



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, SICHALE & KANTAI, JJ.A.)

CIVIL APPLICATION NO. NAI 72 OF 2015

BETWEEN

PRISCA WANJIKU KABERENGE.....APPLICANT

VERSUS

NANAK HOSPITAL SERVICES.....RESPONDENT

(Being an application for stay of execution of the Judgment/Decree of the High Court of Kenya at Nairobi (Gacheru, J.) dated 27th February,, 2015

in

ELC. No. 546 of 2013)

RULING OF THE COURT

The Motion dated 17th March, 2015 is brought under **Rule 5(2) (b)** of this **Court's Rules** and seeks in the main that we order a stay of execution of the decree resulting from a Judgment of the **Environment and Land Court in Case No. 546 of 2013** pending hearing and determination of the application inter partes and thereafter a stay to issue pending the hearing of the intended appeal. In the grounds in support of the Motion the applicant says that it is untenable in law to consider an entity called Nanak Hospital Management Services Limited as being the same as the respondent, Nanak Hospital Management Services. It is also stated that the applicant has been litigating with a stranger but the High Court has issued a decree in favour of the said stranger. Also that the intended appeal is not frivolous and raises what are called in the Motion prima facie issues like whether the respondent and the said limited liability company can be said to be the same entity and whether the respondent had capacity to sue in the said Environment and Land Court. It is also stated that unless a stay of execution is ordered the applicant and her tenant stand to be evicted which would result in the applicant suffering irreparably and that would, to the applicant, render the intended appeal nugatory. The applicant, **Prisca Wanjiku Kaberenge**, swore an affidavit on the same day – 17th March, 2015- to which there are various annexures. That affidavit recapitulates the said grounds already set out and gives a history of various litigation and the processes the proceedings to be appealed underwent leading to the Judgment referred to. The respondent swore a replying affidavit through its director,

Janardhan Dahybai Patel. That affidavit also sets out the history of the matter at various courts and denies that the applicant is entitled to the orders sought.

A background of the matter can be gleaned from the Judgment of the High Court and from the various documents availed to us through the said affidavits. By an Originating Summons filed at the High Court of Kenya at Nairobi (that suit was subsequently transferred to the Environment and Land Court) the respondent as plaintiff sued the applicant for a declaration that the applicants' and her representatives continued occupation of a parcel of land known as **L.R. No. 209/2763/19 Nairobi** was unlawful and constituted an illegal trespass. It was also prayed that the applicant and others claiming under her be evicted from the said parcel of land. In the affidavit in support of that summons the respondent's director deponed that the respondent had purchased the said parcel of land at a public auction and that the respondent then became the legal and equitable owner of the parcel of land. That parcel of land had prior to the said auction belonged to the respondents' deceased husband who filed proceedings in court to challenge the said sale but that those proceedings had been dismissed. A company called Nanak Hospital Management Services Limited was then registered as owner of the land through a vesting order issued by the Senior Resident Magistrate, Nairobi, in Resident Magistrate (City Court) Civil Case No. 51 of 1995.

Lady Justice L. Gacheru, in the Judgment subject of the intended appeal, found as fact that the subject land was sold at a public auction; that a vesting order had been issued transferring the land to the respondent; that the vesting order was amended to transfer the land to a company called Nanak Hospital Management Services Limited and that an application to set aside the said sale had been dismissed.

Mr. Peter Kariuki, learned counsel for the applicant, in arguments before us, submitted in respect of arguability of the intended appeal that the suit before the High Court was incompetent because Nanak Hospital Management Services Limited was a different entity with the respondent. On the nugatory aspect counsel was of the view that since a decree had been issued in favour of the respondent there was a real likelihood that the applicant and her tenant would be evicted from the subject land where they were in occupation and retained the original title to the land.

Mr. Kandara, learned counsel for the respondent, was of the opposite view. He submitted that the subject land had been sold in 1997 and had been transferred through a vesting order but that the respondent had been unable to obtain possession of the land because the applicant resisted the respondent's claim.

Those were the rival arguments made in support or opposition to the Motion.

The principles that we apply on a consideration of applications under **Rule 5(2) (b)** of this **Court's Rules** are now fairly well settled. This Court in deciding such an application exercises unfettered powers but those powers cannot be exercised capriciously or upon the whims of the Judge. The court has to be satisfied that the intended-appeal, or appeal, if already filed, is arguable, which is the same as saying that it is not frivolous. The court must, in addition, be satisfied that should the appeal, or intended appeal, as the case may be, succeed, the success would be rendered nugatory should the court refuse to grant the application – see, for instance, an enunciation of these principles in the case of **Republic v Kenya Anti-Corruption Commission and 2 Others [2009] KLR 31** where the following passage appears:

“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 result or the success would 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 failed to demonstrate the other limb. [See also this Court's decisions in the cases of RELiance BANK LTD v NORLAKE INVESTMENTS LTD (2002) 1 EA 227 & GITHUNGURI v JIMBA CREDIT

CORPORATION LTD & OTHERS (NO. 2) 1988; KLR 828; WARDPA HOLDINGS LTD & OTHERS v EMMANUEL WAWERU MATHAI & HFCK (CIVIL APPEAL NO. 72 OF 2011 [unreported].

In the lead Ruling in **Chris Munga Bichange v Richard Nyagaka Tongi & 2 Others** [2013] eKLR Onyango Otieno, JA stated on arguability of an appeal or intended appeal:

“I do not think, in law it is necessary that there be more than a certain number of arguable issues for the court to find that the appeal filed or the intended appeal is arguable. In fact, in law one arguable point suffices for that finding.”

So an applicant who establishes that there is a single arguable point and who also satisfies the nugatory aspect of the application before the court is entitled to the protection accorded by **Rule 5(2) (b)** of this **Court’s Rules**.

What is the position here?

Learned counsel for the applicant argues that the company called Nanak Hospital Management Services Limited, which is the registered owner of the subject parcel of land, is a different entity with the respondent decree-holder.

We have seen a copy of Certificate of Incorporation No. 33821 issued on 17th July, 1987 in respect of the said company.

The suit in the High Court, and the respondent in the Motion, is Nanak Hospital Management Services.

Learned counsel for the respondent submits that the respondent and the said limited liability company are one and the same entity. The learned Judge of the High Court held as much.

Whether or not the respondent and the said limited liability company can be equated and be called one and the same entity is an issue that requires serious consideration and is obviously an arguable point. We therefore agree with learned counsel for the applicant that an arguable point is raised in the intended appeal.

What about the nugatory aspect which must also be satisfied in an application like this one?

Learned counsel for the applicant says that since a decree has been issued by the trial court an eviction of the applicant and her tenant is imminent which in his view would render the intended appeal nugatory.

As already pointed out the subject property was sold by public auction way back in 1995. A vesting order was issued and registered in the Certificate of Title on 17th June, 1996. A Provisional Certificate of Title was issued to the respondent in accordance with a Gazette Notice No. 16306. All these factors are not in favour of the applicant who, in any event, lost the court battles she lodged to set aside the said sale that took place a long time ago. That is to say that the applicant has failed to persuade us that the intended appeal, if successful, would be rendered nugatory.

The upshot of our findings is that the Motion fails and is accordingly dismissed with costs to the respondent.

Dated and Delivered at Nairobi this 3rd day of July, 2015.

ALNASHIR VISRAM

JUDGE OF APPEAL

F. SICHALE

JUDGE OF APPEAL

S. ole KANTAI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR