



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJA.)

CIVIL APPLICATION NO. 211 OF 2015

BETWEEN

- 1. ALI ABDALLA DUHMY**
- 2. SHEE ATHMAN OMAR**
- 3. NASSIR SALIM KHAMIS**
- 4. MOHAMED HEMED ATHMAN (as representatives of the members of
NUR MUSLIM SCHOOL SOCIETY.....APPLICANTS**

AND

- 1. MOHAMED ABDISHEIKH**
- 2. SWAHEL ABOUD ABDALLA**
- 3. ALI OMAR SAID**
- 4. ABDALLA SWALEH OMAR**
- 5. ABDALLA M. ABDISHEIKH**
- 6. IDRIS MAAMUN ALIRESPONDENT**

(Being an application for injunction pending the lodging, filing, hearing and determination of an intended appeal from the Judgment and Decree of the High Court of Kenya at Malindi (Chitembwe, J.) dated 30th June, 2015

in

H.C. C. C. No. 14 of 2012 consolidated with Nos. 40 of 2009 and 468 of 2006.)

RULING OF THE COURT

The applicants, **Ali Abdalla Duhmy, Shee Athman Omar, Nassir Salim Khamis** and **Mohamed Hemed Athman** moved this Court through an application dated 4th August, 2015 seeking to injunct the respondents, **Mohamed Abdisheikh, Swahel Aboud Abdalla, Ali Omar Said, Abdalla Swaleh Omar, Abdalla M. Abdisheikh** and **Idris Maamun Ali** from taking over office at **Nur Muslim School Society** (hereinafter “*the school*”) pending the hearing and determination of an intended appeal.

The facts leading up to this application are that following a disputed election in 2012; the respondents were declared as duly elected office bearers to the school and consequently sought to assume office. Challenging this outcome, the applicants filed suit against the respondents, being **Malindi High Court Civil Suit No 144 of 2012** in which they not only sought to be declared the lawful office bearers of the school, but also for injunctive orders against the respondents as aforesaid. During the pendency of the said suit, the applicants enjoyed temporary restraining orders which in effect kept the respondents from taking over the school.

However, the tables turned on them when the suit was finally heard and determined. Through a judgment delivered on 30th June, 2015, **Chitembwe, J.** found no merit in the suit and accordingly dismissed it, thereby vacating the hitherto subsisting orders of injunction. This exposed the applicants and left the respondents with the option to take over the school. The respondents in no time proceeded to do so, thus culminating in the applicants filing a notice of appeal against the judgment and decree of Chitembwe, J. aforesaid and thereafter the instant application.

The application is based on grounds appearing on its face, together with the supporting and supplementary affidavits thereto. The application was opposed by the replying affidavit sworn on 21st August, 2015 by **Swaleh Aboud Abdalla**, the 2nd respondent on behalf of the other respondents and himself.

At the hearing of this application, **Mr. Hamza**, learned counsel for the applicants submitted that the application was timeously filed. In addition, that the applicants had a merited appeal with high chances of success, as the impugned judgment was a nullity, having been partly hinged on a non-existent suit. In a bid to demonstrate that fact, counsel contended that prior to the instant suit before the High Court, the respondents had filed another suit, namely Nairobi **High Court Civil Suit No. 468 of 2006** which was later dismissed. In an unusual move, counsel submitted that the learned Judge treated the dismissed suit as having been consolidated with the current suit and erroneously based the impugned judgment on that dismissed suit, thereby reaching a wrong decision. It was counsel’s submission therefore, that this constituted an arguable point in the intended appeal.

The second point addressed by counsel was that the applicants stood to suffer irreparably should the injunction not be granted, as by assuming office, the respondents were likely to not only change the curriculum, but tamper with the school records as well and that unless the orders are granted as prayed, the intended appeal is at risk of being rendered nugatory.

Opposing the application, **Mr. Mutisya**, learned counsel for the respondents submitted that the application was spent, as the respondents had already assumed the contested office in July, 2015. That they had even taken over mandate of the school’s bank accounts, and were in physical possession of the school and other assets owned by the school and as such, there was nothing left to injunct. With regard to the potential loss alluded to by the applicants, counsel contended that the subject matter of the appeal is public and not private interest; and that therefore, it had not been shown how detrimental the respondents’ assumption of office would be to the school. Further, that no evidence was adduced to prove the anticipated change of curriculum. He contended that in the light of the above, the intended appeal was not only frivolous, but unmerited and thus incapable of being rendered nugatory as the application had been overtaken by events.

This is an application brought under **Rule 5 (2) (b)** of this Court’s Rules. Under this provision, the guiding considerations in the determination of such an application are whether:

- a. The applicant has established the existence of an arguable appeal and;
- b. The applicant has shown any irreparable loss he stands to suffer should the application not be granted thereby rendering the appeal or intended appeal nugatory.

(see. Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR)

On the first limb, the applicant contends that the intended appeal shall challenge *inter alia*; the fact that the impugned decision was based on facts contained in a dismissed suit, which facts ought not have been considered. However, no proof has been presented indicating that the said suit had been dismissed. Indeed, this assertion was never even contained in the body of the application and only came to the fore during oral submissions. It is trite law that he who alleges must prove (**see, Section 107** of the Evidence Act Cap 80). An arguable appeal is not necessarily one that will succeed. It is simply an appeal which is not frivolous. (see, **Isaac Gathungu Wanjohi & another v Attorney General & 6 others [2013] eKLR**). Therefore, the onus was upon the applicants to show *prima facie* evidence of an arguable point. While every case undoubtedly turns on its own merits on the issue, the applicants must nonetheless show that there is an arguable point deserving of consideration by the appellate court in the appeal. Our aforesaid reservations notwithstanding, we shall for purposes of this application nonetheless deem that indeed the point aforesaid makes the intended appeal arguable.

On the second limb, the applicant has asserted that the respondents pose a danger to the school's curriculum and records and further, that some parents had withdrawn their children from the school in view of mismanagement on the respondents' part. This submission clearly supports the respondents' contention that they have already assumed office. Infact, the applicants' supplementary affidavit is most elaborate in this regard. It states in part:

“5. That I aver that ever since the alleged takeover of the Madrasa by the defendants, (sic) all the parents withdrew their children therefrom thereby forcing the closure of the madrasa to date....”

A further indicator of this is to be found in the respondents' replying affidavit wherein bank records show a change of the school's bank account signatories which now bear the respondents' names. While not disputing this change, in their supplementary affidavit, the applicants merely termed the change of signatories and taking over of the school's assets 'immaterial' to this application. We do not agree! The running of an institution is pegged on among others, finances and goodwill. If the respondents are the undisputed signatories to the school's accounts, it is evidence enough that the takeover has already materialised. The applicants have thus failed to show that their appeal is likely to be rendered nugatory. By definition, the term "*nugatory*" means more than just worthless but may also mean "*futile*" or "*invalid*" (**see. Isaac Gathungu Wanjohi & another v Attorney General & 6 others supra**). It should have been shown by the applicants that the appeal or intended appeal (if any) shall be rendered futile, invalid or a mere academic exercise, if the application is denied. However, this has not been demonstrated, for if the applicants' worst fears have already come to pass, there remains nothing to injunct. The substratum of this application therefore fails. And since in an application of this nature, the applicant is duty bound to satisfy the court on the twin limbs, and having failed to do so in respect of one limb, we find the application to be lacking in merit. We accordingly dismiss it with costs to the respondents.

Dated and delivered at Mombasa this 22nd day of April, 2016

ASIKE- MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR