



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, MWILU & J. MOHAMMED, JJ.A)

CIVIL APPLICATION NO. NAI. 296 OF 2015 (UR 253/15)

BETWEEN

KHAIRUNNISA MOHAMEDALI HARUNANI.....1ST APPLICANT

SULEMAN ADULSHAKUR HARUNANI.....2ND APPLICANT

AND

NIRANJAN ZAVERCHAND SHAH

SHUSHILA NIRANJAN SHAH

PRADEEP BHANGWANJI SHAH

SUNANDA PRADEED.....RESPONDENTS

(An application for injunction against the respondents pending the hearing and determination of an intended appeal from the Ruling and Orders of the High Court of Kenya at Nairobi (Mutungi, J.) dated 11th December, 2015

in

ELC Case No. 1183 of 2014 (O.S)

RULING OF THE COURT

1. Before us is a notice of motion application brought pursuant to **Rule 5 (2) (b) & 41** of the Court of Appeal Rules (the Rules) wherein the applicants seek *inter alia*;

(i) An order of injunction restraining the respondents whether by themselves or through their agents/servants/employees or any other person claiming through or under them from wasting, damaging, charging, encumbering, alienating, selling, removing, transferring, conveying or disposing of the property known as L.R No. 1870/II/305 along Kabete Lane within Nairobi and all the buildings erected thereon and particularly those standing on a portion of the said property and described as covering the area measuring 5.2m by 13.4m by 11.45m and by 5.53m and as shown on the surveyor's map of June, 2014 pending the hearing and determination of the

intended appeal.

2. The genesis of the said application is that the applicants were the registered proprietors of all that parcel described as L.R. No. 1870/II/129 which they subdivided into two portions namely L.R No. 1870/II/304 and L.R No. 1870/305. The applicants thereafter sold the former parcel to the respondents and retained the latter. According to the applicants one of the terms of the sale agreement was that the applicants would continue to occupy and use the servants' quarter (herein after referred as the suit premises) which was situated on the respondents' parcel without any charges. Further, it was agreed that in the event the respondents wished to sell their parcel such sale would be subject to the applicants' right over the suit premises.

3. Subsequently, the applicants learnt of the respondents' intention to dispose of their parcel. Apprehensive that the disposal of the said parcel would be detrimental to their rights over the suit premises, the applicants filed suit in the High Court. Simultaneously, they also filed an interlocutory application seeking similar injunctive orders as in the application before us. Upon considering the application on merit, the High Court dismissed the same by a Ruling dated 11th November, 2015 on the ground that the applicants had failed to demonstrate a *prima facie* case. It is that decision that is the subject of the intended appeal.

4. Turning back to the application before us, the grounds in support thereof are that the applicants have been in uninterrupted, continuous and open occupation of the suit premises for a period of 31 years and as such have acquired rights over the same by way of adverse possession. The suit premises have great economic and sentimental value to the applicants. The respondents are bent in disposing their parcel together with the suit premises. The intended appeal is arguable and would be rendered nugatory in the event the orders sought are not granted. Further, damages would not in the circumstances be an adequate remedy.

5. In opposing the application, the respondents filed a replying affidavit sworn by the 3rd respondent. He deposed that the respondents being the registered proprietors of L.R. No. 1870/II/305 held absolute and indefeasible title over the parcel which was not subject to any encumbrances; no prescriptive rights had accrued to the applicants who had occupied the suit premises with the respondents' consent. He further deposed that the intended appeal was not arguable and would not be rendered nugatory in the event the injunction sought was not granted since damages would be an adequate remedy.

6. Elaborating on the arguability of the appeal, Mr. E. L. Lubulellah, learned counsel for the applicants, submitted that the learned Judge in the impugned ruling erroneously made final findings and predetermined the suit. In support of that line of argument counsel cited this Court's decision in ***Jared Sagini Keengwe -vs- Walter Onchwari & 2 Others (2014) eKLR***. Placing reliance on ***Mbugua Njunguna -vs- Elijah Mburu Wanyoike & Another (2004) eKLR*** he argued that adverse possession was applicable in this case. On the nugatory aspect, Mr. Lubulellah submitted that there was a real likelihood that the respondents would dispose of their parcel together with the suit premises to the detriment of the applicants.

7. On his part, Mr. J. Makanga, learned counsel for the respondents, argued that the learned Judge exercised his discretion judiciously in declining to grant the injunction sought. In his view, the intended appeal was frivolous. He urged the court to dismiss the application.

8. We have considered the record, submissions by counsel as well as the law. In ***Multimedia University & Another -vs- Professor Gitile N. Naituli (2014) eKLR*** this Court while considering an application under ***Rule 5 (2) (b)*** expressed,

“From the long line of decided cases on Rule 5(2) (b), the common vein running through them and the jurisprudence underlying those decisions was summarized in the case of Stanley Kangethe Kinyanjui -vs- Tony Keter & Others [2013] eKLR 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.

v. 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.

vi. The Court becomes seized of the matter only after the notice of appeal has been filed under Rule 75.

vii. In considering whether the appeal will be rendered nugatory the Court must bear in mind that each case must depend on its own facts and peculiar circumstances.

viii An applicant must satisfy the Court on both the twin principles.

ix. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised.

x An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous.

xi. 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.

xii. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.

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

9 Cautious not to make final findings on the intended appeal, we cannot help but note that the applicants did admit in their pleadings that they occupied the suit premises with the consent of the respondents and as such could they claim ownership by virtue of adverse possession? We also note that the agreement alluded to by the applicants was not reduced into writing contrary to **section 3 (3) of the Law of Contract Act**. That being the case we express our doubts on the arguability of the intended appeal.

10. On the nugatory aspect, we find that the applicants have not demonstrated to our satisfaction how the intended appeal would be rendered nugatory in the event that we do not issue the orders sought. Furthermore, in as much as the applicants claim that the suit premises has great sentimental value to them and is of colossal value, they failed to demonstrate that damages would not be an adequate remedy for any loss suffered in the event the intended appeal succeeds.

1 The upshot of the foregoing is that the application lacks merit and is hereby dismissed with costs to the respondents.

Dated and delivered at Nairobi this 7th day of October, 2016.

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

P. M. MWILU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR