IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, SICHALE & KANTAI, JJ.A) CIVIL APPLICATION NO. NAI. 210 OF 2015

BETWEEN MOHAMED OMAR (Suing as Secretary and on behalf of all members, NASIB FARMERS GROUP) ..……..... APPLICANT

AND

AHMED ABDI TATU ……..……...…….…… 1ST RESPONDENT

HUSSEIN DAGANE SHEIKH ……..……...……. 2ND RESPONDENT

SOBOW ADBIALI ……..…….…… 3RD RESPONDENT

IBRAHIM ABDIALI ……..……...…….. 4TH RESPONDENT

AHMED MUSSEIN AFEY ….…..…….…….. 5TH RESPONDENT

ABDIKADIR ADAN HUSSEIN ……..…..…..……. 6TH RESPONDENT

IFTIN ALI …….…….. 7TH RESPONDENT

HABIBA HIRE ……..……...……..…… 8TH RESPONDENT

(An application for an injunction pending the hearing and determination of the intended appeal against the ruling of the High Court of Kenya at Nairobi (Gitumbi, J.) dated 12th June, 2015

in **H.E.L.C No. 640 of 2014)**

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RULING OF THE COURT

1. The application before us is brought by the applicant on his own behalf and on behalf of the members of Nasib Farmers Group (hereinafter referred to as the Group). The application is anchored under ***Rule 5(2)(b)*** of this ***Court?s Rules*** (the Rules) and seeks *inter alia:* -

- ***An injunction restraining the respondents? whether by themselves, their workers, servants or agents or otherwise howsoever from entering or using Nasib Farm (suit property) or any part thereof or continuing with the construction of structures thereon or***

in any way interfering with the group?s quiet possession and enjoyment of all rights thereto pending the hearing and determination of the intended appeal.

2. It is imperative at this juncture to set out a brief background in order to place the application in context. According to the applicant, the Group took possession of a parcel of land measuring 650 acres along Garissa- Lamu Road in Tana River County in the year 1972 and that the members of the Group cultivated and developed the same with the authority of the Government of Kenya. Following the Group's application, the parcel was allocated under the name Nasib Farm to the Group by the County Council of Tana River vide an allotment letter dated 17th December, 2009. While processing of the title was underway, the Ministry of Lands realized that the parcel was trust land and advised the County Council of Tana River to first set it apart. The Council did so but while doing so reduced the suit property to approximately 214 acres. The applicant's contention is that since then the Group has been in quiet possession of the suit property until the year 2013 when the respondents albeit at different intervals trespassed on portions of the suit property and damaged it by cutting trees and digging trenches for purposes of erecting buildings thereon. According to the applicant, despite demand that they should stop trespassing, the respondents have refused to do so.

3. The foregoing instigated the applicant to file suit in the High Court being H.E.L.C No. 640 of 2014 and simultaneously an interlocutory application therein seeking similar orders as in the application before us. The respondents in opposing the application, maintained that the parcel they occupy belongs to Bour-algy Community and is situated in Garissa County while the Group lays claim on a parcel allegedly situated in Tana River County; the two counties are separated by River Tana and titles in Garissa County are issued by County Council of Garissa. Consequently, no orders could be issued against the respondents' parcels which are distinct from what the Group claims. Upon considering the application, the High Court vide a ruling dated 12th June, 2015 dismissed the same on the ground that the suit property had not been clearly identified. It is that decision that is subject of the intended appeal.

4. Turning back to the application, the grounds in support thereof are that firstly, the members of the Group are the bonafide owners of the suit property; the respondents have trespassed on the suit property and are threatening to forcibly subdivide and ultimately allocate the same to third parties to the detriment of the Group. Secondly, the intended appeal is arguable and unless the order sought is granted the same would be rendered nugatory.

5. Mr. A. Nyandieka, learned counsel for the applicant, informed us that the appeal had already been filed, that is, Civil Appeal No. 222 of 2015. On the arguability of the appeal, he argued that the learned Judge failed to take into account the documentation availed by the applicant which clearly identified the suit property. He further submitted that unless the injunction is granted the substratum of the appeal would be lost rendering the appeal nugatory.

6. Mr. R. Ongegu holding brief for Mr. Amuga, learned counsel for the respondents, submitted that there was no title in favour of the group and further that the respondents had demonstrated that they occupied parcels situated in Garissa County and not in Tana River County. In his view, the applicant had failed to demonstrate prejudice the members of the group would suffer in the event the injunction was not granted. He also argued that the appeal was not arguable and urged us to dismiss the application

7. In a brief rejoinder, Mr. Nyandieka argued that the respondents did not file any affidavit in response to the application before us hence they did not demonstrate that the Group was not in possession of the suit property. He urged us to allow the application.

8. We have considered the application, submissions by counsel and the law.

9. In an application under ***Rule 5(2) (b)*** of the Rules, the applicant ought to establish the twin principles before the Court can exercise its discretion in their favour. These principles were set out in this Court's decision in ***Patrick Mweu Musimba –vs- Richard N. Kalembe Ndile & 3 others [2013] eKLR*** as follows;

"The law applicable in respect of applications under Rule 5(2)(b) of the Court of Appeal Rules is

well settled. Whereas the court has unfettered discretion to grant the orders sought, there are some principles on which suc discretion must be based. In order for an applicant to succeed in such applications, he must establish that he has an arguable appeal i.e. one that is not frivolous while also bearing in mind that an arguable appeal is not necessarily one that will succeed. He must in addition establish that if the orders of stay or injunction sought are not granted, then in the event his appeal or intended appeal succeeds, the same would be rendered nugatory or ineffective." Emphasis added.

10. We are also guided by the decision in ***Eric Makokha & 4 Others –vs- Lawrence Sagini & 2 Others [1994] eKLR*** where this Court in an application under ***Rule 5 (2) (b)*** stated:

"An application for injunction under Rule 5 (2) (b) is an invocation of the equitable jurisdiction of the Court. So its grant must be made on principles established by equity. One of it is represented by the maxim that equity would not grant its remedy if such order will be in vain. As is said, „Equity, like nature, will do nothing in vain?. On the basis of the maxim, courts have held again and again that it cannot stultify itself by making orders which cannot be enforced or grant an injunction which will be ineffective for practical purposes. If it will be impossible to comply with the injunction sought, the Court will decline to grant it."

11. On our part, we find that we are faced with the same dilemma as the High Court, in that the actual description of the suit property is unclear. In as much as it is referred to as Nasib Farm its actual physical location is uncertain bearing in mind that the applicant contends that it is situated in Tana River County while the respondents contend that it is situate in Garissa County. We also cannot help but note that the documents the applicant relies on do not in any way remedy the situation, particularly the allotment letter which neither sets out the description nor the location of the property allocated to the Group. Suffice to state that it remains a contested issue as to whether the land is owned by the Group or the respondents. We therefore find that the applicant has not satisfied the first limb of arguability of the appeal.

12. Having come to the above conclusion, we do not deem it necessary to consider whether the appeal would be rendered nugatory unless we order stay.

13. Consequently, we find that the application has no merit and is hereby dismissed with costs.

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

E. M. GITHINJI

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JUDGE OF APPEAL

F. SICHALE

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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