REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, G.B.M. KARIUKI & J. MOHAMMED JJA

CIVIL APPLICATION NO. NAI 270 OF 2013 (UR 198/2013)

BETWEEN

YELLOW HORSE INNS LIMITED……………………………………APPLICANT

AND

A.A. KAWIR TRANSPORTERS LTD & 4 OTHERS…..……..RESPONDENTS

AS CONSOLIDATED WITH

CIVIL APPLICATION NO. NAI 269"A" OF 2013 (UR 197 OF 2013)

BETWEEN

BROOKSIDE TRANSPORTERS LTD……….……………………APPLICANT

AND

A.A. KAWIR TRANSPORTERS LTD & 4 OTHERS……………..RESPONDENTS

(Application for injunction in an intended appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Gitumbi J) Dated 20th September,2013

in

E.L.C. Case No.747 of 2011)

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RULING OF THE COURT

Before us are two applications. One is filed in No. Civil Application No. 269 "A" of 2013 (UR 197/2013) and the other in 270/2013 (UR 198 of 2013). Both are dated the 9th day of October, 2013, lodged on the same date that is 9th day of October, 2013, and both expressed to be brought under Rule 5 (2) (b) and 42 of the Court of Appeal Rules, and Sections 3A, 3B of the Appellate Jurisdiction Act, Cap 9, of the Laws of Kenya. They are premised on the grounds stated in the body of each application. The application No. 269 "A" of 2013 is supported by

affidavit deponed by one ***Joseph Gathuku*** and the No. 270 "A" of 2013 is supported by a 48 paragraph affidavit deponed by one ***Mary Njuku***. The supporting affidavits were filed simultaneously with the applications. We traced no replying affidavits in opposition to these applications but learned counsel for the respondents in each made submissions on points of law in opposition to the consolidated applications.

Both applications arise from the same set of circumstances, relate to the same substratum and arise from rulings which were similar in content and reasoning, and there was concurrence of all learned counsel on board on at the start of the hearing on 12th November,2013, that they be consolidated and heard together, hence this joint ruling.

Brookside Studios Limited is the applicant in No. 269"A" of 2013 whereas ***Yellow Horse Inns Limited*** is the applicant in No. 270 of 2013. Both applicants will herein-after be referred to as "the applicants." Both applicants separately seek urgent injunctions to issue forthwith restraining the common respondents hereinafter referred to as the 1st , 2nd, 3rd, 4th and 5th respondents respectively namely:- ***A.A. Kawir Transporters Limited, Philma Farm Produce & Supplies Ltd, the Commissioner of Lands, City Council of Nairobi and the Hon. Attorney General***, forthwith by themselves ,their agents, servants and/or any other person or group of persons from purporting to act on their behalf from alienating, entering into, subdividing, taking possession and or interfering with the suit premises known as LR. No. 209/11803/3 in application No. 269 "A"/2013 and 209/11803/2 in Application No. 270 of 2013, or in any manner whatsoever and/or registering a grant and or title or any other document whatsoever relating to the suit premises in favour of the first respondent or any other person whomsoever pending the hearing and determination of the applicants' intended appeals. The applicants also seek costs of the applications and such further reliefs as this Honourable Court may deem fit to grant.

The grounds in the body of the application No. 269A of 2013 state that the applicant is the registered proprietor of property No. LR. 209/11083/3, whereas the grounds in application No. 270/2013 state that the applicant is the registered proprietor of LR. No. 209/11083/2. These registrations are under the now repealed Registration of Titles Act, Cap 281, Laws of Kenya. Both have respective grants in their favour. The Applicants are aggrieved because the Commissioner of Lands, the 3rd respondent, seeks to fraudulently and in contravention of all provisions of law to issue parallel grants to the first respondent, ***A.A. Kawir Transporters Limited.***

Being aggrieved by the 3rd respondents actions, the applicants moved to the High Court separately seeking injunctive reliefs to restrain the respondents from divesting the applicants of their proprietary rights to their above respective properties and vest them in the 1st respondent. The High Court separately dismissed the applications seeking the said injunctive reliefs. The dismissal orders paved the way for the 3rd respondent to actualize parallel deed plans and grants in favour of the first respondent. In dismissing the applications, the learned High Court Judge held that it was not possible at that interlocutory stage and on the basis of the facts before her to tell who the prima facie owner of the suit properties were. To the applicants, the learned trial Judges' holding runs contrary to the protective injunctive reliefs granted in favour of the respective applicants in Nai Civil Application No. Nai 280 of 2010 and Nai 281 of 2010. It is further the applicants case that although the 3rd respondent was not party to applications Numbers Nai 280 of 2010 and 281 of 2010, he was none the less aware of those orders and therefore the 3rd respondents move to divest the applicants of their proprietary rights in the said property and then vest them in the 1st respondent is in contempt of the above crystallized injunctive reliefs.

In summary and globally, ***Mr. Joseph Gathuku*** in his supporting affidavit in Nai Number 269"A" of 2013 and ***Mary Njuku*** in Nai No. 270 of 2013, reiterated the grounds in the body of their respective applications. In addition, they contended that they are the rightful and lawful proprietors of the above mentioned properties; that they hold duly registered grants and have leases in their favour; that they became aggrieved because invaders unknown to them moved to the suit premises in a bid to evict the applicants' employees. This unlawful invasion prompted the applicants to move separately and file in the High Court E.L.C. No. 746 of 2011 and 747 of 2011. Simultaneously with the filing of the said suits, the applicants filed interlocutory applications seeking interim injunctive reliefs to prevent the unlawful divestation of their proprietary rights in the suit properties. The High Court declined to grant the interim reliefs.

The applicants were aggrieved by the dismissal of their applications and they instructed their respective advocates to appeal against the orders in addition, to move to this Court to seek protective reliefs, hence the applications under review.

The deponents have further deponed that there is an urgent need for this Court to grant them interlocutory interim protective orders to prevent the 3rd respondent, in collusion with the 1st and 4th respondents, from fraudulently actualizing the generation of parallel grants, deed plans and registration of the said parcels of land in favour of the first respondent, who in turn intends to pass on the intended proprietary rights to the 4th respondent, a fact demonstrated by presence of duly exhibited executed sale agreements between the 1st and 4th respondents.

The deponents have gone further to depone that in a bid to defeat the applicants proprietary rights in the said properties, and actualize their own intended but unlawful proprietary rights, the 1st respondent filed petition No. 194 of 2011 and then successfully applied to join the applicants as parties to that petition. That it is only after the applicants had been served with all the paperwork pertaining to the above mentioned petition that the applicants came to learn of the existence of parallel deed plans and beacon certificates which the first respondent in cahoots with the 3rd respondent intended to use to divest the applicants of their lawful proprietary rights in the said properties to the first respondents, to their detriment.

Although the applicants moved to present the afore mentioned Civil Applications Nai 280 of 2010 and Nai 281 of 2010 in which protective injunctive orders were granted, to the knowledge of both the 1st and 3rd respondents, the 1st and 3rd respondents threatened to flout those orders. That in the premises, and in the circumstances demonstrated above, it would be prudent and imperative that the applicants herein be granted the protective injunctive reliefs that they seek from this court.

In his oral submissions, learned counsel, ***Mr. A.B. Shah (JA rtd)*** leading ***Mr. Kimondo Mubea***, for the applicants urged us to grant the reliefs sought in both applications. He reiterated the contents of the grounds in the body of both applications and supporting affidavits and argued that the applicants have demonstrated existence of the two prerequisites required of them under Rule 5(2) (b) of the Courts Rules of this Court.

In support of their arguments that the intended appeal is arguable ***Mr. A.B. Shah (JA rtd)*** submitted that there is already in place appeal No. 116 of 2012 now awaiting for allocation of a hearing date; that all the documentation exhibited herein and relied upon by the applicants go to demonstrate that the suit plots were among the 11 plots that had been parceled out way back in 1996; that plot Numbers 2 and 3 were lawfully and rightfully allocated to the respective applicants; that original titles were issued and later rectified in favour of the respective applicants who duly paid government charges as requested of them.

It was further the learned counsels' contention that, all the above mentioned documentations go to demonstrate that the applicants were properly vested with titles to the suit lands; that later on when allegations were made that the said titles were forgeries, the Commissioner of Lands confirmed that they were genuine titles and applicants were therefore entitled to move to Court to protect their proprietorship of the suit properties.

On the 2nd ingredient that the intended appeal will rendered nugatory, in the event that the appeal succeeds if the orders sought are not granted, learned counsel argues that the first respondent does not have a lawful claim; that this is borne out by the fact that the 1st respondent was only issued with letters of allotment recently in the year 2011; that that is when the 3rd respondent attempted to cancel the applicant's titles; that the 1st respondent's attempted acquisition of the suit properties is suspect, as the 1st respondent purported to sell the subject suit properties vide agreements of sale made on the 3rd day of June, 2011 and yet the letters of allotments are dated 29th day of June, 2011; that the existence of agreements of sale is sufficient proof that if the injunctive relief sought is not granted, the first respondent will dispose of the suit plots leading to the applicants receiving a Judgment that will be an empty shell

should they succeed in their intended appeal; lastly that they have a strong appeal with high chances of success.

In response to the applicants submissions, ***Mr. James Gitau Singh*** learned counsel for the first respondent urged us to dismiss the applicants applications on the grounds that the applicants intended appeal is a non-starter as the suits on the basis of which the injunctive reliefs were sought in the High Court had not been initiated pursuant to a company's resolution to do so; that the earlier injunctions had been issued without any undertaking as to damages; that the financial position of the applicants is unknown if not suspect; that police commenced investigations in connection with the subjects plots, which investigations led to the prosecution of the applicants with Criminal offences and those proceedings are still on-going. Further, that since the main grievance is directed at the 3rd respondent who is a government agent, no injunction can be issued against the government, in contravention of Section 16A of the Government Proceedings Act; that the applicants are guilty of abuse of the Court process as they have failed to prosecute the appeals arising from CA No. Nai 280 of 2010 and No.Nai 281 of 2010, and the suits filed by them; and lastly that if granted the reliefs sought, they will likewise sit on them to the detriment of the first respondent.

On the second ingredient, it was the learned counsel's argument that there is no way the intended appeal can be rendered nugatory as the substratum of the litigation in controversy are the two parcels of land. Their value can be computed and paid for as compensation in monetary terms.

Mercy Maragua Mogusu, learned counsel for the 4th respondent adopted the submissions of learned counsel for the first respondent in its entirety. On her own, she added that the applicants stand non-suited because the affidavit of ***Wilson Gachanja*** relied on by the applicants is not categorical that the documents he signed are the very titles that the applicants are relying on; that the two titles relied upon by the applicants are subject of police investigation; that the proprietorship initiating documents, namely, letters of allotment allotting the subject plots to the applicants have not been exhibited; lastly that the two documents also bear different I.R Numbers.

Learned counsel ***Mr. Thande Kuria*** for the 3rd and 5th respondents also associated himself fully with the submissions of ***Mr. James Gitau Singh***. He also added that the reasoning of the learned trial Judge in declining the injunctive reliefs was justified; that the applicants had failed to establish the existence of the ingredients required to be established before one could earn such a relief; that the 3rd respondent should be believed when they assert that they hold no records regarding the parcels of land claimed by the applicants; that, it is more prudent for the applicants to pursue the final conclusion of the intended appeal and the suits in order to crystallize their claims than to pursue the interlocutory reliefs. Lastly that this Court should not assist the applicants to run away from the impending trials on merit.

In reply to the respondents submission, ***Mr. A.B. Shah,*** submitted that company resolutions to initiate suits were duly granted and these have been exhibited; that knocking out the applicants applications on the technical grounds as suggested by the respondents would offend Article 159 (2) (d) of the current Kenya Constitution, 2010; that failure to give an undertaking as to damages is no ground for withholding the reliefs sought from the applicants as this condition can be ordered by the Court at any stage of the proceedings; and lastly that this Court is urged to hold that police investigations directed at the applicants were meant to influence the Courts decision either to grant or with hold the reliefs sought as they have not conclusively determined that appellants have no lawful claim to the suit titles.

On failure to exhibit letters of allotment, the learned counsel submitted that upon issuance of the grants, letters of allotment became surplusage and as such there was no need to exhibit them; that it is undisputed that they were enjoined to the proceedings in Petition Number 194 of 2011 because the other Court found that they were not only in possession but were also holders of title documents being challenged then. Learned counsel conceded that the real issues in controversy will be determined in the proceedings in the High Court Suits, but pending such disposal, it is only proper that the substratum of these proceedings be preserved in its present form; that ***Wilson Gachanja*** was certain about what he was talking about regarding the ownership of the suit properties; lastly that the injunctive reliefs sought are not non-starters as it is not directed at the Attorney General per se. As such, Section 16A of the Government Proceedings

Act does not apply.

Our jurisdiction to grant or withhold the relief sought has been invoked under Rule 5(2) (b) of this Court's Rules. It is now trite that it is a discretionary jurisdiction. The Rule enjoins us to exercise such a discretion judicially, that is not by whim, caprice or sympathy but with sound reason. See the case of ***Githiaka versus Nduriri [2004] 2KLR 67.***

The orders sought to be stayed were made by the learned trial Judge on the 20th day of September, 2013 in both applications. We have perused them and find that they are Mutatis Mutandis, similar both in content and framing. In arriving at the decision to withhold the exercise of her judicial discretion in favour of the applicants, the learned trial Judge delivered herself, inter alia, thus:-

> ***"In determining whether or not to give the plaintiff applicant the orders they seek of an interlocutory injunction, I will refer to and rely on the principles laid down in the celebrated case of Giella versus Cassman Brown [1973] EA 358 as follows:-***
>
> ***"The conditions for the grant of an interlocutory injunction are now I think well settled in East Africa. First an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt it will decide an application on the balance of convenience."***
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> ***Has the plaintiff/applicant made out a prima facie case with a probability of success? In the case of Mrao versus first American Bank of Kenya Limited & 2 others [2003] KLR 125, a prima facie case was described as follows:-***
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> ***"A prima facie case in a Civil Application includes but is not confined to a "genuine and arguable case". It is a case which, on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the letter"***
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> ***Has the plaintiff/applicant established a genuine and arguable case?. There is no question in my mind as to the fact that the ownership of the suit premises is under very intense contention as between the various claimants thereto being the plaintiff, the 1st and 2nd defendants. Going by the evidence supplied so far and the information supplied to this Court by the parties involved, it emerges that it is not possible to determine on a prima facie basis who is the legitimate owner of the suit premises at this interlocutory stage. This will have to halt until full trial of this case. Hence, at this stage of the proceedings, this Court finds that the plaintiff/applicant has not established a prima facie case. That being my finding, I see no reason for further interrogating whether the other two conditions set out in the Giella case have been met.***
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> ***In light of the foregoing, the application is hereby dismissed with costs to the defendants"***

Also not to be lost sight of is the presence of rulings by this Court in Nai 280/2010 (UR 197 of 2010) and in full citations showing parties to the suits Nai 281 of 2010(UR) 1981/2010). Both of these were decisions by this Court arising from applications under Rule 5(2) (b) of the Rules of this Court. As submitted earlier on by learned counsel for the applicants, both related to the same substratum of those applications under review herein namely LR. No.209/11803/3 and 2. The end result in both is that those applications were granted pending hearing and determination of the appeal we have been informed is in place and is only awaiting allocation of a hearing date.

It has also been submitted that the contents of both rulings dated 4th day of March, 2011 were brought to the notice of the learned trial Judge at the time of hearing on merits of the interlocutory applications giving rise to applications under review herein, but were not given the necessary weight as at the time of

her decision to withhold the reliefs sought.

In ***Ruben & 9 others versus Nderito and Another [1989] KLR 455***, this Court made the following observations at page 467.

> "***In dealing with Rule 5(2) (b) applications, this Court exercises original jurisdiction and this has been so stated in a long line of cases decided by this Court once an applicant has properly come before the Court; the Court has jurisdiction to grant an injunction or make an order for a stay on such terms as the Court may think just. We have to apply our minds de novo (a new) on the propriety or otherwise of granting the relief sought. And as we have always made clear, this exercise does not constitute an appeal from the trial Judges discretion to ours. In such an application, the applicant must show that the intended appeal is not frivolous or put the other way round, he must satisfy the Court that he has an arguable appeal. Secondly it must be shown that the appeal, if successful would be rendered nugatory. See Stanley Munga- Githunguri versus Jimba Credit Corporation Limited Civil Application Nai 161 of 1985"***

In ***Bob Morgan systems Limited & Another versus Jones [2004] 1KLR 194*** at page 195, this Court had this to say;

> ***"The powers of the Court under Rule 5(2) (b) aforesaid are specific. The Court will grant a stay or an injunction as the case may be if satisfied firstly that the applicant has demonstrated that his appeal or intended appeal is arguable; and secondly that unless a stay or injunction is granted his appeal or intended appeal if successful will be rendered nugatory***"

See also ***Gibson Ngugi and another versus Turf Development CA Nai 166 of 2009 (UR 39/2009)*** in which this Court had this to say of the exercise of the jurisdiction under Rule 5(2) (b). "***It is now an old hat that for the applicant to succeed in an application for a stay of orders or injunction under rule 5(2) (b) of this Court's rules, he must satisfy the twin guiding principles that the intended appeal is arguable, that is that it is not frivolous and that unless a stay or injunction is granted, the appeal or intended appeal if successful would be rendered nugatory***- See ***Githunguri versus Jumba Credit Corporation (No.2) [1788] KLR 838. J.K Industries Limited versus Kenya Commercial Bank Limited [1982-88] 1KLR 1088, and Reliance Bank (In Liquidation) versus Norlake Investments Limited- Civil Application No. 78 of 2002 (unreported).***

Being so guided by the above set out principles, our simple task at this juncture is to determine whether on the basis of the material placed before us, the applicants have brought themselves within the ambit of the prerequisites required to be established before one can earn the relief sought under Rule 5(2) (b) of this Court's Rules, or alternatively whether the respondents, have ousted the applicants plea of entitlement to the said reliefs. We say at the outset that the applicants have demonstrated existence of an arguable appeal and thus have met the first ingredient.

We have identified issues for interrogation on the appeal/intended appeal as follows. **One**, whether the applicants are non suited on account of alleged lack of authority to initiate litigation; **two**, whether the learned trial Judges' ruling should have borne in mind this Courts protective injunctive orders granted in both applications Nai 280 of 2010 and Nai 281 of 2010 both of which were brought to her attention, considering that these had shielded the applicants proprietary rights pending the hearing and determination of the intended appeal, which had not crystallized as at the time the learned trial Judge delivered her rulings. **Three**, whether or not the presumption of innocence or otherwise in the Criminal proceedings initiated against the applicants should have been another factor which should have tilted the scales of justice towards the granting of a preservatory order. **Four**, whether the very fact that the issue of ownership of the subject suit properties was hotly contested by several claimants and the fact that it was not clear to the Court as to who was the owner or was in possession should have been sufficient reason even as a sole reason for the learned Judge to grant a preservatory order pending the disposal on merit of the pending litigation. **Five,** whether the learned trial Judge should not have put matters to rest after

discounting the major ingredient for granting or with holding of an injunctive relief, but should have gone further to consider the applicability or otherwise of the other two equally important ingredients for the granting of this relief, apply these to the facts before her and then proceed to determine whether consideration of these two ingredients would have tilted the balance of scales of justice in favour of the applicants for the reliefs they sought before her.

It is now trite that only one arguable point is sufficient for the granting of the relief under Rule 5(2) (b) of this Courts' Rules. Herein we have identified more than one as demonstrated above.

Turning to the issue of the intended appeal being rendered nugatory should the applicants succeed on their appeal, it has been argued by the 1st respondent that the subject suit properties can be valued and compensated for in terms of money. We have no quarrel with that considering that the subject suit properties are land, and are capable of being valued and compensated for in monetary terms. However, the circumstances displayed herein call for a restraint in making a move in that direction. The reason being that in a situation where ownership and possession is being hotly contested by several claimants, the possibility of ownership falling prematurely into the hands of a party who may ultimately not be adjudged the rightful owner at the conclusion of the litigation cannot be ruled out. The net result of such a situation arising is that the applicants if ultimately adjudged the lawful and rightful owners may very well have to undergo great expense if not inconvenience to pursue other persons for the recovery of ownership or monetary value. In the result, we find the second limb, namely, that the intended appeal may be rendered nugatory if the orders sought are not granted in the event that the applicants succeed in it also made out.

In the result and on the basis of the above reasoning, we find merit in both applications. We grant prayers 2 and 3 in each of the applications numbers 269"A"/2013 and 270 of 2013.

2. We also direct that in view of the peculiar circumstances displayed herein, the appeal/intended appeal process be expedited.

3. The applicants shall file an undertaking as to damages within thirty (30) days of this ruling.

4. Costs of this application shall be in the intended appeal.

Dated and Delivered at Nairobi this 14th day of February, 2014

R.N. NAMBUYE

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JUDGE OF APPEAL

G.B.M. KARIUKI

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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

D/O