IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPLICATION NO. 70 OF 2015

BETWEEN

1. BOB AND URSULLA BRENNEISEN…….……..….APPLICANT

2. SIMON AND MELINA PHILLIPS…….APPLICANT

3. PETER AND ANNELLIES LOCHART-MUIRE…….APPLICANT

4. ANNE SUTTCLIFFE…….....APPLICANT

5. ALLAN AND THEA JENNINGS.....APPLICANT

6. ADRIAN AND ULLA GRIMWOOD……..…….APPLICANT

7. BOB AND NICHOLAS WEYN…….....…….APPLICANT

8. HARISH AND MAMTA PATEL…….....…….APPLICANT

AND

SHANZU WATERFRONT LIMITED…….....… RESPONDENT

(Being an application for an injunction pending appeal from the ruling of the Environment and Land Court at Mombasa (Omollo, J.) dated 30th July, 2015 in H.C.C. Suit No. 103 of 2014.)

RULING OF THE COURT

By an application dated 17th December, 2015, the applicants seek orders, inter alia:-

> ***"That pending the hearing and determination of the applicants' intended appeal, the defendant be restrained whether by itself or through its directors, servants, agents, contractors or successors in title or howsoever else, from continuing with the illegal and unlawful development of ten (10) blocks of four (4) flats each on its property known as MN/1/16633 and registered as C.R. 50074".*** (the suit premises)

The applicants contend that they intend to file an appeal against the ruling of **Omollo, J**., delivered on 30th July 2015. The said ruling was in respect of two applications; one by the applicants, seeking injunctive orders similar to those sought herein against the respondents; save to state that in that

application, the injunction sought was to be in place pending the hearing and determination of the suit ***Mombasa ELC No. 103 of 2014; Bob & Ursulla Brenneisen & Others v. Shanzu Waterfront Limited***. The second application was by the respondents, who sought a discharge of the hitherto subsisting *ex parte* injunctive orders which the applicants were then enjoying while their application was pending determination interpartes.

The applicants' case in the High Court was that the respondents had commenced construction works on the suit premises, without the relevant approvals from the County Government of Mombasa and that if at all such approvals were obtained, they were dubiously and unprocedurally obtained, and further that the intended construction was bound to affect the eco-system and the flora and fauna of adjacent properties, owned by the applicants.

In their response, the respondents relied on approvals issued to them by the County Government of Mombasa and submitted that, therefore, all their activities undertaken on the suit premises were within the law.

By the impugned ruling, the court declined to grant the orders as prayed but instead granted a conditional injunction against the respondent stating in part as follows:-

> ***"In conclusion, I shall grant a conditional injunction for a period of 90 days in order for the defendant to make available measures it has/will undertake to protect the ecosystem. This will be done through an environmental audit of the development. To*** *(sic)* ***this regard, I direct NEMA to carry out an audit as provided under section 3(3)(c) of EMCA at the defendant's expense and make a report to this court within 90 days on the state of environment of the area where the development is, thereafter this court will make appropriate orders whether to lift the injunction upon compliance and or sustain it pending determination of case or further orders as may be appropriate"***

The court further held that no *prima facie* case had been made out to warrant the grant of the injunction in favour of the applicants since they had failed to show the invalidity of the approvals given to the respondents. In addition, the court observed the applicants, having failed to enjoin the County Government of Mombasa in the suit, could not be heard to question the validity of its approvals and that in any case, the applicants had never sought the nullification of the said approvals if indeed they believed that they were fraudulently obtained.

That ruling is what has precipitated the application before this Court; which is expressed to be brought under **sections 3A** and **3B** of the **Appellate Jurisdiction Act** and **rule 5(2)(b**) of this **Court's rules**. The same is based on two broad grounds: that the applicants intend to file an arguable appeal and that unless these orders are granted, the intended appeal will be rendered nugatory as the High Court continues to carry on with proceedings in relation to the subject matter despite the fact that the said court is *functus officio*. By purporting to 'revisit' the matter at a later date, it was argued the court was proposing to act beyond its jurisdiction as it is already *funcus officio*. Lastly, it was submitted that should the orders herein sought not be granted, the appeal shall be rendered nugatory as the flora and fauna shall have by the time the intended appeal is heard and determined, been irreparably damaged and that the conditional injunction was not what the applicants had sought.

Opposing the application ***Mr. Amjad Abdul Rahim***, a director of the respondent swore a replying affidavit on 9th February 2016 in which he contended that the High Court did not dismiss the applicants' application and cannot therefore be *functus officio.* He further contended that the applicants have not shown that they indeed occupy adjacent properties as to be in a position to suffer damage; that even if they were in close proximity, damage to flora and fauna was not irreparable; and that new flora and fauna can be cultivated or the loss thereof adequately compensated by way of damages.

The parties' respective positions were reiterated at the hearing, with ***Mr. Khagram*** and ***Mr. Sarvia*** appearing for the applicants and the respondent respectively.

In applications under **rule 5(2)(b),** this Court considers two factors namely whether the applicant has established an arguable appeal and secondly, if the intended appeal would be rendered nugatory if the order sought is denied. In this connection this Court in the case of ***Stanley Kangethe Kinyanjui versus Tony Ketter & 5 Others, [2013] eKLR,*** succinctly expressed itself thus on the issue:-

> ***"We note that such an application is everyday fare in this Court and the principles on which the Court acts if invited to exercise that jurisdiction, is old hat. This Court, in accordance with precedent, has to decide first, whether the applicant has presented an arguable appeal, and second, whether the intended appeal would be nugatory if these interim orders were denied. From the long line of decided cases (although none was cited by counsel, perhaps due to their notoriety) on Rule 5(2)(b) aforesaid, the common vein running through them and the jurisprudence underlying these decisions can today be summarized as follows:-***

i. ***In dealing with rule 5(2)(b) the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this court. See Ruben & 9 Others versus Nderitu & another (1989) KLR 459;***

ii. ***The discretion of this Court under rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so;***

iii. ***The Court becomes seized of the matter only after the notice of appeal has been filed under rule 75. Halai & another versus Thornton & Trupin (1963) Ltd. [1990] KLR 365;***

iv. ***In considering whether an appeal will be rendered nugatory the Court must bear in mind that each case must depend on its own facts and peculiar circumstances. David Morton Silverstein versus Atsango Chesoni, Civil Application No. Nai 189 of 2001;***

v. ***An applicant must satisfy the Court on both of the twin principles;***

vi. ***On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. Damji Pragji Mandavia versus Sara Lee Household & Body Care (K) Ltd. Civil Application No. Nai 345 of 2004;***

vii. ***An arguable appeal is not one which must necessarily succeed, but one which out to be arguable fully before the court; one which is not frivolous. Joseph Gitahi Gachau & another versus Pioneer Holdings (a) Ltd. & 2 Others. Civil Application No. 124 of 2008;***

viii. ***In considering an application brought under rule 5(2)(b) the Court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal. Damji Pragji (supra);***

ix. ***The term 'nugatory' has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. Reliance Bank Ltd versus Norlake Investments Ltd [2002] 1 EA 227 at page 232;***

x. ***Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or it is not reversible, whether damages will reasonably compensate the party aggrieved; and***

xi. ***Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecunity, the onus shifts to the latter to rebut by evidence the claim. International Laboratory for Research on Animal Diseases versus Kinyua [1990] KLR 403."***

In this case, it is not in doubt that a notice of appeal was lodged on 31st July 2015 and that therefore, the process of appeal has been set in motion. Some of the arguable points the applicants will be advancing at the hearing of the intended appeal are that the learned judge failed to appreciate the evidence placed

before her, granted orders not sought in the application and that she misapprehended the law by failing to appreciate that the court was rendered *functus officio* upon delivery of the ruling. No doubt these grounds are not frivolous. They are arguable and will be eventually tested at the hearing of the intended appeal.

How about the 2nd limb? The applicants contend that the intended appeal shall be rendered nugatory on account of the destruction of flora and fauna and indeed the eco-system during the construction. However, the applicants have not shown the manner of the feared destruction and whether they are irreplaceable. No indication was made to the effect that the eco-system is made up of rare species of the flora and fauna, for example. Indeed, the respondents contend that the same can easily be replaced by replanting. There is nothing on record to controvert that assertion. In a nutshell the applicants have not demonstrated to our satisfaction how the intended appeal will be rendered nugatory if the injunction sought is denied.

The applicants having failed to satisfy the twin limbs, the fate of the application is obvious. It is for dismissal with costs to the respondents.

It is so ordered.

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

ASIKE MAKHANDIA

JUDGE OF APPEAL

W. OUKO

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR