



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MUSINGA & KIAGE, JJ.A.)

CIVIL APPLICATION NO. NAI. 255 OF 2014

BETWEEN

NYAHURURU D.E.B. PRIMARY SCHOOL

Through its Executive Officials namely

JOHN ALUMA EKAI – CHAIRMAN

MARY NJERI MUNENE - SECRETARY

GERALD NDUHIU – TREASURER APPLICANT

VERSUS

CATHERINE WANGUI KARIUKI RESPONDENT

*(Being an application for stay of execution of the ruling and orders of the High Court of Kenya at Nakuru
(Waithaka, J.) dated 20th June, 2014*

in

HC. ELC No. 329 of 2012)

RULING OF THE COURT

The applicant’s Notice of Motion dated 25th September, 2014 seeks, pending hearing and determination of an intended appeal, stay of execution of the orders given on 20th June, 2014 in E.L.C. No. 329 of 2012, Nakuru (Waithaka, J.).

The application was supported by an affidavit sworn by **Mary Njeri Munene**, the Executive Secretary of the Management Committee of Nyahururu D.E.B. Primary School, hereinafter referred to as “**the school**”. The school was the defendant in the aforesaid suit that was instituted by the respondent seeking the following orders:

“a) A declaration that the leasehold interest in title number Nyandarua/Nyahururu Municipality Block 6/650 hereinafter referred to as

(“the suit land”) manifests in her absolutely.

- b. An interim order of injunction restraining the defendant either by itself, its agents, servants or anybody claiming either under it or in its names from in any manner whatsoever interfering with the suit land pending the hearing and determination of the suit.*
- c. A permanent order of injunction do issue restraining the defendant either by itself, its agents, servants or anybody claiming either under it or its name from in any manner whatsoever interfering with the suit land.*
- d. Cost of the suit and interest.”*

Together with the plaint the respondent also filed an interlocutory application seeking interim orders in terms of the above orders pending hearing and determination of the suit. On being served with the said application, the applicant through the office of the Attorney General, filed a memorandum of appearance and a replying affidavit thereto. The application was disposed of by way of written submissions.

In a ruling delivered on 20th June, 2014 in the absence of the Attorney General’s representative, the trial court ordered the school to vacate the suit land within 30 days from the date of the ruling and hand over the suit land to the respondent, failing which the respondent would be at liberty to evict the school from the suit land.

The Attorney General’s representative did not inform the school about the said ruling and the applicant only became aware of the same on 25th August, 2014 when the secretary received a letter from the respondent’s advocate enclosing an order issued pursuant thereto. A management committee of the school was convened to discuss the issue and it was resolved that the school appoints its own advocate to deal with the matter. Upon appointment of such counsel a letter was sent to the Office of the Attorney General requesting for the case file. However, the Attorney General’s office notified the school that it could not cease acting without instructions from the Principal Secretary, Ministry of Education. Eventually, the counsel appointed by the school obtained copies of the pleadings on 12th September, 2014 from the court file and proceeded to file a notice of appeal on 22nd September, 2014. Thereafter the substantive appeal was also filed.

The school argues that its appeal is arguable, considering that the High Court gave final orders in an interlocutory application without according the applicant an opportunity to file its defence and have the case heard on its merits. The school further argued that unless this Court granted an order of stay of execution there was imminent danger of eviction and destruction of its properties which include removal of a live perimeter fence and cutting down of exotic trees growing on the suit land.

In the application filed by the respondent in E.L.C. Case No. 329 of 2012, she stated that she was the registered proprietor of the suit land, having been bequeathed the same vide **Nakuru High Court Succession Cause No. 55 of 2007** following the demise of her husband, the late Charles Peter Murage Kariuki. Her late husband had applied for allotment of the suit land and was issued with an allotment letter in respect of the same on 9th May, 1992. Subsequently, the respondent’s deceased husband was issued with a certificate of lease by the Government of Kenya for a term of 99 years from 1st June, 1994. The respondent asserted that the school had encroached on the suit land without her consent.

On its part, the school contended that the suit land initially belonged to Nyahururu Municipal Council and the title of the land was given to the said municipality on 1st May, 1954 by the Colony and Protectorate of Kenya. A copy of the said title was annexed to the applicant’s replying affidavit. The school further contended that it is the lawful owner of the suit land, having been given the same by the Municipal Council of Nyahururu.

In the ruling delivered on 20th June, 2014 the trial court held that the respondent’s deceased husband had lawfully acquired the suit land. She discounted the applicant’s contention that the Nyahururu Municipal

Council, Town Planning and Housing Committee, in its meeting held on 4th August, 1992, had recommended that the suit land be planned by the District Physical Planning Officer as an extension of the school land. In that regard, the respondent's entitlement to the suit property could not be defeated, the court held.

In granting interlocutory mandatory injunction against the school, the trial court was well aware that such orders will have the effect of substantially concluding the suit. The court cited, inter alia, **THE DESPINA PONTIKOS [1975] 1 E.A. 38**, **MACUHA v RIPPLES LIMITED [1990-1994] 1 E.A. 338** and **KENYA BREWERIES LIMITED v OKEYO [2002] 1 E.A. 109 (CAK)** in which the principles for grant of interlocutory mandatory injunctions were considered.

Both **Mr. Chege** and **Mr. Ranja**, learned counsel for the applicant and the respondent respectively, made brief submissions before us. Mr. Chege submitted that the school was established in 1951 and has been in occupation of the suit land since then. He questioned the manner in which the respondent's late husband was issued with a certificate of lease over the suit land. In his view, this was a triable issue. Another triable issue which counsel identified was the manner in which the trial court granted final orders of mandatory injunction which had not been sought by the respondent. Lastly, Mr. Chege submitted that the appeal that has already been filed is likely to be rendered nugatory if the orders sought are not granted. The developments on the suit land would be destroyed and the suit land itself may be disposed of.

Although the respondent had not filed any replying affidavit, Mr. Ranja made submissions on issues of law. He submitted that the respondent had a superior claim over the suit land than that of the applicant, given that she had a certificate of lease. He urged the Court to take into consideration that the respondent's late husband had lawfully acquired the suit land, having followed the due process. He urged the Court to dismiss the application.

We have considered the submissions made by counsel and all the other relevant material on record. The twin principles that an applicant must satisfy in an application made under **rule (5) (2) (b) of this Court's Rules** such as the one before us are well known. The first one is that the applicant has to demonstrate that the appeal or intended appeal is arguable and secondly, that unless the order sought is granted the appeal or intended appeal will be rendered nugatory. See

RELIANCE BANK LTD v NORLAKE INVESTMENTS LTD [2002] 1 E.A. 227.

The draft memorandum of appeal that was exhibited before us has five grounds of appeal which are as follows:

- “1. The learned trial Judge erred in law and fact in granting a mandatory injunction when conditions for doing so had not been met by the Respondent.**
- 2. The learned trial Judge erred in law and fact in granting orders which had not been pleaded by the Respondent thereby occasioning a travesty of justice.**
- 3. The learned trial Judge erred in law and fact in making draconian final orders at the interlocutory stage without conducting a hearing leading to a miscarriage of justice.**
- 4. The learned trial Judge erred in law and fact in making final orders at an interlocutory stage before the parties had filed all their pleadings.**
- 5. The learned trial Judge erred in law and fact in purporting to summarily adjudicate the dispute before her without such an application being made by either party.”**

Are these grounds of appeal arguable? In our view, the answer is in the affirmative. An arguable appeal is not one which must necessarily succeed, it is one that is not frivolous or raises serious questions of law or a reasonable argument deserving consideration by this Court. We need not say more lest we pre-empt the appeal or embarrass the bench that shall hear the appeal.

Turning to the second principle, we are satisfied that the appeal may be rendered nugatory unless the orders sought are granted. The respondent shall execute the order of mandatory injunction granted by the High Court, meaning that the live fence that demarcates the suit land shall be destroyed and the school shall lose part of the suit land. The respondent may also sell and dispose of the suit land before the appeal is heard and determined.

For these reasons we allow the application and direct that execution of the orders given on 20th June, 2014 in Nakuru E.L.C. No. 329 of 2012 be stayed pending hearing and determination of the appeal filed by the applicant. The respondent shall bear the costs of this application.

Dated and Delivered at Nairobi this 27th day of February, 2015.

R.N. NAMBUYE

JUDGE OF APPEAL

D.K. MUSINGA

JUDGE OF APPEAL

P.O. KIAGE

JUDGE OF APPEAL

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

DEPUTY REGISTRAR