



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: P. KIHARA KARIUKI, (PCA), KIAGE & GATEMBU JJA)

CIVIL APPLICATION NO. 256 OF 2013

BETWEEN

AHMED MUSA ISMAEL .....APPLICANT

AND

KUMBA OLE NTAMORUA ..... 1<sup>ST</sup> RESPONDENT

SARONI OLE NTAMORUA..... 2<sup>nd</sup> RESPONDENT

PARSAAYA OLE KUTU ..... 3<sup>RD</sup> RESPONDENT

COUNTY COUNCIL OF NAROK ..... 4<sup>TH</sup> RESPONDENT

COMMISSIONER OF LANDS ..... 5<sup>TH</sup> RESPONDENT

*(Application for an order of injunction restraining the respondents from interfering with Parcel Number Narok No. 326 pending the filing, hearing and determination of an appeal from the High Court of Kenya at Nakuru (Waithaka, J.) dated 26<sup>th</sup> July, 2013*

in

*ELC NO. 121 OF 2012)*

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RULING OF THE COURT

By the motion dated 23<sup>rd</sup> September 2013 and brought under Rule 5(2) (b) of the Court of Appeal Rules, the applicant seeks the following orders against the respondents;

*“2. That pending the filing, hearing and determination of an appeal preferred against the orders made on 26<sup>th</sup> July, 2013 in Nakuru ELC No. 121 of 2012 by Hon. L.N. Waithaka, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents whether acting person, through their agents, servants employees or anyone executing their instructions be restrained from taking possession, trespassing, constructing, encroaching or in any manner howsoever dealing with or interfering with Parcel Narok Parcel No.*

326 (hereinafter referred to as the suit property).

**3. That pending the filing, hearing and determination of an appeal preferred a mandatory injunction be issued compelling the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents to demolish and remove the structures erected in the suit property at their own costs.”**

The grounds upon which the application is premised are set out on the face of the motion as follows;

***a. That the applicant is the legal allottee and beneficial owner of the suit property having been issued with an allotment letter on 29<sup>th</sup> January, 1987.***

***b. That the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents trespassed onto his land which prompted him to file ELC No. 121 of 2012 formerly NAKURU HCC NO. 69 OF 2011 and simultaneously an application for injunction dated 29<sup>th</sup> March, 2011 which was however dismissed on 26.7.2013.***

***c. That this has left the applicant's land exposed to interference by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents who have embarked on construction of permanent building on it.***

***d. That the applicant has filed a notice of appeal against the ruling of 26<sup>th</sup> July, 2013 by Hon. Waithaka and this appeal will be rendered nugatory if injunctive orders are not issued.***

***e. That further the applicant will suffer great prejudice and the substrum of the suit will change drastically should these constructions go on.***

***f. That it is in the interest of justice law and equity that this application be allowed.”***

The evidentiary or factual basis of the application is supplied by the affidavit of one Amran Ahmed Musa expressed as sworn on **23<sup>rd</sup> September 2013**. The deponent derives his authority to swear the affidavit from a power of attorney donated to him by the applicant which is exhibited. He deposes that the 4<sup>th</sup> respondent's plot allocation committee at a meeting held on 16<sup>th</sup> August 1985 allocated unsurveyed Plot No. 302 to the applicant which led to the 5<sup>th</sup> respondent issuing a letter of allotment to the applicant on **29<sup>th</sup> January 1987**. The applicant accepted the allotment and paid the stand premium for the plot and was subsequently shown a plot which was surveyed and a request made by the District Commissioner that the applicant be issued with a title deed.

It is further averred that the applicant has had quiet possession of the plot but that in 2011 the 1<sup>st</sup> to 3<sup>rd</sup> respondents trespassed upon the same and unlawfully commenced construction precipitating the applicant filing a suit in the High Court at Nakuru which was later transferred to the Land and Environment Court. He made an application for an injunction in the said suit which was dismissed on **26<sup>th</sup> July 2013**, a decision against which he intends to appeal and has filed a notice of appeal. The applicant now makes the prayers before this Court fearful that without them the said respondents will carry on with construction on the disputed property thereby “drastically changing the substrum of the land and the suit at large.”

The 1<sup>st</sup> and 2<sup>nd</sup> respondents in opposition to the motion filed a replying affidavit sworn by Kumba Ole Ntamorua on **14<sup>th</sup> November 2013** in which they charge that the applicant, by not placing before this Court the respondents' defence, statements and replying affidavit filed in the court below, was guilty of material non-disclosure.

The application was urged before us by Mr. Kurgat, learned counsel for the applicant who was supported

by Mr. Njuguna learned counsel for the Attorney-General who expressed no opposition to its grant. Mrs. Omollo, learned counsel held brief for Mr. Chomba for the 1<sup>st</sup> and 2<sup>nd</sup> respondents and relied wholly on the replying affidavit we have referred to herein and the documents attached thereto.

The principles upon which we exercise our jurisdiction under **Rule 5(2)(b)** of the Court of Appeal Rules are notorious. See, for instance **DHIMAN Vs. SHAH** [2008] KLR 165; **BOB MORGAN SYSTEMS LTD & ANOR Vs. JONES** [2004] 1KLR 194. An applicant must show that he has an arguable appeal and further that unless we grant the orders sought, his appeal, if successful, will be rendered nugatory. An arguable appeal need not raise a multiplicity of explorable points, a single one would suffice. That point or points need not be such as must necessarily succeed on full consideration of the appeal – it is enough that it is a point on which there can be a **bona fide** question to be explored and answered within the context of an appellate adjudication. The second limb, and both must be established, is an indication that stays or injunctions are not automatic. Rather they are granted to preserve the integrity of the appellate process so as not to render any eventual success a mere pyrrhic victory devoid of substance or succour by reason of intervening loss, harm or destruction that turns the appeal into a mere academic ritual.

Bringing those principles to bear to the application before us, it would seem that the only basis upon which the applicant asserts the arguability of his intended appeal is a letter of allotment allegedly issued to him in respect of the suit property. Arrayed against the applicant is the evidence presented by the 1<sup>st</sup> and 2<sup>nd</sup> respondents that they were bona fide purchasers for value having bought the suit property from one **Alimina Rehintula**, the original allottee of the same. The evidence contained in the replying affidavit in opposition to the application was not responded to by the applicant. That leaves the said respondents' contention of ownership wholly uncontroverted.

Besides the foregoing, there is also the uncontested averments by the 1<sup>st</sup> and 2<sup>nd</sup> respondents that the applicant has been guilty of concealment of facts material to this Court's just determination of this matter. This was captured in the 1<sup>st</sup> respondent's replying affidavit filed on 13<sup>th</sup> October 2011 in the court below in HCCC 69 OF 2011 as follows;

***“3. That I am further informed by the previous owner of the suit property one Alimina Rehintula and whose information I verily believe to be true and correct that the plaintiff/applicant's application is an abuse of court process, the plaintiff/applicant having previously moved to various courts being Resident Magistrate's Court Civil Case No. 3198 of 1995 and HCCC NAIROBI NO. 1600 OF 1995 respectively and now the present suit. The applicant in all these suits raises the same issue of ownership the same was dismissed with costs.”***

We find it most odd that the applicant failed to disclose the critical and relevant facts deposed to above in his application before us. That he did not in candour volunteer the information and that he did not challenge or controvert those averments when brought by the respondents leads us to the conclusion that the applicant did not approach this Court with the transparency and candour that was required of him. Deliberate concealment of material facts can only be seen as an attempt to mislead the court and to steal a march on opposing parties. It also compromises an applicant's chances of obtaining a favourable exercise of this or any other court's discretion. As this Court stated in **DAVID KAMAU GAKURU Vs. NATIONAL INDUSTRIAL CREDIT BANK LTD** (Civil Appeal No. 84 of 2001) an injunction being an equitable remedy cannot be granted to party who has demonstrated openly by his conduct that he is undeserving of the equitable relief.

That apart, and more implicative of our **5(2)(b)** jurisdiction, the facts that the applicant deliberately concealed or otherwise failed to disclose are such as go to cast a significant doubt on whether the applicant has an arguable appeal. Mounting only a doubtful case as to arguability of an appeal will not satisfy the first limb.

Once an applicant fails to satisfy the arguability test, there really is no need for us to consider whether the intended appeal would be rendered nugatory. But even if we were to consider it, on the material before us,

the disputed property has been in the possession of the 1<sup>st</sup> and 2<sup>nd</sup> respondents pursuant to a purchase. They have been in occupation and have exercised proprietary rights over the said property for nearly two decades while the applicant is alleged, without controvert, to have been outside of jurisdiction and unconnected to the property for the same period of time. In those circumstances, the nugatory test is also unsatisfied.

Being of this view, we find ourselves unpersuaded that this application is meritorious. We accordingly dismiss it with costs to the 1<sup>st</sup> and 2<sup>nd</sup> respondents

*Dated and delivered at Nairobi this 28<sup>th</sup> day of March, 2014.*

**P. KIHARA KARIUKI, PCA**

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**JUDGE OF APPEAL**

**P.O. KIAGE**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU**

.....

**JUDGE OF APPEAL**

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

**REGISTRAR**