



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWERA, MWILU & ODEK, JJA.)

CIVIL APPLICATION NO. NAI.62 OF 2015 (UR.53/2015)

BETWEEN

GRACE WAIRIMU SORORA (Suing on behalf of

The Estate of Sorora Oloitiptip).....APPLICANT

AND

CHAKA LIMITED.....1ST RESPONDENT

PAN AFRICA CREDIT & FINANCE LTD (Through

THE DEPOSIT PROTECTION FUND BOARD)..... 2ND RESPONDENT

ASHFORD KANG'ETHE .

T/A TOI EDUCATION SERVICES.....3RD RESPONDENT

BRIDGING SAVINGS AND CREDIT.....4TH RESPONDENT

**CO-OPERATIVE SOCIETY LIMITED.....5TH
RESPONDENT**

**THE PRINCIPLE REGISTRAR OF TITLES – NAIROBI.....6TH
RESPONDENT**

**KIBUCHO LIMITED (Through THE OFFICIAL RECEIVER.....7TH
RESPONDENT**

CITY COUNCIL OF NAIROBI.....8TH RESPONDENT

(Being an application for injunction and stay of execution pending the determination of an intended appeal from the judgment and decree of the High Court of Kenya at Nairobi (Nyamweya, J.), dated 2nd March, 2015 in H.C. Elc. No.592 of 2010 as consolidated with H.C. Elc. No.29 of 2012, H.C. Elc. No.340 of 2010 and H.C. Elc.

RULING OF THE COURT

Grace Wairimu Sorora, on behalf of the estate of the late **Sorora Oloiptip** filed the notice of motion herein on 11th march, 2015 under **Rule 5(2)(b) Court of Appeal Rules**, seeking three orders, that there be:

- i. **a stay of execution of the decree in the High Court Judgment (Nyamweya, J.), delivered on 2nd March, 2015, following the determination of the consolidated suits – Elc.592/10, Elc.29/12, Elc.340/10 and Elc.564/10.**
- ii. **an injunction to restrain the 1st respondent from alienating/encumbering Plot LR. No.209/9749 Nairobi; and**
- iii. **an injunction to restrain the 1st and 7th respondents from entering/evicting her from the said Plot LR. No.209/9749,**

until Civil Appeal No.64/2014 is heard and determined. Learned Counsel present before us, were **Mr. N. Havi** and **Ms. M. Ng'ania** for the applicant; **Mr. Lagat** for the 1st respondent, **Mr. E. N. Mwangi** for the 2nd respondent, **Mr. S. O. Kaumba** for the 5th respondent and **Mr. H. Faraji** for the 7th respondent.

The affidavit of service filed in Court indicated that the 3rd respondent, acting in person was served with hearing notice on 6th May, 2013; **M/S Muchoki Kangata & Company Advocates** for the 4th respondent were served on 28th April, 2015 while the Official Receiver (6th respondent representing Kibucho Ltd) was served on 13th April, 2015. All these three parties were absent when the notice of motion was heard.

In essence, the main bone of contention in all the suits that were consolidated, was the claim that the appellant pleaded in her Originating Summons filed as High Court Civil Case No.339/2-007 O.S., which was later titled, **High Court Elc. No.29/2012**, regarding the suit property. By it the applicant sought to be registered as the owner of Plot LR. 209/974, on account of having acquired the rights over it by way of adverse possession in the name of her deceased husband, **Sorora Oloiptip** who was said to have entered the suit property with effect from 25th January, 1981 on authority of the letter of allotment issued by the 7th respondent. For what may not be of essence to go into the claims and the parties in the respective other suits, suffice it to state that all touched on the suit property. They were consolidated by consent to enable the court to determine the various claims pleaded in each which the learned judge did by setting them out meticulously in her judgment before proceeding to determine them and render the final decision that gave rise to the decree whose execution is sought to be stayed by this motion. Her orders also included directions to evict the applicant from the suit plot.

In her determination, the learned judge found as undisputed facts in the consolidated cases that the current registered owner of the suit property was Chaka Ltd (1st respondent) by way of purchase from the 2nd respondent and that the applicant was in possession thereof. Then she set out four (4) issues in dispute, namely, whether:

- i. the sale of the suit property to Chaka Ltd was illegal/fraudulent;
- ii. the applicant had acquired ownership of the suit property by way of adverse possession;
- iii. the appellant had the requisite approvals to erect structures on the suit property; and
- iv. the parties involved were entitled to reliefs sought.

Nyamweya, J began by determining the preliminary issue whether the 2nd respondent, Pan Africa Credit

& Finance Ltd, had been validly sued in ELC.592/10 (and in the other suits involving it), in the circumstance that at the time of suing it, it was in liquidation and yet a court sanction required by **section 228 of the Companies Act** was not obtained before instituting the suit. The learned judge found that the applicant did not obtain the requisite court sanction before suing the 2nd respondent (in liquidation) and struck out her suit against it.

As to whether Chaka Ltd (1st respondent) validly bought the suit property from the 2nd respondent, the answer was in the affirmative in that the appellant had not proved her allegations of fraud in respect to the said sale.

Next, the learned judge determined whether the applicant had acquired the suit property by way of adverse possession. The court found that the applicant had been in possession of the suit plot since October, 26th 1985 and not from 1981, and that that occupation was disrupted when HCCC No.3178/95 was filed, meaning that she was not in continuous occupation of the land for the statutory twelve years.

Regarding the approvals for the applicant to build structures on the subject plot, the judge found evidence as to the signatures and approvals to the original drawings and plans wanting or conflicting and so she answered that question in the negative.

In respect of the reliefs sought by the parties, that can be answered by simply quoting the learned judge's conclusion of the matter:

“I accordingly enter judgment for the (sic) Chaka Ltd as against Grace Wairimu Sorora only to the extent of the following:

- 1. That Grace Wairimu Sorora and/or her agents and servants shall within 30 days of the date of this judgment vacate the parcel of land known as LR No.209/9749 and shall remove all structures constructed thereon within the said 30 days.***

Upon default the Nairobi County Government and Chaka Ltd shall be at liberty to evict Grace Wairimu Sorora and/or her agents and servants, and to demolish the said structures, and eviction orders to issue.

- 2. That Grace Wairimu Sorora shall pay Chaka Ltd the sum of Kshs.100,000/= as nominal damages for trespass together with interest at court rates from the date of this judgment until payment in full.***
- 3. That the prayers by Grace Wairimu Sorora in the originating summons and various plaints filed in Elc.340 of 2010, Elc.592 of 2010 and Elc.29 of 2012 are denied.***
- 4. That the prayers by Ashford Kang'ethe trading as Toi Educational Services in the plaint filed in Elc.564 of 2010 are denied.***
- 5. Each party shall bear its own costs of the consolidated suits.”***

So by the foregoing, the learned judge disposed of the issue regarding reliefs sought by the parties. It is this decision that prompted the applicant to bring the notice of motion under review. We have already set out the 3 prayers sought by that motion, namely, a stay of execution of the decree herein; an injunction against the 1st respondent from charging or alienating the suit property and an injunction to restrain the 1st and 7th respondents from evicting the applicant from the said property. **Mr. Havi's** first salvo in the arguments was that the Originating

Summons (O.S) by which the applicant claimed occupation of the suit property by way of adverse possession, was not opposed by the 1st, 2nd and 6th respondents. Nevertheless, in the judgment it was stated that the applicant had not proved the date of occupation claimed to have been 1981 up to the time

the Originating Summons was filed. That filing of HCCC 3178/95 did not disrupt occupation because the applicant exhibited documents, including a letter from the 7th respondent, allotting the plot to her (or the late **Francis Sorora**). We heard that despite the permission by the 7th respondent for the occupation of the suit property, which was done, the same was later registered in the name of Kibucho Ltd in 1983. Appearing to abandon the 1981 as the year of occupation **Mr. Havi** at this point boldly asserted that:

“Adverse possession thus began in 1983 and when the O.S was filed on 19th July, 2007, twelve years had elapsed. In law then the period of occupation was with effect from

1983;”

and not 1985 as learned judge found. This, to the appellant, forms an arguable point on appeal. Referring to HCCC 3178 of 1995 which the High Court held as having interrupted the applicant’s occupation, counsel told us that the applicant was not a party to that suit which the 6th respondent instituted. Again, **Mr. Havi** told us that it will be an arguable point on appeal, whether the suit, not instituted by or against the applicant could disrupt her occupation of the suit property. And that in any event, that suit was dismissed because the requisite sanction of the court was not obtained before it was instituted, its plaintiff having been under receivership. Referring to the cases of ***Mugah vs Kuunga [1988] eKLR*** and ***Beth Kaari & Another vs M’Nyeri M’Rimunya [2010] eKLR***, **Mr. Havi** urged us to stop the ordered eviction to maintain the *status quo*, thereby preserving the subject matter of the appeal until it is heard and determined. This, counsel stressed was important because if the 1st and 7th respondents proceeded to evict the applicant from the suit premises, the substratum of the appeal, the suit property, and the structures thereon will stand in jeopardy. Or in case the 1st respondent charged or alienated the suit property the appeal will be rendered nugatory in the event it ultimately succeeded.

Mr. Lagat, relying on the replying affidavit filed on behalf of the 1st respondent, took the position that the High Court found that the documents exhibited by the applicant as originating from the 7th respondent, namely, the letter of allotment and approved building plans, were found to have been forged. Further, that the filing of HCCC 3178/95 disrupted the applicant’s occupation of the subject property. Therefore, on those two points the applicant had not made out grounds to constitute an arguable appeal.

Counsel further told us that the applicant currently faced a case of forceful detainer at the City Court (reference not given) which signified that she was a trespasser on the suit property. **Mr. Lagat** concluded that the appeal would not be rendered nugatory because the applicant had effected no development on the plot and her stay there was occasioning the 1st respondent immense loss.

Mr. Mwangi similarly relied on the replying affidavit filed on behalf of the 2nd respondent. His position was that since the requisite court sanction was not sought before suing Pan Africa Credit & Finance Ltd, no case lay against it and equally no appeal could be maintained against that party. As to the appeal, if any, being rendered nugatory, **Mr. Mwangi** told us that his client was a chargor of the suit premises, not a registered owner, against whom proceedings for adverse possession could be raised. Finally, that in substance the 2nd respondent had no business being in these proceedings.

As for **Mr. Kaumba** on behalf of the 5th respondent, we were told that the 3 orders sought in the present motion were to be directed against the 1st and 7th respondents only – nothing involving the 5th respondent. **Mr. Kaumba** added no more. **Mr. Faraji** for the 7th respondent saw no arguable appeal made out against his client. Counsel submitted that the applicant produced before the High Court documents which the 7th respondent disowned and the court found them not to have been authentic – the letter of allotment and approval of building plans. It was denied that the 7th respondent put the applicant in possession. If anything, she was a squatter and the 7th respondent was bound to demolish her structures on the land because they constituted a slum or shanty. That the 7th respondent had statutory powers to demolish those claimed structures whether the appeal succeeded or was lost, since the structures were illegally constructed. We heard that accordingly, the applicant had no arguable appeal against the 7th

respondent which could be rendered nugatory.

Mr. Havi in a brief reply, pointed out that only the building plans were termed forged but the 7th respondent's letter dated 22nd January, 1981 was valid. It allotted Plot LR. No.209/974, to the applicant's late husband who went into occupation. He added that the 1st respondent acquired the subject plot when the applicant's Originating Summons was already in court and that was acknowledged. As to the finding by the High Court that a court sanction was required to maintain a suit against the 2nd respondent, counsel argued that that party applied and joined the subject suit when it was already in court. In such circumstances, the applicant did not have the duty to obtain the usual orders as provided for in **section 228 of the Companies Act** to maintain the suit against the 2nd respondent. That closed the arguments.

In determining this motion, we are cognisant of the twin principles upon which the orders under **rule 5(2) (b) of the Court of Appeal Rules** may be obtained. The principles are that the applicant should place before us what will constitute an arguable appeal and also that if the orders sought are not granted and that appeal eventually succeeds, it shall be rendered nugatory. In that regard, we are alive to the aspect that while exercising jurisdiction under the said rule, we exercise original and discretionary power (see **Ruben & 9 Others vs Nderitu & Another [1989] KLR 459**. That discretion is wide and unfettered. And whether the appeal is arguable, even a single *bona fide* arguable ground raised, suffices (see **Damji Pragji Maudavia vs Sara Lee Household & Body Care (K) Ltd. Civil Application No. Nai.345/04.**) We are also mindful of the aspect that an arguable appeal is not necessarily one that will succeed. It is sufficient that the appeal is one that ought to be fully argued before the Court, one which is not frivolous. As for an appeal which may be rendered nugatory, each case depends on its own facts and peculiar circumstances (see **David Morton Silverstein vs Atsango Chesoni Civil Application No. Nail.189/2001**). The foregoing factors should suffice, even as there are many more enunciated in many decisions of this Court, to dispose of this application.

In this application arguments of counsel have been set out above. The final position they lead us to is that the applicant has made out an arguable appeal to present. For us, two points avail: one, the date of occupation of the suit property and therefore when the time required to prove possession by prescription began to run: is it with effect from 1981 when the applicant claims that the letter of allotment was issued by the 7th respondent followed with occupation; 1983 when the 1st respondent was registered over the property, or 1985 as the High Court found. Two, whether HCCC 3178/95, in which the applicant was not a party constituted disruption of occupation as the High Court found. Parties did not canvass the point whether registration in favour of the 1st respondent in 1983 affected the claim of occupation or not. It could as well be a third arguable point.

We are satisfied that the appeal could be rendered nugatory if the 1st and 7th respondents evicted the applicant from the premises and or also destroyed the structures she claims she has put up there. Being thrown off the premises and structures destroyed is a thing that this Court should not allow because even if she fell to claim damages, if the appeal succeeded, expense and time to file a suit in that regard may as well be avoided now by granting the orders of stay and injunction sought against those parties. In the circumstances, it is fair and proper that the subject matter be preserved in the manner it is until hearing and determination of Civil Appeal 64 of 2014.

In similar vein, we grant injunction against the 1st respondent not to charge or alienate the suit property. Any of those acts would change the nature of court proceedings intended in a substantial way, for instance, if a chargor appeared on the scene or indeed a 3rd party owner came along. All that can be held in abeyance for now until the outcome of the said appeal.

In sum, we grant the orders sought and direct that the costs of this application shall abide the outcome of the appeal.

Dated and delivered at Nairobi this 12th day of June, 2015

J. W. MWERA

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR