



IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPLICATION NO. 24 OF 2016

BETWEEN

ABDALLA ALI ABDULRAHAMAN.....APPLICANT

AND

ALIYA APARTMENTS LTD.....1ST RESPONDENT

MAHMOOD HAIDERALI KHIMJI.....2ND RESPONDENT

SUKAINA MAHMOOD KHIMJI.....3RD RESPONDENT

(Application for injunction pending the hearing and determination of an intended appeal against

the ruling and order of the High Court of Kenya at Mombasa (Muriithi, J.) dated 3rd May 2016

in

HCCC No. 236 of 2002)

RULING OF THE COURT

The applicant, *Abdalla Ali Abdulrahman*, is aggrieved by the ruling of the High Court at Mombasa (*Muriithi, J.*), dated 3rd May 2016 in which the learned judge declined to review his earlier order of 14th May 2014 directing the County Government of Mombasa and the Land Registrar, Mombasa to create a road of access to the applicant's parcel of land, *Mombasa/Block XVII/108 (the suit property)*. The applicant lodged a notice of appeal on 17th May 2016 and followed it up with the Motion on Notice now before us, in which he seeks, pending the hearing and determination of his intended appeal, an injunction restraining the *Mahmood Haideraji Khimji (the 2nd respondent)* and *Sukaina Mahmood Khimji (the 3rd respondent)* from closing an existing temporary road of access to the suit property.

In summary, the background to the application before us may be stated as follows. The suit property abutts *Mombasa/Block XVII/107*, which was previously owned by the *1st respondent, Aliya Apartments Ltd*, before selling and transferring it to the *2nd* and *3rd* respondents on 1st March 2005. Both parcels of land are subdivisions of Plot No. 825/111 and according to the Land Registrar, Mombasa, neither has a

road of access.

By a plaint dated 12th June 2012 and amended on 15th April 2011, the applicant filed a suit against the three respondents contending that the Mombasa Municipal Council had allowed him to access the main road through two properties, namely the respondents' property and **Plot No 106/XVII/MI**, whose owner was not made a party to the dispute. Illegally and without justification, the applicant averred, the respondents had closed the access through their land. He accordingly prayed for an order compelling the respondents to unconditionally open the road of access through their property.

Thereafter both the applicant and the respondents filed interlocutory applications seeking various interim reliefs. By an order issued on 14th May 2012, the learned judge directed the Land Registrar, Mombasa, in accordance with **section 21** of the repealed **Registered Land Act**, to ascertain the boundary between the suit property and the respondents' property, the existence or otherwise of an access road through the latter property, and to report to court within 30 days.

The Registrar duly visited the two properties and submitted to court a report dated 15th June 2012. The salient points of the report were that neither parcel had an access road; that the closest road to the respondents' property is along Tom Mboya Avenue across Plot No. Mombasa/Block XVII/106; that the closest road to the suit property was an access road southeast, between Plots Nos. Mombasa/Block XVII/1298 and 1299; that the said access road was 2.5 meters from the actual position and was no better option; and that the road which could have best served the suit property was blocked due to uncontrolled construction of Hantoosh Filling Station and extension of *kiosks* and *bandas* which were recommended for demolition to create access.

The Registrar proposed three options to resolve the problem as follows: one, the applicant and the respondents enter into and register a memorandum of understanding maintaining the prevailing *status quo*; two, the demolition of all illegal constructions and the opening up of the access road that was blocked; and three, a court order creating an easement to serve both the suit property and the respondents' property. After hearing counsel for the parties and considering the Registrar's report, the learned judge declined to sanction creation of an access road through the respondents' property. Instead he issued the following order:

“1. That the county Government of Mombasa and the Land Registry, Mombasa do create a permanent access road to parcels of land namely Mombasa/Block XVII/107 and Mombasa/Block XVII/108 from Hantoosh Filing Station as per the Town Planning Act which will involve demolition of all kiosks and part of the illegal structures...”

2. That for avoidance of doubt the court does not make any order for the creation of an easement or right of way in favour of the plaintiff's parcel of land Mombasa/Block XVII/108 on the defendant's parcel of land Mombasa/Block XVII/107 as proposed in recommendation No. 3 of the Land Registrar's Report dated 15th June 2012;

3. That the defendants who are aggrieved by the road of access sought to be created through their parcel of land do serve the order of the court on the County Government of Mombasa and the land Registrar, Mombasa;

4. That this matter shall be mentioned after sixty 60 days to confirm compliance with the order of the court herein and for final orders for the settlement of the dispute in the suit;

5. That the parties be at liberty to apply.”

On 29th September 2014, the applicant went back to the High Court, seeking review of the above orders. The grounds for review were that it was not feasible to create the road of access as ordered by the court and that the information was not within the applicant's knowledge. By the ruling dated 3rd May 2016, the learned judge dismissed the application and held that there was no new evidence that was not within the

knowledge of the applicant or which he could not have discovered by due diligence; that there was no mistake or error apparent on the face of the record; that there was no other sufficient reason advanced for review; that the same land registrar who was purporting that the order of the court was unimplementable was the same registrar who had recommended it as one of the viable options; and that on the whole the applicant was seeking an easier option entailing creation of an easement over the respondents' property without their consent. It is that order that the applicant seeks to appeal and in the meantime he seeks an injunction, whose effect would be to allow him to access the suit property through the respondent's land.

Relying on the applicant's affidavit sworn on 24th May 2016, **Mr. Munyithya**, his learned counsel submitted that the applicant had an arguable appeal; that he had used the access road through the respondents' property for some time; that the respondents had threatened to close it; that without that road of access the applicant would not otherwise be able to access his property; that the effect of denial of the road of access would be to violate the applicant's right to property; and that unless the injunction sought was granted, the intended appeal would be rendered nugatory.

The respondents resisted the application vide a replying affidavit sworn by the 2nd respondent on 14th June 2016. Their learned counsel, **Mr. Njenga** submitted that the learned judge had properly dismissed the application for review; that the applicant had not satisfied the threshold for review set by Order 45; that the intended appeal therefore was not arguable; that the applicant's demand of an access road through their property would result in direct violation of the respondents' right to property; that the applicant had developed the suit property without passing through the respondents' land; that it was only on 17th October 2011 that the applicant had, illegally, violently, forcefully and without any colour of right, created a road of access through the respondents' property; that the order for *status quo* which had enabled the applicant to use the access road he had illegally created was vacated and or lapsed on 3rd May 2016; and that the applicant has an alternative access road entailing removal of illegal structures rather than invasion of the respondents' property, which he was trying to avoid.

To entitle the applicant to the order of injunction pending appeal that he craves, he must satisfy us that he has already filed a notice of appeal and that his intended appeal is arguable or is not frivolous and that unless we grant the injunction, it will be rendered nugatory. (See **Safaricom Ltd. v. Ocean View Beach Hotel Ltd. & 3 Others, CA No 325 of 2009** and **Jaribu Holdings Ltd v. Kenya Commercial Bank Ltd, CA No 314 of 2007**). An arguable appeal is not one that must necessarily succeed on appeal; it is merely an appeal that raises even one bona fide ground that deserves to be considered by this court. (See **Kenya Tea Growers Association & Another v. Kenya Planters & Agricultural Workers Union CA No. Nai. 72 of 2001**).

Whether or not the intended appeal will be rendered nugatory depends on the circumstances of each case. (See **Silverstein v. Chesoni [2002] 1 KLR 867**). Nevertheless, an appeal will be rendered nugatory if what is sought to be stayed happens and is irreversible or is incapable of being reasonably compensated by award of damages to the party aggrieved. (See **Stanley Kangethe Kinyanjui v. Tony Ketter & 5 Others, CA. No. 31 Of 2012**). Lastly the applicant must satisfy both considerations, i.e. that the appeal is arguable and that it will be rendered nugatory without the order of injunction. It will not suffice to satisfy only one of the considerations. (See **Republic v. Kenya Anti-Corruption Commission & 2 Others [2009] KLR 31**).

The applicant argues that his intended appeal is arguable because the learned judge misapprehended the considerations for review under Order 45 and that the realization that the order of the court dated on 14th May 2014 was incapable of implementation constituted new and important matter or evidence which was not within the knowledge of the applicant or sufficient reason to warrant review of the order. He also intends to argue that denial of the road of access to his property constitutes a violation of his right to property.

On whether the intended appeal will be rendered nugatory if it is successful and there is no order for injunction, the applicant argues that he will suffer irreparable loss and damage because he will have been denied access to his property. While admitting that the respondents are not at fault and are not responsible for his predicament, he nevertheless contends that he had used the road of access through the respondents'

land for some time and that the balance of convenience was in letting him to continue using the road pending the hearing and determination of the appeal.

The respondents argue in reply that there is no arguable appeal demonstrated and that the High Court did not err in dismissing the application for review because the matters relied upon were within the knowledge of the applicant and the Land Registrar or could have been easily established after exercise of due diligence. They argue further that the applicant should not be allowed to violate their right to property under the guise of protecting his own right to property. They contend too that the intended appeal will not be rendered nugatory because the order for *status quo* that allowed the applicant to access his property through their land lapsed with the dismissal of the application for review and had not been reinstated and that the applicant has an alternative road of access, which he is unwilling to use.

We have no problem in holding that the applicant has demonstrated an arguable appeal, which deserves to be considered on its merits. One of the issue that is certainly not idle is the possible violation of the applicant's and the 2nd and 3rd respondents' property rights. However, will that appeal be rendered nugatory if an order of injunction is not granted? The applicant concedes that the respondents are not responsible for his predicament. He has not controverted the respondent's submissions that when he developed his property, he used an alternative road of access to his property, which did not entail passing through the respondents' property. The order of the High Court that the applicant sought to review identified a road of access to his property which, to actualize, required removal of illegal constructions and structures.

In our view, it is not possible to hold, in these circumstances, that the balance of convenience favours the applicant; it will be tantamount to saying that his right to his property is superior to the right of the respondents to their property, particularly when the applicant readily concedes that the respondents are not to blame for the prevailing situation. We are satisfied that the applicant has not established that his intended appeal will be rendered nugatory, in the absence of an order of injunction. Accordingly, the Motion dated 24th May 2016 is hereby dismissed with costs to the respondents. It is so ordered.

Dated and delivered at Malindi this 15th day of July, 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