



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: OKWENGU, MAKHANDIA & OUKO, JJ.A.)

CIVIL APPLICATION NO. 30 OF 2013

BETWEEN

CECILIA KADZO EMMANUEL APPELLANT

AND

MIRIAM CHEA MUNGAI RESPONDENT

(An application for an injunction pending an appeal against the ruling and order of the Environment and Land Court (Angote, J.) dated 1st November, 2013

in

Malindi E.L. C.C.. No. 140 OF 2013)

RULING OF THE COURT

Cecilia Kadzo Emmanuel, 'the applicant,' is a resident of Kilifi County. She was married to the late **John M. Karisa** "deceased" who according to her was allocated **Plot No. 490** situate at Mabirikani area of Kilifi town. Pursuant to the allocation, the deceased made all the necessary payments to the defunct County Council of Kilifi whereupon he together with his entire family moved and settled in the plot. That was in 1982 and they have since been in continuous and uninterrupted occupation. However that occupation was rudely interrupted sometimes in 2010 when **Miriam Chea Mungai** 'the respondent' through her advocates authored a letter to her alleging that she had trespassed onto her land being **L.R. No. 5054/328**. To the applicant Plot No. 490 was one and the same as respondent's parcel of land aforesaid. We shall henceforth refer to both Plot No. 490 and L.R. No. 5054/328 as "the suit premises."

Sometimes in September, 2010 the respondent sent the District Surveyor to the suit premises and soon thereafter, the respondent started the construction of the perimeter wall around the suit premises. In the process she enclosed the applicant's developments and or house therein. This was followed by a notice issued at the instigation of the respondent by the defunct Kilifi Town Council to the applicant requiring her within 21 days to demolish her aforesaid developments. These actions pushed the applicant to file **Civil Suit No.140 of 2013**, in the Land and Environment High Court at Malindi. In the suit the applicant prayed for a declaration that she was the legal owner of the suit premises, and that if the suit premises were one and the same then the respondent was barred by operation of law from recovering the same and a permanent injunction would issue restraining the respondent from interfering with her quiet enjoyment, possession and use of the suit premises. She also prayed that the grant issued to the

respondent be revoked and a new one issued to her, an order that the respondent do remove, at her own cost, developments she had made in the suit premises, compensation in the sum of Kshs.25,425/- for the trees damaged, exemplary damages for mental torture and finally, costs.

Contemporaneously with the filing of the suit, the applicant took out a motion on notice dated 12th August, 2013 in which she sought in the interim an order of injunction against the respondent pending the hearing and final determination of the suit. The affidavit in support of the application merely reiterated what we have already set out above. The only addition however being that the respondent's plot was formally unsurveyed **Plot No.16 Kilifi** which was situate next to the Old Ferry area which is not the same area as Mabirikani where the suit premises are situate.

The respondent in her reply deponed that whereas the applicant claimed that her plot was initially allocated to her late husband, she had however in a previous suit pitting her against the respondent claimed that she had personally bought the same from one **Juma Msuko** for Kshs.700/- on 23rd November 1982. In the said suit being **Mombasa Elc No. 104 of 2012**, the applicant had made similar claims as in the instant suit but it was struck out by Mukunya, J. Consequently, the instant suit was an abuse of the court process. Otherwise, the respondent had been allocated unsurveyed residential Plot No. 16, Mabirikani on 4th November, 1987. She processed the allocation and was eventually issued with a grant on 26th September, 2012. That her land Parcel No. 5054/328 had nothing to do with the applicant's Plot No. 490; and finally that the court made a finding in Mombasa case that there was no nexus between the two parcels of land.

Having considered the application, rival affidavits and the annexures thereto, the oral submissions by learned counsel and the law, **Angote, J.** on 1st November, 2013 ruled in favour of the respondent by holding thus “... **The end result is the same, that is, the application for injunction is res judicata.**” Accordingly, he proceeded to dismiss the application with costs. On the very day, the applicant lodged with this Court Notice of Appeal evincing her intention to challenge that decision in this Court. On 20th November, 2013, the applicant lodged an application under **Rule 5(2)(b)** of this Court's Rules seeking that pending the hearing and determination of the intended appeal, this Court be pleased to issue an order staying the proceedings in the High Court as well as grant an injunction restraining the respondent from evicting the applicant from the suit premises. The applicant prayed for yet another injunction to restrain the respondent from proceeding with the construction of a perimeter wall or a hostel worth Kshs.45,000,000/- on the suit premises. That application is the subject of this ruling.

The grounds in support of the application were that, following the dismissal of her application by the High Court, she had immediately lodged a Notice of Appeal. In the meantime, the respondent had resumed the construction of the perimeter wall around the suit premises. Indeed the contractor had in the process demolished part of her house and denied her access. That her intended appeal would be rendered nugatory if the injunction sought is denied since the respondent may complete the construction of the hostel given the rate at which the respondent working on the same. That the applicant's intended appeal as evidenced by grounds in the draft memorandum of appeal annexed to the supporting affidavit was arguable and not a frivolous one. Finally, she contended that the ends of justice in this case called for an unconditional order of injunction otherwise the intended appeal would be rendered merely academic.

The affidavit in support of the application merely reiterated and expounded on the above grounds. Suffice to add however that the applicant is persuaded that her intended appeal is arguable on the grounds that the learned Judge erroneously applied the doctrine of **res judicata**. That the injunction if granted, will preserve the suit premises and she would not suffer eviction therefrom together with her entire family. She was otherwise willing to abide by any condition(s) that this Court may deem fit to impose in allowing the application.

In response to the application, the respondent filed grounds of opposition stating that the applicant had not demonstrated any ownership of the suit premises and on that basis, the application was completely devoid of merit. The application before the High Court was **res judicata**, that **section 26** of the Land Registration Act was in favour of the dismissal of the application, the orders sought in the plaint

were incapable of being granted and so the injunctive relief sought by the applicant was an abuse of the Court process; the attached draft memorandum of appeal did not disclose any triable issue and lastly, that on the balance of probabilities, the respondent stood to suffer massive loss in halting the development of the suit premises as she had already obtained all approvals and commenced development.

Urging the application before us on 16th December, 2013, **Mr Odhiambo**, learned counsel for the applicant reiterated the argument that the intended appeal was not frivolous, that if the injunction was denied, the applicant would suffer eviction. The applicant would suffer prejudice bearing in mind that she had been in occupation since 1982. Regarding grounds of opposition, counsel submitted that they dealt with matters of evidence which should await the appeal. There were two titles to the suit premises. The broad issue for determination is whether, the suit premises claimed by both parties is the same and whether the reliefs sought by the applicant are available to her.

On his part, **Mr Kimani**, learned counsel for the respondent submitted that there was no arguable appeal. The findings by the two courts below was that the applicant's land had no nexus whatsoever with the respondent's. The respondent had a grant to the suit premises as opposed to the applicant whose only claim to the suit premises is a document by **Kalolo Kibaoni Bayamagonzi upgrading project**; that to the extent that the respondent had title, the intended appeal was not arguable. Lastly, counsel submitted that balance of convenience titled in favour of the respondent as she had all the approvals allowing her to develop the suit premises and resources so far mobilised for the project are being wasted.

From the submissions, it is quite apparent that the applicant is keen on the prayer for the injunction and not for both injunction and stay of proceedings as prayed for in the application. Nowhere in her submissions before us has she addressed the need to stay the proceedings. In which case therefore we shall deem it that the applicant is no longer keen on the prayer for stay of proceedings.

We have considered the applicant's case and that of the respondent as advanced in their pleadings and oral submissions. As we understand it, our role at this point in time is to grant an injunction once we are satisfied that on the face of it, the intended appeal is arguable. The appeal need not however succeed at the end of the day. Secondly, we need to be satisfied that if by not granting the injunction the intended appeal would be rendered nugatory. These two principles have held sway over a long period of time such that they would appear to be cast in stone. This is what this Court said in the case of **Ishmael Kagunyi Thande v Housing Finance Company Limited, Nai Civil Application No. 157 of 2006 (UR)**:-

“... the jurisdiction of the Court under Rule 5(2)(b) is not only original but also discretionary. Two principles guide the Court in the exercise of that jurisdiction. These principles are now well settled. For an applicant to succeed he must not only show his appeal or intended appeal is arguable but also that unless the Court grants him an injunction or stay as the case may be, the success of the appeal will be rendered nugatory ...”

Applying the aforesaid principles of law and case law to the rival arguments herein, we are satisfied that the applicant has attained the threshold of the first consideration. Having perused the grounds of appeal in the draft memorandum of appeal, we are satisfied that they are not frivolous. One ground stands out in particular; that is, that the Judge misapprehended the doctrine of **res judicata** and proceeded to dismiss the application. Whether or not the Judge was right in his application of the doctrine is certainly a matter that requires to be ventilated at the substantive hearing of appeal. This ground alone makes the intended appeal not frivolous but arguable in the light of the fact that both parties hold contrasting views on the issue. In an application of this nature, all that the applicant needs to demonstrate is that the appeal is arguable. Even a single issue will suffice. In other words, the applicant need not establish a multiplicity or a plethora of arguable issues in the intended appeal before he can bring himself within the ambit of this requirement.

Will the intended appeal otherwise be rendered nugatory if the injunction is not granted? The applicant has deponed that soon after the ruling by the high Court dismissing her application for injunction the effect of which was to effectively discharge the interim injunction orders in place, the respondent moved with speed and immediately embarked on constructing a perimeter wall around the suit

premises. In the process she demolished part of her house. Should the respondent be left to complete the perimeter wall, the applicant will effectively be locked in or outside the suit premises, the overall effect of which will be the eviction of the applicant and her family from the suit premises. The respondent has not seriously challenged this deposition. If anything she confirms through her counsel's oral submissions her determination to have the suit premises secured by a perimeter wall so that she can commence the construction of the Kshs.45,000,000/- hostel. Given the foregoing, we have no hesitation in reaching the conclusion that indeed the appeal will be rendered nugatory if the injunction sought at this juncture is refused. The applicant will most probably be locked out of the suit premises forever. Further the suit premises may be developed by the respondent as threatened thereby putting it beyond the reach of the applicant.

For all the foregoing reasons, we allow the application in terms that pending the hearing and determination of the intended appeal an injunction shall forthwith issue restraining the respondent from constructing a perimeter wall or a Kshs.45,000,000/- hostel and or evicting the applicant from the suit premises. Costs shall be in the intended appeal. However the injunction so granted shall only last for six (6) months from the date of this ruling within which time it is expected that the applicant would have filed and prosecuted the intended appeal.

Dated and delivered at Malindi this 6th day of February, 2014.

H. M. OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

I certify that this is a
true copy of the original

DEPUTY REGISTRAR

/saa