



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, MWILU & GATEMBU JJ.A)

CIVIL APPLICATION NO. NAI 184 OF 2012 (UR 139/2012)

JAMES MBATIA THUO.....1ST APPLICANT

EPHANTUS MWANGI.....2ND APPLICANT

VERSUS

KENYA RAILWAYS CORPORATION.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

(Application for injunction pending the hearing and determination of an intended appeal from the judgment and decree of the High Court of Kenya at Nairobi (Korir J) dated 9th May 2012

in

HC MISC APPL. NO 829 OF 2008)

RULING OF THE COURT

1. Before the Court is an application dated 4th July 2012 brought under sections 3A and 3B of the Appellate Jurisdiction Act and Rules 5(2)(b) & 42 of the Court of Appeal Rules, 2010. The substantive relief sought by the applicants is an order of temporary injunction ***“restraining the 1st respondent, whether by themselves or their agents from evicting, intimidating, harassing and/or in any manner interfering with the 1st and 2nd applicant's quiet possession and enjoyment of house No. WK 10 on LR No. 209/6445, Kileleshwa, Nairobi and house No. WK 21 on LR No. 209/6444, Kileleshwa, Nairobi, pending the hearing of this application inter partes”*** until the final determination and disposal of the intended appeal herein.

2. That motion is supported by the affidavit of the 1st applicant, also sworn on behalf of the 2nd applicant on 4th July 2012. The grounds in support of the application are that the applicants are in occupation of the said suit premises but face imminent eviction during pendency of the appeal; that the intended appeal will be rendered nugatory if the applicants are evicted as the 1st respondent has exhibited the intention to sell/lease the suit premises to third parties; and that the 1st respondent will suffer no prejudice as the applicants are ready and willing to continue paying rent. There was no affidavit filed by the respondent to challenge the facts as stated by the applicants in their supporting affidavit.

3. The brief history of the matter is that, the applicants are both former employees of the 1st respondent. While still in the employ of the 1st respondent, the Board of Directors formulated a proposal to sell residential houses owned by the 1st respondent to its staff. By a letter dated 16th April 2007, the Ministry of Finance approved the proposal. However, the applicants were retrenched from employment in June 2007. Pending implementation of the proposal, the 1st and 2nd applicants entered into an annual lease agreement on 3rd and 5th July 2007 respectively with the 1st respondent, for the suit premises. On 22nd December 2008, the 1st respondent issued notices to the applicants purporting to terminate the leases and subsequently requiring the applicants to vacate the suit premises by 1st January 2009.

4. The applicants then instituted suit, being *Nairobi High Court Judicial Review Miscellaneous Application No. 829 of 2008* and later consolidated with *High Court Judicial Review ELC No. 3 of 2012* seeking the High Court's intervention to prevent their imminent eviction by the 1st respondent. The applicants sought orders of certiorari to quash the 1st respondent's notices to vacate the suit premises; prohibition to restrain the 1st respondent from terminating their occupancy of the suit premises; and an order of mandamus to compel the 1st respondent to sell the suit premises to them. The applicants relied on the doctrine of legitimate expectation, arguing that a promise had been made by the 1st respondent to sell to them the suit premises but the respondent had since reneged on that promise. By relying on the doctrine of legitimate expectation the applicants sought orders from the court to prevent the 1st respondent from terminating their occupancy of the suit premises and to compel the 1st respondent to give priority to the applicants to purchase the suit premises. This Judicial Review suit was dismissed by Korir J in his judgment delivered on 9th May 2012. It is this judgment that is the subject of the intended appeal. The Notice of Appeal was filed on 15th May, 2012.

5. As at the time of making this application, the applicants were still in possession of the suit premises and keeping up with their rent payments. The applicants now seek a temporary injunction under **Rule 5(2)(b)** of this Court's Rules, as they are apprehensive that the 1st respondent is likely to not only evict them but also sell or lease out the suit premises to third parties thereby rendering the intended appeal nugatory. The applicants aver in their affidavit that the 1st respondent stands to suffer no prejudice as they are ready and willing to continue their rent payments for the duration of the injunction pending the determination of the appeal. The applicants rely on their draft memorandum of appeal attached to their application to illustrate that they have an arguable appeal.

6. In addition to the applicants' arguments in their motion and supporting affidavit, Mr. Muchoki Gichuru, learned counsel for the applicants submitted that according to the 1st respondent's proposal, the 1st respondent was to provide affordable housing to its employees at a concessionary cost of 40%. Counsel also submitted that the applicants' urgency in seeking protection from this Court pending the determination of the appeal was because the 1st respondent had served upon them another notice to vacate by 31st May 2013 despite counsel previously intimating to the Court that the *status quo* would be maintained. Counsel further submitted that they had an arguable appeal based on a wider interpretation of the doctrine of legitimate expectation and cited the case of *Attorney General of Hong Kong v NG Yuen Shiu [1985] LRC (Const) 931* in support of that argument. Counsel reiterated that no prejudice would be suffered by the 1st respondent since the applicants were still paying rent. Ms. E. Ouma learned counsel for the 1st respondent opposed the application on points of law only, submitting that the applicants had no arguable appeal with a chance of success.

7. This being an application under **Rule 5(2)(b)** of the **Court of Appeal Rules, 2010**, the applicants must satisfy the Court that not only is the intended appeal arguable but that if it is successful, that success will be rendered nugatory if the orders sought are not granted. This Court clearly reiterated these principles in *Republic v Kenya Anti-Corruption*

Commission & 2 others [2009] KLR 31 as follows:

“The law as regards the principles that guide the Court in such an application brought pursuant to Rule 5(2)(b) of the Rules are now well settled. The court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the Court, first, that the appeal or

intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds, the results or the success could be rendered nugatory. In order that the applicant may succeed, he must demonstrate both limbs and demonstrating only one limb would not avail him the order sought if he fails to demonstrate the other limb. See also this Court's decisions in the case of Reliance Bank Ltd v Norlake Investments Ltd (2002) 1 EA 227 and Githunguri v Jimba Credit Corporation Ltd & Others (No.2) [1988] KLR 828...

8. On the first limb, whether the intended appeal is arguable, this Court stated in *Civil Application No. Nai 265 of 2011 Dennis Mogambi Mongare v Attorney General & 3 others*; that

“An arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the Court's consideration.”

Contrary to the submissions of the 1st respondent, an arguable appeal is not one that must necessarily succeed but one that raises an issue(s) deserving of consideration by this Court. Even one *bona fide* issue is sufficient (See: *CA No. Nai 176 of 2012 Kenya Railways Corporation v Ederman Properties Ltd* and *CA No. Nai 72 of 2001 Kenya Tea Growers Association & Another v Kenya Planters & Agricultural Workers Union.*)

The court is aware that at this interlocutory stage it is not desirable to express a concluded view so as not to prejudice the Court that is to hear the intended appeal. Nevertheless the complaint that the learned Judge erred in the interpretation of the doctrine of legitimate expectation in this case is not frivolous in our view.

9. On the second limb this Court must determine whether, if successful, the intended appeal would be rendered nugatory if the orders sought are not granted. To grant the orders sought, satisfaction of this limb is imperative in order ***“to preserve the integrity of the appellate process so as not to render any eventual success a mere pyrrhic victory devoid of substance or succor by reason of intervening loss, harm or destruction that turns the appeal into mere academic ritual.”*** See: *CA No. 256 of 2013 Ahmed Musa Ismael v Kumba Ole Ntamorua & 4 others.*

It has not been denied that the purpose of evicting the applicants from the suit premises is to avail the same to the 1st respondent to hand over to its employees by sale or lease. Indeed, the 1st respondent issued to the applicants notices to vacate the suit premises for the corporation's use. We are in these circumstances satisfied that the applicants have satisfied this limb as well. For these reasons we allow the Motion dated 4th July 2012 and filed herein on 5th July 2012 in terms of prayer 3 thereof. The applicants shall continue paying due rent. The costs of the application shall be paid by the respondents.

We greatly regret the unintended delay in the delivery of this Ruling.

DELIVERED at NAIROBI this 20th day of March, 2015.

W. KARANJA

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR