for instance **National Industrial Credit Bank Ltd vs Aquinas Francis Wasike & Another) Civil Appeal No 54 of 2007.**

We reiterate the same position here, and find that there is a Notice of Appeal before us for purposes of the application before us. If the respondent wishes to challenge the appeal on this point as per the Rules of this Court, he will certainly be at liberty to do so, and may be do so more comprehensively by calling in aid authorities from this Court in support of his application.

For purposes of this application, we hold that there is a Notice of Appeal in this matter, which clothes us with the requisite jurisdiction to entertain this application. We accordingly dismiss the preliminary objection and proceed to determine the application on its substantive merits.

We have heard and considered carefully submissions proffered by counsel from both sides. For the applicant, Mr. Ahmednasir, learned senior counsel's strongest point appears to be that there was no privity of contract between the plaintiff in the High Court i.e Mara North Holdings Limited and the applicant herein. Consequently, he submitted that the learned Judge erred in finding that the 1st respondent had established a *prima facie* case against the applicant herein.

The second prong of his argument was that the learned Judge made orders purporting to preserve the suit property as against its owner. His contention was that, since the applicant is the registered owner of the said properties, then the Court could not grant orders preserving the property against the registered owner. For this proposition, he called in aid this Court's decision in **Nguruman Limited vs Jan Bonde Nielsen & 2 Others (Civil Appeal No. 77 of 2012, [2014] eKLR** where this Court held:-

> ***"It must also be remembered that it is a serious thing to restrain a registered proprietor of a property over what is undeniably his unless there are justifiable grounds to do so."*** *Emphasis supplied.*

We must point out that from the above finding, it is clear that learned counsel's submission on this point would only hold sway where the ownership of the property itself is not contested.

In this case, the 1st respondent's claim is that the applicant's Title to the properties in question was obtained through fraud. That is the gravamen of the case before the ELC Court. That being the case, this matter is easily distinguishable from the Nguruman's case above.

On the issue of privity of contract, learned senior counsel's contention was that the 1st respondent had no locus to challenge the applicant's ownership to the said property - as there was no nexus between them. On this proposition, he called in aid this Court's decisions in **Agricultural Finance Corporation vs Lengetia Limited [1985] KLR;** and **William Muthee Muthami vs Bank of Baroda** (**Civil Appeal No. 21 of 2006 2014 (eKLR)**, which stipulate in brief that only parties to a contract can enforce any rights and/ or obligations under that contract.

He therefore, urged us to find that the 1st respondent had not established a prima facie case before the High Court to enable the learned judge grant the now impugned injunctive orders against the applicant. He urged us to allow this application and set aside the orders in question and stay the hearing of the suit before the ELC Court until the intended appeal is heard and determined. He submitted that his client continues to suffer massive loss on account of the injunctive orders which in his view were not merited at all.

In reply to these submissions, Mr. Oyomba, learned counsel for the 1st respondent urged us to dismiss the application. The thrust of his submissions is that the entire transaction of sale and transfer of the parcels of land in question was predicated on a fraudulent surrender of the lease which enabled the 2nd respondent to thereafter sub-divide and sell the plots to the applicant. He submitted that, the 5th respondent could not surrender a lease that was not in its name, and which had already been transferred to the 1st respondent.

He also submitted that the transfer of the properties to the applicant, a company whose directorship was exclusively foreign, was in contravention of the law. He also raised the issue of contravention of **Section 9 of the Land Control Act**, stating that consent to transfer agricultural land had not been sought/ and or granted contrary to **Section 9 of the Land Control Act.**

He submitted that the learned judge was in order to grant orders for preservation of the property. The gravamen of his argument was that the entire claim of ownership by the applicant was based on fraud, and the appellant had no arguable appeal at all, and its application therefore calls for dismissal.

Having considered all these submissions, the cited authorities and the applicable law, what remains now is for us to determine whether, firstly, the applicant has established that it has an arguable appeal; and secondly whether if the application is not allowed the applicant's appeal, were it to succeed will be rendered nugatory.

These two principles, as we have maintained in a litany of our decisions are conjunctive, and not disjunctive. The appellant needs first and foremost to establish that its intended appeal is arguable. After doing so, then it should establish the nugatory aspect. (See **Reliance Bank vs Norlake Investments Ltd**

[2002] I CA 218 (CAK), and **Githunguri vs Jimba Credit Corporation Ltd [1988] KLR 838).**

On the first limb on arguability, we wish to reiterate that arguability itself does not mean that an appeal or intended appeal must succeed. It means one that raises a *bona fide* issue that would merit or call for consideration, and determination by the Court, on appeal. **(**See **Kenya Tea Growers Association & Another vs Kenya Planters Agricultural Workers Union, Civil Application No. Nai 72 of 2001)**.

It is also settled that an applicant only needs to establish one arguable point (see **Ahmed Musa Ismael vs Kumba ole Ntamorua & 4 Others [200] KLR 31**.

Mr. Ahmednasir, learned senior counsel for the applicant faulted the learned judge for what he termed as a digression before granting an injunction contrary to the time honoured criteria set under the *locus classica* case of **Giella v Cassman Brown [1973] EA 358.**

In reply to this submission, Mr. Oyomba stated that the learned Judge only introduced a 4th criterion to the 3 already set in the Giella Cassman Brown case(supra) i.e preservation of suit property pending hearing and determination of the case.

In our considered view however, the learned Judge did not introduce a 4th test not contemplated in the **Giella vs Cassman case** (supra). Preservation of a property *per se* can never be a factor to be considered in isolation of the other requirements. The court can however order preservation of suit property where it is evident that the peculiar circumstances of the case, viewed in a wholesome manner call for such preservation. We agree with the learned authors of Halsbury's Laws of England 4th edition at paragraph 953 where they state:-

> ***"It is not necessary that the courts should find a case which would entitle the plaintiff to relief at all events. It is quite sufficient for it to find a case which shows that there is a substantial question to be investigated and the status quo should be preserved until that question can be disposed of…….***
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> ***An interlocutory injunction (a quia timet injunction) will be granted to restrain an apprehended or threatened injury where the injury is certain or very imminent or where mischief of an overwhelming nature is likely to be done."***

In this case, the learned judge did definitely appreciate the fact that the applicant had embarked on a project of immense magnitude requiring application of huge capital.

On the other hand, there was this evidence before the court questioning the validity of the Title Deed on which this massive project was being constructed. The learned judge had to balance the two sides and decide what remedy was fair under the circumstances. Looking at the documents annexed to the rival affidavits and the submissions of counsel, it is clear, as we have stated earlier, that the entire case is predicated on the validity of legality of the Title Deed held by the applicant herein. If at the end of the day the Court were to find that indeed the surrender of the lease by the 5th respondent was fraudulent, what would happen to the applicant's humongous investment?

The answer to that question may be what prompted the learned Judge to give the preservatory orders. We cannot also fault the following finding/observation by the learned Judge.

> ***"There is a surrender of lease dated and registered on April 2014 but the plaintiff has been categorical that he never executed any surrender of lease. The surrender of lease is executed by an entity called Mara North Conservancy. It is apparent that Mara North Conservancy was not the beneficiary of the lease, and on my part, at least at this stage of the proceedings, I do not see how an entity which is not the beneficiary of a lease can purport to surrender it."***

The above just goes to show that the learned Judge did not make the preservatory orders in a vacuum. He

did so within the confines of the law, and the special circumstances surrounding the case.

Having said so, we warn ourselves that at this point, we must eschew making any findings of a definitive nature, so as not to embarrass the trial court, or the bench that will be seized of this appeal. We cannot therefore comment on the validity of the Title Deed in question or such other issues. We do however agree that the matters raised, in the intended appeal, are not necessarily frivolous. We are therefore, reluctant to find that the applicant has no arguable appeal.

On the other hand however, the mere fact that the respondent has claimed for an award of damages before the High Court does not shut him out of the purview of award of other alternative remedies. The Court must be wary of creating a precedent where a well to do respondent can always flaunt its wealth before the Court in an attempt to dissuade the Court from granting injunctive orders, for the only reason that it is able to pay damages for any loss , even if the court were to eventually rule against it.

In this case, our view is that the learned judge was in order to grant the injunctive orders, complained of. We are also satisfied that if the Court stays the said orders, as prayed by the applicant this would amount to lifting the injunction. This would have serious ramifications both to the applicant, and the 1st respondent if the Court eventually rules against the applicant.

In our view, the intended appeal will not be rendered nugatory if the orders sought are not granted. In the circumstances, we find that this application does not meet the threshold set for applications under **Rule 5(2)(b) of this Courts Rules.**

Accordingly, we dismiss the same with orders that costs be in the intended appeal.

Dated and delivered at Nairobi this 5th day of February, 2016.

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR