



**IN THE COURT OF APPEAL**

**AT NAIROBI**

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

**CIVIL APPLICATION NO. NAI. 212 OF 2013 (UR 152/2013)**

**GITAMAYU TRADING COMPANY LIMITED ..... APPLICANT**

**VERSUS**

**NYAKINYUA MUGUMO KIAMBAA CO. LTD.....1<sup>ST</sup> RESPONDENT**

**WARIARA NJENGA.....2<sup>ND</sup> RESPONDENT**

**MUMBI GICHURU .....3<sup>RD</sup> RESPONDENT**

**ESTATE OF JAMES NJENGA KARUME .....4<sup>TH</sup> RESPONDENT**

**J.R. NJENGA .....5<sup>TH</sup> RESPONDENT**

**THE COMMISSIONER OF LANDS.....6<sup>TH</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....7<sup>TH</sup> RESPONDENT**

*(Being an application for an injunction pending the hearing and determination of an intended appeal from the judgment and decree of the High Court of Kenya at Nairobi (Machelule J.) dated 13<sup>th</sup> February, 2012*

*in*

*HCCC No. 4496 of 1994)*

\*\*\*\*\*

**RULING OF THE COURT**

1. Before us is a notice of motion application brought under the provisions of Sections 3A & 3B of the Appellate Jurisdiction Act, Cap 9 and rule 5 (2) (b) of this Court’s Rules. The Application seeks the following orders:

“1. ....

2. *That the status quo be maintained in the suit property consisting of Land Reference Numbers 89/4 89/5 89/6 89/7, 89/8, 89/9, 89/10, 89/11, 89/12, 89/13, 89/14,*

**89/15, 89/16, 89/17, 89/18, 89/19 and 89/20, situated in Kiambu pending the hearing and determination of the appeal in HCCC No. 4496 of 1994.**

**3. The Respondents whether by themselves or through their agents or officers be restrained from subdividing, transferring, effecting change to title or in any way dealing with the suit property aforementioned pending hearing and determination of the appeal.**

**4. The suit herein be heard and determined expeditiously de benesse as most of the witnesses/owners are very old and fragile.**

**5. The costs of this application be provided for.”**

2. The Application is supported by an affidavit sworn by **Billy Amendi**, learned Counsel for the Applicant. The affidavit advances generally, that the Applicant is dissatisfied with the whole judgment of the learned judge of the High Court, and argues that since the Respondent has sought to have the interim orders that had been issued pending hearing and determination of the suit vacated, there is need for this court to issue an injunction to maintain status quo so as not to render the intended appeal nugatory.

3. The Respondent opposed the Application by way of a replying affidavit sworn by a director of the 1<sup>st</sup> Respondent, **Ms. Mary Kihiu**. She stated, *inter alia*, that the Applicant did not have any arguable appeal as the Applicant had not

obtained the requisite Land Control Board Consent for the purchase of the suit property. Also, that the suit before the High Court was statute barred as the Applicant's cause of action accrued in 1979 but the suit was only filed in 1994.

Finally, it was argued that the 1<sup>st</sup> Respondent is the registered proprietor of the suit property and has been in its possession thereto since 1977. The deponent added that the Applicant's Advocates had not complied with Order 9 Rule 9 (a) and (b) of the Civil Procedure Rules, 2010 and were therefore not properly on record.

4. The brief background is that the Applicant filed suit at the High Court, being Civil Case No. 4496 of 1994 where it sought to secure a claim of interest in a property, located in Kiambu District measuring approximately 512 acres being LR. Nos. 89/4-9 and 89/11-20, also known as Fanros Estate and Kiu Farm.

The Applicant had entered into an agreement on 18<sup>th</sup> February, 1977 for the purchase of the suit property from Fanros Limited for Kshs. 4, 200,000/= which was paid in full. The Applicant's shareholders took possession of the suit property until 1979 when they were forcefully evicted by the local Provincial Administration. Subsequently, the 1<sup>st</sup> Respondent took possession of the suit property and became the registered owner thereof.

The trial judge found that the 1<sup>st</sup> Respondent was the registered owner of the suit property and that the suit filed by the Applicant was time barred. In his judgment, **Muchelule J**, on 13<sup>th</sup> February, 2012, held in part, that,

**“But the more important issue is that the Plaintiff does not have any enforceable legal right or interest in the suit property. Secondly, the suit was brought out of time.**

**I hope I have said enough to show that the Plaintiff's suit has no merits. It is hereby dismissed with costs.”**

5. That outcome aggrieved the applicant who filed a notice of appeal on 21<sup>st</sup> February, 2012 against the judgment. During the trial at the Superior Court below, the Applicant enjoyed conservatory orders issued on 20<sup>th</sup> February 1995 that had restrained the ultimately successful Respondent from selling transferring and/or

alienating wasting or dealing in any way with the suit property pending the hearing and determination of the suit.

Upon the pronouncement of the judgment by **Muchelule J**, the Respondent filed a notice of motion application seeking that the Court vacates the said conservatory orders. The decision on that application is not within our knowledge. However, the anticipated consequences by the Applicant by the notice of motion application being allowed seem to have provoked this Application seeking an order of status quo on the suit property pending the hearing and determination of the intended appeal.

6. At the hearing of the application before us, Mr. Amendi, learned Counsel for the Applicant submitted that the application seeking the discharge of restraining orders on the Respondent issued on 20<sup>th</sup> February, 1995 created the need for this Court to exercise its jurisdiction under Rule 5 (2) (b) of the Court of Appeal Rules, to issue an injunction pending the hearing and determination of the intended appeal.

Counsel contended that his client had an arguable appeal since the suit was not statutorily barred. He submitted that the learned Judge erred in making a decision on limitation because it was *res-judicata*. He argued that the issue of time limitation was addressed by **Hayanga J**, as a result of the preliminary objection of the Respondent filed on 25.10.95 and which had been dismissed.

He further contended that the trial Judge failed to consider the purpose of the caveat that had been placed by the Applicant on the suit property. He argued that the sole defence witness disowned his documents and the judge had not made a finding on the disowned documentary evidence.

7. To demonstrate that the appeal would be rendered nugatory if the injunction sought did not issue, counsel for the Applicant contended that the suit property was valued at over Kshs. 1 billion and compensation was not possible if execution ensues upon the grant of the orders to vacate the interim injunction order. He based his view on **Article 40(6) of the Constitution of Kenya, the Land Control Act, Cap 302, Laws of Kenya** and the case of **CMC Holdings v. Jaguar Civil Application No. 66 of 2013 (UR 44/2013)**.

He contended that the Replying Affidavit of the Respondent was misleading since the Applicant had taken steps and appealed the decision. Further that the Applicant was in possession of the suit property between 1977 and 1979 when he was forcibly and fraudulently evicted. Lastly he contended that he was properly on record having complied with the requirements of the law and filed a notice of change of advocates. He therefore urged the Court to allow the application. In reply to the Respondent's submissions, the Applicant's counsel reiterated that the order of 20<sup>th</sup> February 1995 was flouted and that his client had an arguable appeal.

8. Opposing the application, Mr. Shairi, learned counsel for the Respondents,

stated that the 1<sup>st</sup> Respondent is the registered owner of the suit property. He contended that there was no arguable appeal arising from the judgment which was in favour of the Respondent. He reiterated the 2 grounds relied upon by the High Court in its judgment, being that no Land Control Board consent had been obtained and that the suit was time barred since the Applicant purchased the suit property in 1977 but the suit was only filed in 1994 outside the 12 years' time limit allowed.

Counsel added that **Hayanga J**. did not determine the issue of limitation of time which was later determined by **Muchelule J**.

On the dual issues of fraud and placing of the caveat, he submitted that **Muchelule J**, dealt with them correctly and relied on the authority of **Peter Waweru Waititu vs. Cyrus J. Karanja Civil Appeal No. 257 of 2001** where this Court held that where the transaction is void for lack of Land Control Board consent, there is no reason to maintain a caveat on the property. In any event, it is Fanrose Limited that had applied for the removal of the caveat and not the 1<sup>st</sup> Respondent.

He further submitted that Order 9 Rule 9 (a) & (b) of the **Civil Procedure Rules** had not been complied with and therefore the Notice of Appeal filed by Mr. Amendi was a nullity and so is the appeal. As a result the application had not met the threshold of **Rule 5 (2) (b)** and the Applicant

had no arguable appeal, concluded counsel. He therefore urged the court to dismiss the application.

9. Ms. Sirai, learned counsel for the 6<sup>th</sup> and 7<sup>th</sup> Respondents submitted that her client takes no position in the case as the matter involved the Applicants and the 1<sup>st</sup> Respondent.

10. We have considered the Application, the Affidavits, rival submissions and authorities in support of the various arguments advanced on record. It is now trite that for an application under **rule 5 (2) (b) of the Court of Appeal Rules** to succeed there must be a valid Notice of Appeal on record and the twin conjunctive principles must be satisfied. They are:

(i) *The intended appeal has to be arguable, in other words, it must be demonstrated that the intended appeal is not frivolous; and*

(ii) *The orders sought, if not granted and the appeal eventually succeeds, the appeal would be rendered nugatory.*

See **Reliance Bank (in Liquidation) v. Norlake Investments Ltd, Civil Application No. NAI. 98 of 2003 (unreported).**

11. The power to grant the order is discretionary, see **Equity Bank Limited vs. West Link Mbo Limited, Civil Application No. NAI. 78 OF 2011**, where Githinji JA held that:

*“It is trite law in dealing with 5 (2) (b) applications the court exercises discretion as a court of first instance ..... It is clear that rule 5 (2) (b) is a procedural innovation designed to empower the court entertain an interlocutory application for preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals.”*

12. An arguable appeal has been defined severally. In **Dennis Mogambi Mongare v. Attorney General & 3 Others, Civil Application No. NAI 265 of 2011 [UR 175/2011]** it was described thus,

*“An arguable appeal is not one that must necessarily succeed; it is simply one that is deserving of the court’s consideration.”*

In **Damji Pragji Mandavia v. Sara Lee Household & Bodycare (K) Ltd, Civil Application No. NAI 345 of 2004**, it was held that it is sufficient if a single,

*bona fide* arguable ground of appeal is raised; we are also alive to the caution rendered in **Damji Pragji Mandavia (supra)** that in considering an application as the one before us, the Court must not make definitive or final findings of either fact or law at this stage as doing so may embarrass the hearing of the main appeal.

13. Bearing all the above in mind, we find that the Applicant has failed to place before us sufficient material for us to find any arguable ground of appeal. From the material before us, we find that it is not disputed that the Applicant

entered into the sale agreement of 18<sup>th</sup> February, 1977. It is also not disputed that a Land Control Board consent was not obtained and thus rendering the agreement unenforceable, thereby failing to secure the Applicant's interest. A perusal of the ruling of **Hayanga J.** exhibits no definite determination on the issue of time limitation. Rather, the learned **Hayanga J.**, in determining the preliminary issue of limitation of time stated as follows;

*“They can be argued when all the facts are contained in evidence.”*

The Applicant has also not demonstrated to the court how the critical issue of limitation is an arguable point. In **Joseph Gitahi Gachau &**

**Another v. Pioneer Holdings (A) Ltd & 2 Others, Civil Application No. 124 of 2008**, this court stated that the arguable ground raised must not be frivolous. Nothing in the circumstances of this application turns on the removal of the caveat.

14. Having failed to satisfy the first conjunctive of the twin principle there is no need to delve into the nugatory aspect of the appeal.

15. We find that the applicant has not satisfied the dual limb requirements to avail it an order under rule 5(2)(b) Court of Appeal. Consequently this application is dismissed with costs.

**DELIVERED at NAIROBI this 22<sup>nd</sup> day of May, 2105.**

**D. K. MARAGA**

.....

**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**