



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, G.B. M. KARIUKI & OTIENO-ODEK, JJ.A)

CIVIL APPLICATION NO. 168 OF 2014 (UR 131/2014)

BETWEEN

THE PUBLIC SERVICE CLUB REGISTERED TRUSTEES... APPLICANTS

AND

MARY WANGECI KETHI KARIITHI.....1ST RESPONDENT

MARGARET NJOKI KARANJA.....2ND RESPONDENT

NGARI KARIITHI 3RD RESPONDENT

KIBUGA KINYUA KARIITHI4TH RESPONDENT

(All four duly appointed Executors and holders of a Grant of Probate

of the Will of GEOFFREY KAREKIA KARIITHI)

(An application for injunction pending the hearing and determination of an appeal from the judgment and decree of the High Court of Kenya at Nairobi (Nyamweya, J.) dated 17th June 2014 in H.C.C.C. NO. 3000 OF 1993)

RULING OF THE COURT

1. The suit properties in this application are **Nairobi LR No. 209/1408** comprising 18.95 acres or thereabouts and **LR No. 209/9629** comprising 1.404 hectares or thereabouts. The dispute is whether the smaller parcel being **Nairobi LR No. 209/9629** comprising 1.404 hectares is part of the larger parcel **Nairobi LR No. 209/1408** which comprises 18.95 acres. The two properties are registered in the names of different proprietors.
2. To appreciate the origin of the dispute, the following facts are pertinent.
 - a. *The applicant, The Public Service Club Trustees, is the registered proprietors of the larger parcel of land being Nairobi LR No. 209/1408 which comprises 18.95 acres or thereabouts.*
 - b. *The respondents, are executors of the Will of the late Geoffrey Karekia Kariithi and, are the*

registered proprietors of the smaller parcel of land being Nairobi LR No. 209/9629 comprising 1.404 hectares or thereabouts.

- c. *The larger parcel of land is all that piece of land situate in Nairobi within the City of Nairobi and otherwise known as the Public Service Club. At all material times “The Public Service Club” as a legal entity, conducts its affairs and acts through Trustees of the Club.*
 - d. *In 1922, the Government of the Colony of Kenya granted the Civil Service Athletic Association (the predecessor to The Public Service Club) an Inland Grant IR 2077 being Nairobi Land Reference No. 209/1408 measuring approximately 18.95 acres. This parcel of land is the larger parcel of the two suit properties. As successor in name and title, the applicant continues to be the registered proprietor of this parcel of land. The applicant since 1922 to this date has been in possession of this parcel of land.*
 - e. *At all material times in this suit, the Late Geoffrey Karekia Kariithi was one of the trustees of The Public Service Club and a Permanent Secretary in the Office of the President and later Head of the Civil Service.*
 - f. *In an undated Minutes duly signed by Chairman (Mr. J.G. Kiereini), Secretary (Prof. J. Mati) and Hon. Treasure (Mr. E.N. Wainaina) and attached to the Respondents Replying Affidavit attached to the present application, it is minuted that the Executive Committee of the Public Service Club resolved to surrender the title deed for LR No. 209/1408 to the Government of Kenya and that the same title deed be registered in the name of the Permanent Secretary, Office of the President/Head of Civil Service. The minutes referred to above show that the then Patron of the Public Service Club was the late G.K. Kariithi.*
 - g. *It appears that subsequent to the receipt of the aforementioned Minutes, the Commissioner of Lands proceeded to excise 1.404 hectares of land from LR No. 209/1408 and allotted the same to Mr. G.K. Kariithi. A new certificate of title was issued for the 1.404 hectares and the parcel was registered as Nairobi LR No. 209/9629 in the name of the late G.K. Kariithi. This is the smaller parcel of the two suit properties.*
3. The applicants in the suit filed before the High Court contend that the smaller parcel LR No. 209/9629 is part and parcel of the larger parcel LR No. 209/1408 and that the Commissioner of Lands had no power to allot, alienate and or excise any portion of the parcel and register the same to any other person. It is the applicant’s contention that the Commissioner of Lands could only allot and alienate Government land and the larger parcel LR No. 209//1408 was not an unalienated government land, the parcel was not available for allotment and alienation. In contrast, the respondents contend that the applicants had surrendered the larger parcel LR No. 209/1408 to the Government and the said parcel became government land available for allotment and alienation; that the Commissioner of Lands properly excised, allotted and alienated the smaller parcel LR No. 209/9629 and registered the same in the name of the late G.K. Kariithi.
 4. In the amended plaint filed at the High Court, the applicants aver that the late Geoffrey Karekia Kariithi, in breach of his duties as Trustee of the Public Service Club caused to be alienated from the Club property a portion of LR No. 209/1408 and caused the excised portion measuring 1.404 hectares to be registered in his name as LR No. 209/9629; that the late G.K. Kariithi’s conduct was a fraud and breach of trust.
 5. In the plaint before the trial court, the applicant sought orders for declaration that it was the owner and entitled to possession of LR No. 209/9629; an order directed at the Registrar of Titles to rectify the register, an injunction to restrain the respondents or his agents from alienating and or in any manner interfering with LR No. 209/9629 and exemplary damages for breach of trust.
 6. The respondents filed an amended defence and contended *inter alia* that the plaint was bad in law and ought to be struck out. The core of the respondents defence was that the suit was time bared

- under the provisions of **Section 7** of the **Limitation of Actions Act**; that if the late Geoffrey Kariithi had perpetrated a fraud, it was inconceivable that his co-trustees would have failed to find out such a fraud for a period of 18 years and that the applicants are estopped in law from filing a suit alleging fraud since they were aware that a portion of the larger parcel of land had been excised and allotted to three individuals including the late G.K. Kariithi.
7. The trial court upon hearing the parties and their witnesses delivered judgment dated 17th June 2014 dismissing the applicants claim to the smaller parcel LR No. 209/9269. In dismissing the applicants claim, the trial court held that the claim and suit was barred under **Section 7** of the **Limitation of Actions Act** for the reason that the suit was filed on 18th June 1993, 18 years after the cause of action arose in March 1975. The trial court held that the applicants were not only deemed to have been aware of the letter dated 12th November 1973 but could also have discovered the excision and allotment of LR No. 209/9629 had they exercised reasonable care and diligence and maintained interest in the dealings affecting LR 209/1408.
 8. Aggrieved by the judgment of the trial court, the applicant filed a notice of appeal and has lodged draft grounds of appeal. Pending the hearing and determination of the intended appeal, the applicants have moved this Court under **Rule 5 (2) (b)** seeking an injunction to restrain the respondents, their servants or agents from alienating, selling, and or interfering with the applicants user and or dealing with LR No. 209/9629 on the ground that the said parcel is part and parcel of LR No. 209/1408.
 9. At the hearing of the application, learned counsel Mr. J. P. Machira represented the applicant while learned counsel Mr. E.N. Mwangi appeared for the respondents.
 10. The applicant urged that there are arguable grounds in the intended appeal and which appeal shall be rendered nugatory if injunctive orders are not granted. It was submitted that whereas the applicant is in possession of the disputed property, the trial court held that its claim on the property was time barred; that it is an arguable ground whether limitation can apply against a person in actual and physical possession of the suit property and that in the instant case, it is arguable whether the trial court properly invoked **Section 7** of the **Limitation of Actions Act** against the applicant.
 11. On nugatory aspects, counsel for the applicant relied upon the affidavit in support as deposed by **Mr. Njoroge Ndirangu** and submitted that the applicant was apprehensive that the respondents were likely to alienate LR No. 209/9629 and or interfere with the applicants use and occupation of the premises; that LR No. 209/9629 is part of the larger LR No. 209/1408; that the trial court erred in finding that the applicants suit was time barred under **Section 7** of the **Limitation of Actions Act**; that the applicant has never surrendered to the Government of Kenya its title to LR No. 209/1408; that the applicant is in possession of its title document and continues to hold and have custody of the same; that despite the undated letter indicating surrender of the title, the title to LR 209/1408 was never surrendered; that there can be no two certificates of title on one parcel of land and that there can be no certificate of title overlapping another parcel of land.
 12. The respondents counsel urged in opposition that both the applicant and respondents were registered proprietors of two different parcels of land; that deceased parcel of land being LR No. 209/9629 exists independently of the applicants property and that the applicant has refused to accept this reality; that the applicant has refused to surrender its original title to enable subdivision to be done; that the respondent's title was issue after re-planning of the area and the re-planning that was done was at the initiative of the applicant and the then Nairobi City Council; that following Nairobi City Council decision, the area formerly known as **Dog Section** was surrendered by the applicant and appropriate resolution passed by the applicant's officials; that by letter dated 15th March 1975, the deceased was allocated plot LR No/ 209/9629 when he had already exited from any leadership position in the applicant Club; that the original parcel of land held by the applicant was sub-divided into 3 (three) plots i.e. LR 209/9629; LR 209/9627 and a smaller plot being LR 209/1408; that all the three plots have separate, distinct and distinguishable

titles and parcels of land; that there is nothing on record to demonstrate that the deceased plot has encroached or overlaps the applicants property; that there in no way in which the title to the deceased's plot LR No. 209/9629 can be faulted yet the neighbours title LR No. 209/9627 remains valid; that the National Land Commission has confirmed that LR No. 209/9629 does not belong to the applicant; that the trial court correctly held that the applicants claim and suit is statute barred; that the trial court did not give any positive orders that can be stayed by this Court; that because the applicant has no proprietary interest in LR No. 209/9629, the intended appeal cannot be rendered nugatory and the applicant can suffer no loss or prejudice if injunctive orders are not granted; that the applicant placed a caveat on the suit property in 1993 which caveat is still in place and that the estate of the deceased stands to suffer prejudice and loss if injunctive orders are granted as the estate shall be denied the use, occupation and mesne profits from the property. The respondents urged us to decline to grant the injunctive orders prayed for.

13. We have considered the grounds in support of the instant application, the written and oral submissions as well as the bundle of authorities. This being an application under **Rule 5 (2) (b)** of the rules of this Court, this Court must be satisfied in the twin guiding principles that the intended appeal is arguable; it is not frivolous and that unless a stay or injunction is granted, the appeal or the intended appeal, if successful, would be rendered nugatory – see **Githunguri vs. Jimba Credit Corporation Ltd. (No. 2) (1988) KLR 838**; **J.K. Industries Ltd. vs. Kenya Commercial Bank Ltd. [1982 – 88] 1 KAR 1088** and **Reliance Bank Limited (In Liquidation) vs. Norlake Investments Limited – Civil Application No. 98 of 2002 (unreported)**.
14. In the instant case, a notice of appeal has been filed and draft grounds of appeal are attached to the supporting affidavit. Whereas the applicant contends that the intended appeal is arguable, the respondents assert that it is not arguable. This Court has on numerous occasions stated that in an application for stay, it suffices that a single arguable point is identified. It is trite that the arguable ground of appeal is not one that must succeed but one that is arguable.
15. We have analyzed the judgment of the trial court and the proposed ground of appeal. The first issue for our determination is whether the intended appeal is arguable. The *ratio decidendi* of the trial court's judgment is that the applicants claim was statute barred under **Section 7** of the **Limitation of Actions Act**. The applicant contends that the limitation period and time cannot run against the person in possession of the disputed property and that time and limitation runs against the person dispossessed of the property and not the person in possession. The trial court's judgment is premised on the notion that limitation period and time can run against a person in possession of the disputed property. We have considered the applicants submission on limitation and we are satisfied that there is a disclosed arguable ground of appeal in relation to applicability of the **Limitations of Actions Act** against the applicant who is a person in possession of the disputed property. Further, note that the trial court made a determination that the doctrine of estoppel applies against the applicants; in our view, it is an arguable ground of appeal whether the doctrine of estoppel can divest a person proprietary right or interest in property; it is also an arguable point of fact and law whether the applicant's larger parcel of land was in fact and in law surrendered to the Government; it is also a disputed and arguable point of fact when the deceased breach of trust or fraud, if any, was discovered by the applicant and finally it is an arguable ground of appeal whether the trial court erred in failing to make a determination whether the respondent's parcel of land overlaps and is within the applicants parcel of land.
16. On nugatory aspects, we note that the dispute in relation to LR No. 209/9629 started well back either in 1973, 1975 or 1993. We further note that neither the deceased nor the respondents have been in actual physical possession of the suit property from 1981 when the deceased became the registered proprietor of the disputed LR No. 209/9629.
17. As pointed out in this Court's decision in **Equity Bank Limited -vs- West Link MBO Limited- Civil Application No. 78 of 2011** an injunctive order is designed to empower this Court to entertain interlocutory applications for preservation of the subject matter of the pending appeal in order to ensure the just and effective determination of appeal. Musinga, J.A in **Equity Bank**

Limited (supra) expressed himself as follows:

“Courts of law exist to administer justice and in so doing they must of necessity balance between competing rights and interests of different parties but within the confines of law, to ensure the ends of justice are met. Inherent power is the authority possessed by a Court implicitly without it being derived from the Constitution or Statute.”

18. The applicants submitted that the intended appeal shall be rendered nugatory if injunctive orders are not granted; that the applicant is reasonably apprehensive that the respondents may alienate and or alter the nature and character of the disputed property thereby altering the substratum of the case and rendering the intended appeal nugatory. On our part, we are satisfied that if the respondents alienated or sub-divided the LR No. 209/9629, the intended appeal shall be rendered nugatory. Further, being cognizant that the dispute between the parties has been long drawn, we are inclined to preserve the status quo and subject matter of dispute between the parties to ensure that the ends of justice are met. The upshot is that we find the Notice of Motion dated 8th July 2014 has merit and is allowed.
19. Accordingly, we hereby issue an injunction to restrain the respondents, their servants, employees or agents from alienating, selling and or interfering with the applicant’s user and or dealing with LR No. 209/9629 until the hearing and determination of the intended appeal. Costs in the appeal.

Dated and delivered at Nairobi this 6th day of May, 2016

E. M. GITHINJI

JUDGE OF APPEAL

G.B.M. KARIUKI

JUDGE OF APPEAL

J. OTIENO-ODEK

JUDGE OF APPEAL

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

DEPUTY REGISTRAR