



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: VISRAM, KARANJA & J. MOHAMMED, JJ.A.

CIVIL APPLICATION NO. NAI 171 OF 2014 (UR 133/2014)

BETWEEN

NAIROBI CITY COUNTY.....APPLICANT

AND

CHRISTOPHER MWANGI KIOI & NANCY WAMBUI WAWERU

(Legal representatives of the estate of the late MWANGI KIOI).....RESPONDENT

HASHIM KAMAU ATHMAN.....1ST INTERESTED PARTY/RESPONDENT

YUSUF ALI.....2ND INTERESTED PARTY/RESPONDENT

(An Application for stay of execution against the whole of the Judgment of the

High Court of Kenya at Nairobi (Korir, J) delivered on 22nd May 2014

in

Misc. Appl. No. 416 of 2002)

RULING OF THE COURT

Nairobi City County is the applicant in the notice of motion dated 8th July 2014, while the respondents are **Christopher Mwangi Kioi and Nancy Wambui Waweru** (Legal representatives of the estate of the late **Mwangi Kioi**), who we shall for ease of reference refer to as the 1st respondent, **Hashim Kamau Athman** (2nd respondent) and **Yusuf Ali** (3rd respondent). The property, the subject matter of this application is **Pumwani Bar, L.R. 2378/P.T or L.R 209/2378/4R**, measuring about 0.156 hectares.

According to Mwangi and Wambui, the late Mwangi Kioi (1st respondent in JR No. 416 of 2002) had leased the property in question sometime in 1957 at a monthly rent of Ksh 2,000/=.

Their case was that the deceased operated the said bar from 1958 up to October 1975 when the predecessor of the applicant (City Council of Nairobi) offered to sell the property to the deceased at Ksh 90,000/=. He is said to have paid the money and thereafter continued paying ground rent and rates as required. This appears to have continued until December 2001 when some people – the 2nd and 3rd

respondents, herein went to the property claiming that part of the land had been allocated to them by the applicant. Apparently, the plot in question had been subdivided into six sub-plots named C1, C2, C3, C4, C5 and C6. The deceased had been allocated one of the said parcels while the 2nd and 3rd respondents had also become beneficiaries of the said sub division.

For the 1st respondent, it was argued that the appellant, having allocated the plot to him in early 1970s, then there was nothing left for the appellant to purport to subdivide and allocate to other people. For this proposition, the 1st respondent sought solace in **Section 75 of the repealed Constitution of Kenya** and the **Local Government Act**.

The 1st respondent placed reliance on several correspondences exchanged between him and the appellant, which left no doubt that the 1st respondent, had purchased the property described as Pumwani Bar. It was common ground however, that the property was not surveyed, nor had the Title Deed in favour of the 1st respondent been processed.

The appellant's stand seemed to be that the plot allocated to the 1st respondent had not been surveyed and its extent could not therefore be identified. The appellant therefore, surveyed the plot surrounding Pumwani Bar and sub-divided it into six plots which they went ahead to allocate to the 2nd and 3rd respondents. The appellant even proceeded to 'allocate' one of those plots to the 1st respondent.

It was this 'grabbing' of the 1st respondent's plot by the applicant that prompted the 1st respondent to move to court seeking *inter-alia* an order of certiorari to remove into the High Court for quashing, the decision of the applicant to subdivide the unsurveyed part of L.R No. 2378 P.T. also known as the Pumwani Bar plot, along with the letters of allotment issued for the sub-plots created following the said decision. He also sought an order of mandamus directed at the applicant or its successors commanding them to cancel the sub-division of the said parcel of land.

The High Court (W. Korir J.), heard the Judicial Review Application and allowed it with costs to the 1st respondent. Being aggrieved by the said order, the applicant moved to this Court vide the notice of appeal dated 30th May 2014, and subsequently filed this motion under **Rule 5(2) (b) of this Courts Rules** and **Section 3A and 3B of the Appellant Jurisdiction Act**.

The applicant is principally seeking an order of stay of execution of the judgment and order of W. Korir J. made on 22nd May 2014 pending the hearing and determination of the intended appeal. For purposes of this ruling, we need not delve into the details of the evidence adduced before the trial court, in order to avoid making findings that may impact on the hearing or determination of the appeal itself.

The application is predicated on nine grounds on its face which we can summarise as follows:-

That the learned Judge had erred in not finding that the offer to the 1st respondent lapsed after 30 days; that there was actually no allocation to the 1st respondent and that the 1st respondent had failed to establish any rights over the property and was indeed a trespasser on the property; and that the order of certiorari would cause grave injustice and hardship to the applicant.

These grounds are expounded in the undated supporting affidavit of Karisa Iha the applicant's Director of Legal Affairs.

It was Ms. Karisa's contention that the 1st respondent had failed to comply with the terms of the letter of allotment which he says was issued to him in 1976. Further that the 1st respondent had failed to pursue the Title Deed and reiterated that the 1st respondent was a trespasser on the said property. He deposed that if an order of stay is not granted, then the appellant would suffer hardship.

The application was opposed by the legal representatives of the Estate of the deceased (1st respondent) through the affidavit of Christopher Mwangi Kioi. He has deposed that the appellant has no arguable appeal, and further that he has failed to establish that if the order of stay is not granted, the appellant's appeal will be rendered nugatory. It was his view that since the appellant had accepted and acknowledged

the purchase price, then it cannot turn round and deny any knowledge of the 1st respondent having been on the property, and branding him a trespasser.

As stated earlier on, we must eschew making a final determination that might fetter or otherwise embarrass the court that will be seised of the appeal itself. At this stage, all we are required to do is to consider the application and make a finding on whether the applicant has satisfied the twin limbs of arguability of the appeal and the nugatory aspect. The law on this is well settled and needs no re-emphasising.

See **Reliance Bank Ltd vs Norlake Investments Ltd [2002] 1 EA 227, Silverstein vs Chesoni (supra) and Kenya Commercial Bank Ltd vs Benjo Amalgamated Ltd & Another, Civil Application No. Nai 50 of 2001**).

Has the appellant established that it has an arguable appeal?

According to Mr. Koceyo, learned counsel for the applicant, they will be arguing on appeal that the letter of allotment issued to the 1st respondent was only in respect of the bar, but not the land surrounding it. We heard him to be saying that since the plot had not been surveyed following the sale to the 1st respondent, then it would not be possible to know the extent of the 1st respondent's plot. There would therefore be a possibility that some of the sub-divided plots did not fall within the 1st respondent's property.

In our view, this point could be arguable on appeal. We nonetheless hasten to state that as has been held by this Court on numerous occasions, an arguable appeal is not necessarily one that will succeed. An applicant only needs to show that his intended appeal is not frivolous and that the same raises serious issues or reasonable argument deserving consideration by this Court. See **Kenya Railways Corporation vs Edermann Properties Ltd, Civil Application No. Nai 176 of 2012, Kenya Tea Growers Association & Another vs Kenya Planters & Agricultural Workers Union, Civil Application No. Nai. 72 of 2001**.

We are therefore prepared to accept that the applicant has an arguable appeal.

Has is established the nugatory aspect? Establishing arguability is itself not enough. The two principles are conjunctive and not disjunctive. The applicant must therefore convince this Court that if the orders applied for are not granted, then the appeal, were it to succeed would be rendered nugatory.

In our view, the nugatory aspect did not come out clearly. All counsel said on the second limb, was that the applicant has sold the land to other parties and so if stay orders are not granted, the said parties will follow them for compensation.

With respect, we do not see how that would render the appeal nugatory. The appellant took those people's money. If the court finds that it had no land to transfer, then the logical remedy is for those people to get a refund of their money. Learned counsel did not intimate that the applicant is bankrupt and cannot therefore be in a position to refund the money. In the absence of any evidence to that effect, we cannot be left to surmise, or assume so.

The long and short of this is that the applicant has failed to establish the nugatory aspect as by law required. It is our finding that this application has failed to meet the threshold set for applications of this nature to succeed.

The application is therefore for dismissal. The same is hereby dismissed with costs to the 1st respondent as the 2nd and 3rd respondents did not oppose but actually supported the appeal.

Dated and delivered at Nairobi this 13th day of November, 2015.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR