



IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

(CORAM: OKWENGU, KIAGE & J. MOHAMMED, JJ.A.)

CIVIL APPLICATION NO. 123 OF 2010 (UR.97/2016)

BETWEEN

ALEXANDER NGOTHO NGUNYI.....1ST APPLICANT

MARY WANJIKU NDUNGU.....2ND APPLICANT

DANIEL MUCHEMI NGUNGYI.....3RD APPLICANT

ELIJAH NGUNYI WAGOI.....4TH APPLICANT

AND

JOHN NGUGI GACHAU.....RESPONDENT

(Being an application for a temporary injunction to issue compelling the respondent to reopen and restore the access road/footpath and its amenities and for staying orders staying any and for further proceedings of the High Court of Kenya at Nakuru (Munyao, J.), dated 31st March, 2016

in

H.C. ELC. No.235 of 2012)

RULING OF THE COURT

[1] ***Alexander Ngotho Ngunyi, Mary Wanjiku Ndungu, Daniel Muchemi Ngunyi and Elijah Ngunyi Wagogi***, (hereinafter referred to as the applicants), were defendants in High Court ELC Civil Suit No.235 of 2012 at Nakuru. ***John Ngugi Gachau*** who is now the respondent was the plaintiff in that suit.

[2] The subject of the dispute between the applicants and the respondent was the existence of an access road running across Land Title No. Nyandarua/Wanjohi/1274. The respondent who owned Nyandarua/Wanjohi/1274 had filed a suit seeking a declaration that the applicants' use of the access road amounts to trespass on his land, and seeking an injunction restraining the applicants and their families from trespassing on his property. The applicants opposed the respondent's suit, maintaining that the respondent had no right to stop them from using the access road, as it was not part of the respondent's

land. The applicants also raised a counterclaim seeking *inter alia* declarations that: the land comprising the access road that traverses LR No.Nyandarua/Wanjohi/1274 was not sold to the respondent; and that it is an overriding interest, right of way and or any other easement or restriction against the respondent's title.

[3] Hon. Waithaka, J. who heard the suit delivered a judgment in which she dismissed the applicants' counter claim, contending that no easement had been created over the respondent's land. The learned Judge made a finding that there was in existence a footpath measuring 4 feet wide, which the applicants had been using with the respondent's permission; but that no trespass had been established. The learned Judge declined to grant an injunction restraining the applicants from using the access road until the existence of the access road is determined by the Land Registrar in accordance with sections 18 and 19 of the Land Registration Act 2012, and directed that the Land Registrar of the area in question visit the disputed land to determine whether an access road exists on the ground and if it exists to fix the boundaries. The orders made by the learned Judge led to a report being prepared and filed in court. In the report the Land Registrar concluded that the existing six-foot footpath on parcel No.1274 did not amount to an access road, as there were no official documents showing the existence of the road. Following the filing of the report the respondent closed the access road and filed an application for review of the judgment delivered by Waithaka, J. On their part, the applicants filed an application for committal of the respondent for contempt of court contending that he was in contempt of the injunction issued by Waithaka J.

[4] The application for contempt was heard by Sila Munyao, J, who delivered a ruling on 31st March, 2016 in which he found that the judgment delivered by Waithaka J, only restrained the respondent until the Land Registrar made his report, and therefore there was no longer an injunction in place and the respondent was therefore not in contempt.

[5] Being aggrieved by the ruling of 31st March, 2016, the applicants filed a notice of appeal on 11th April, 2016. By a notice of motion dated 9th May, 2016, the applicants have moved this Court under Rule 1(2) and 5(2) of the Court Appeal Rules seeking orders *inter alia* that:

(i) This Honourable Court be pleased to certify the matter as urgent, dispense with service in the first instance and the same be heard exparte.

(ii) Pending the interpartes hearing and determination of this application this honorable Court be pleased to issue a temporary injunction compelling the respondent to reopen and restore the access road/footpath and its amenities over land Title Numbers Nyandarua/Wanjohi/1026 and Nyandarua/Wanjohi/1274 ex debito justitiae.

(iii) pending the hearing and determination of this appeal, this honorable Court be pleased to issue a temporary injunction compelling the respondent to reopen and restore the access road/footpath and its amenities over land Title Numbers Nyandarua/Wanjohi/1026 and Nyandarua/Wanjohi/1274 ex debito justitiae.

[6] The applicants maintain that the learned Judge Munyao, J erred in failing to appreciate that the judgment delivered by Waithaka, J upheld the applicants' right of use of access road and that the closing of the road by the respondent amounted to contempt of existing court orders. The applicants maintained that they have an arguable appeal with a high probability of success and that this appeal would be rendered nugatory unless an injunction was issued compelling the respondent to restore the access road/footpath.

[7] The applicants have filed written submissions contending *inter alia* that this Court has jurisdiction under the provisions of Section 3A and 3B of the Appellate Jurisdiction Act to issue the orders sought by the applicant *ex debito justitiae*; that the respondent committed an illegality by closing down the disputed access road; that the closure of the access road by the respondent was premature, illegal and in contempt of the judgment delivered by Waithaka, J. In support of these submissions ***Owners of the Motor Vehicle Lilian S vs Caltex Oil Kenya Limited [1989] KLR 1***, was cited.

[8] It was argued that the Court should strive to further the overriding objective of its appellate jurisdiction by refusing to condone the illegalities committed by the respondent and issuing the orders sought by the applicants. It was maintained that Hon Munyao J misdirected himself and therefore the applicants had an arguable appeal. Finally, it was argued that the applicants' intended appeal would be rendered nugatory if the Court reviewed the judgment dated 30th January, 2015 on the basis of an illegal, irregular and patently flawed report made by the Land Registrar.

[9] In response to the applicants' motion, the respondent filed a replying affidavit in which he deposed that the judgment delivered on 30th January, 2015 by Waithaka, J, was a temporary judgment in which the learned Judge deferred the question whether or not there is an access road to await a determination by the Land Registrar; that the report filed by the Land Registrar clearly and unequivocally, demonstrated that no legal footpath or access road existed through parcels Nyandarua/Wanjohi/1274 and Nyandarua/Wanjohi/1276; that the Land Registrar having compiled his report concerning the footpath/access road, the report was adopted without any objection from the parties; that the court cannot purport to create an access road on the respondent's land where none lawfully exists; that the injunction issued by Waithaka J, was only to last until the determination of the issue of the access road by the Land Registrar; that no prejudice would be suffered by the applicants if the orders sought are not granted by the Court.

[10] The respondent also filed written submissions in which he reiterated that the applicants have no arguable appeal, as there is no lawful access road traversing the respondent's suit land; that the evidence of the District Surveyor and the report of Land Registrar Nyandarua confirmed this position; and that the applicants have not demonstrated that the appeal would be rendered nugatory.

[11] We have carefully considered the applicants' motion. Being an application for injunctive relief pursuant to Rule 5(2)(b) of the Court Rules, the conditions upon which such application can be granted are clear. That is the applicant must demonstrate first, that they have an arguable appeal, and secondly, that if the injunctive relief is not granted the appeal shall be rendered nugatory if successful. (**Silverstein v Chesoni [2002] 1 KLR 867**; and **Reliance Bank Limited v Norlake Investments Limited [2002] 1 EA 227**). It is clear that the motion before us is the result of a rather convoluted process arising from two rulings made by different judges. The second ruling made by Munyao J, that is subject of the applicants' intended appeal, involved interpretation of the first ruling made by Waithaka J. At the heart of the two rulings, is the issue of the existence of the injunction relating to the access road, the closing of the access road and the purported violation of the order by the respondent. We do not find it appropriate at this stage to analyze these issues. Suffice to state that the applicants have identified several issues that will form subject of their appeal and that the issues are complex and arguable. We are therefore satisfied that the applicants have an arguable appeal.

[12] As regards the nugatory aspect, we are not so convinced. As already noted the substratum of the dispute is the access road. The injunction sought by the applicants is in effect a mandatory injunction seeking the re-opening of the access road during the pendency of the appeal. In **Kenya Breweries Ltd & Another vs Washington O. Okeyo [2002] eKLR** this Court adopted the following test from Halsbury's Laws of England 4th Edition:

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a match on the plaintiffs ... a mandatory injunction will be granted on an interlocutory application.”

[13] We reiterate that under normal circumstances a mandatory injunction is one to be issued only in special circumstances the effect of which would be to render the appeal nugatory. In this case, the applicants seek to have the access road that has been closed by the respondent reopened. Are there special circumstances that justify the granting of the mandatory injunction at this interlocutory stage pending the hearing of the appeal? **In Charter house Bank Limited v Central Bank of Kenya & others**

[2007] eKLR the Court of Appeal held, with regard to granting of injunctions pending appeal that:

“The purpose of granting an injunction pending appeal is to preserve the status quo and to prevent the appeal, if successful, from being rendered nugatory. (see also Madhu Paper International Limited v Merr [1985] KLR 840...”

[14] The questions that are relevant in determining the matter before us, is whether the reopening of the access road is necessary for the preservation of the *status quo* for the proper determination of the appeal; or whether the reopening of the access road is one that can be addressed on a successful appeal without injustice or prejudice to the applicants. The applicants contend that the closure of the access road has resulted in hardship because children cannot access schools and members of the public cannot access the Shopping Centre. However, that is a mere allegation. There is no definite averment that there is no alternative route that can be used. In our view, the applicants have not demonstrated any extreme hardship or situation that cannot be reversed should they succeed on appeal. All it would take if the applicants were to succeed on appeal is an order for the respondent to reopen the access road. Thus, the failure to grant the mandatory injunction would not in any way render the appeal nugatory.

[15] For the applicants to succeed in this matter it is necessary for the applicants to meet both the requirement of establishing an arguable appeal as well as the nugatory aspect of the failure to grant the mandatory injunction. The applicants having failed to prove that the failure to grant the mandatory injunction would render the appeal nugatory, this motion fails. It is accordingly dismissed with costs.

Dated and Delivered at Nakuru this 8th day of December 2016.

H. M. OKWENGU

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a

True copy of the original

DEPUTY REGISTRAR