



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, MWERA & G. B. M. KARIUKI, JJA.)

CIVIL APPLICATION NO.NAI. 160 OF 2014 (UR.124/2014)

BETWEEN

HAITHAR HAJI ABDI.....1<sup>ST</sup> APPLICANT

ABDI HAITHAR HAJI.....2<sup>ND</sup> APPLICANT

AND

SOUTHDOWNS DEVELOPERS LIMITED.....RESPONDENT

*(Being an application for stay of execution pending the lodgment, hearing and determination of an intended appeal from the judgment of the High Court of Kenya at Nairobi (Mutungi, J.), dated 20<sup>th</sup> June, 2014*

in

H.C.C.C No.1389 of 2004

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RULING OF THE COURT

The two applicants herein filed a notice of motion dated 1<sup>st</sup> July, 2014 under **Rule 5(2)(b) of the Court of Appeal Rules** seeking stay of execution of the order arising from the ruling of the High Court (**Mutungi, J**) delivered on 20<sup>th</sup> June, 2014 after hearing the applicants’ notice of motion dated 28<sup>th</sup> November, 2013. That motion was brought under **sections 3, 3A, 80 of the Civil Procedure Act**. It sought orders to restrain the respondent company from dealing with the suit property **LR No.13154 Langata Karen, Nairobi**; reviewing/varying or setting aside the orders issued 9<sup>th</sup> October, 2013 and the decree issued on 3<sup>rd</sup> June, 2013. It was added in the prayers that some listed suits be declared a nullity for reasons stated, and that the Court orders one **Paul Omondi Mbago**, to bear the costs of the notice of motion and the suits referred to and listed. Those suits were not found to have a bearing here.

There were other prayers which the High Court did not find relevant for determination and which we therefore do not reproduce here. However, the main prayer that the High Court determined was the one of review filed by virtue of **section 80 of the Civil Procedure Act**. And the ground upon which that prayer was premised read as follows:

“(i) *That the discovery of the new and important matter or evidence was not in the*

***reach of the defendants neither could they have suspected the same.”***

In the arguments presented, the applicants had told the High Court that their investigations disclosed that the respondent company was never registered as such, even as at the date of the judgment delivered on 29<sup>th</sup> April, 2013 and therefore it could not buy or be registered as the owner of the property aforesaid. And further, that the auction leading to the sale of the applicants' property to the respondent was invalid because ***James Kariuki Ng'ang'a t/a Ndarugu Merchants*** was not a registered auctioneer in 1991 when the sale took place.

Particularly regarding the non-registration of the respondent company, the applicants argued that it was a second company registered on 5<sup>th</sup>

November, 2013 by the said ***Paul Omondi Mbago***, by manipulation and machination to take the suit land. The applicants disputed the assertion by the respondent that it was registered on 9<sup>th</sup> November, 1989 and therefore was a legal entity capable of buying and holding the suit property. So on this aspect, one ***Francis Kigo Ndirangu***, an Assistant Registrar of Companies was summoned. He testified and was cross-examined by the court on this issue of registration of the respondent company.

After hearing both sides, the learned judge stated what he was proceeding to determine thus:

***“Principally, the defendants' present application seeks to review this court's judgment rendered on 29<sup>th</sup> April, 2013 and the consequential orders emanating from the decree that arose from the said judgment. The other prayer/orders that the defendants seek in the application in my view are dependant on whether or not the order for review of the judgment is granted.”***

The learned judge then remarked that that prayer was premised on the claim that there had been discovery of new and important matter in that the respondent was not a registered company at the time it purported to purchase the suit property at the public auction in 1991 and so it lacked legal capacity.

Then after setting out the provisions of ***Order 45 rule 1 of the Civil Procedure Rules*** on grounds upon which review can be considered, the judge remarked that the applicants having lodged an appeal against the judgment delivered on 29<sup>th</sup> April, 2013, they were not entitled later to apply for review of the same judgment. However, he went on to determine the legality of the respondent company as contested by the applicants. Relying on the evidence of the aforesaid Assistant Registrar of Companies, who produced the records that indicated that the respondent company was incorporated on 9<sup>th</sup> November, 1989 vide certificate No.C41516, the learned judge concluded that:

***“I therefore accept the evidence that the plaintiff company was indeed incorporated on 9<sup>th</sup> November, 1989 as per the certified copy of the certificate of incorporation and as evidenced by the manual register produced in court...”***

And with that the High Court held that:

***“...the defendant's discovery of a new and important matter or evidence is a discovery that never was.”***

Their application was dismissed for lack of merit provoking the present application of stay, awaiting the intended appeal.

***Mr. G. J. Kahuthu***, learned counsel for the applicants, argued that his clients' case was premised on fraud which had been established in that the respondent was a company incorporated long after the sale of the suit property merely to take possession of that property. The auctioneer who conducted the sale was not licensed. The applicants had always remained in occupation of the suit property grazing their livestock

there. If the stay orders are not granted, the respondent could proceed to evict the applicants, charge the property or even alienate it, occasioning great loss in which case the appeal could be rendered nugatory. Further, that on a balance of convenience, the applicants should get the stay order.

**Mr. C. M. Kang'ethe**, learned counsel for the respondents had a contrary view that the review application was filed after an appeal had been lodged; that the auctioneer who sold the land was duly licensed; that evidence produced proved that the respondent company was registered on 9<sup>th</sup> November, 1989 and not 5<sup>th</sup> November, 2013 as the applicants claimed; that the applicants had not made out even a single arguable ground to be raised on appeal; and that the respondent was in possession, having fenced off the suit property and stationed a security firm there. From the bar, counsel told that the suit property had since been sold to a 3<sup>rd</sup> party.

In determining applications under **Rule 5(2)(b) of the Court of Appeal Rules**, we are cognizant of the need for the applicant to fulfill the twin conditions of first presenting an arguable appeal, even if it is only on one ground and secondly demonstrating that if the stay orders sought are not granted the appeal, if it eventually succeeds, will be rendered nugatory. The decisions of this Court regarding the applicability of Rule 5(2)(b) are legion and well known. Suffice it only to reiterate that an arguable appeal need not be one that will succeed at the hearing. It needs only be one that raises an issue that can be fully argued before the Court and that the same is not frivolous (see **Joseph Gitahi Gachau vs Pioneer Holdings (A) Ltd & Others Civil Application No.124/08**). And to whether an appeal will be rendered nugatory or not, in **Stanley Kangethe Kinyanjui vs Tony Ketter & Others Civil application No.31 of 2012** this Court said:

**“(x) Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible where damages will reasonably compensate the party aggrieved.”**

In this application the applicants' claim that they had established fraud in that the respondent was incorporated in 2013 for the sake of taking the suit land from the applicants. That this was an arguable ground that should warrant a stay of **Mutungu, J's** order of 20<sup>th</sup> June, 2014. We have also perused the draft memorandum of appeal and noted therein the ground that the auctioneer who sold the suit property was not duly licensed. To this the learned judge remarked:

**“An affidavit sworn on 25<sup>th</sup> February, 2014, by James Kariuki Ng'ang'a, the auctioneer who carried out the auction of the suit property in 1991 is annexed to Paul Omondi Mbago's affidavit as “PoM 3”. The said James Kariuki Ng'ang'a deposes that at the time he was duly registered to practice (sic) as an auctioneer and has annexed licenses (sic) to confirm that he was licenced (sic) in 1991 under the trade name Ndarugu Merchants.”**

Although the learned judge appeared satisfied that the auctioneer was duly licensed as such, in 1991, that point, too, may be argued on appeal.

We have come to the conclusion that the applicants have demonstrated that they have grounds that are arguable on appeal. Whether they succeed on appeal or not is not for us to say now.

As to whether the appeal may be rendered nugatory if stay orders do not issue, we observe that theirs is a case where if the appeal ultimately succeeds the suit property will always be there since there was no proof that it had been alienated to a 3<sup>rd</sup> party. Or if the land has been alienated, compensation by damages could do. Thus the appeal will not be rendered nugatory.

So with that, we dismiss this application and order that the applicants pay its costs to the respondent company.

**Dated and delivered at Nairobi this 3<sup>rd</sup> day of July, 2015**

**H. M. OKWENGU**

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**JUDGE OF APPEAL**

**J. W. MWERA**

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**JUDGE OF APPEAL**

**G. B. M. KARIUKI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

/jkc