



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & MWILU- JJ.A)

CIVIL APPLICATION NO. NAI 234 OF 2010 (UR 168 OF 2010)

BETWEEN

**EX-PARTE DICKSON OLENTIKOISA.....
APPLICANT**

AND

**LAND DISPUTE COMMITTEE RIFT VALLEY PROVINCE.....1ST
RESPONDENT**

**SERAH N. THEURI-THOTHI KIANDA SELF HELP GROUP.....2ND
RESPONDENT**

**EDITH NJAMBI KAMAU SENIOR RESIDENT MAGISTRATE KAJIADO.....3RD
RESPONDENT**

(Application for an Injunction and/or Stay Order of any further proceedings in an intended Appeal from the Ruling and order of the High Court of Kenya at Nairobi (Sitati.J0 dated 27th September, 2010

in

H.C. Misc. Civil Appl. No. 38 of 2009)

RULING OF THE COURT

1. Before us is a notice of motion dated the 11th day of October, 2010 brought under Rules 5(2) (b) and 42 of the Court of Appeal Rules. The main prayers are for an injunction to issue against the respondents to prevent them from executing the order issued by the 3rd respondent, and an order for stay of further proceedings in the 3rd respondent's Court in respect of the suit premises until the hearing and determination of the applicants intended appeal. The order sought for an injunction is essentially an order for stay of execution.
2. The background to the application is that, once upon a time there existed a property known as NTABHATI/27 Saikeri Group Ranch, in Ngong-Kajiado. The applicant **Mr. Dickson Ole Ntikoisa** was a member of that group Ranch, owning a number of shares and entitled to a certain acreage of the land not specifically defined on the ground by then. On the 15th day of September,

- 1988, the applicant executed a sale agreement with one **Edith Njambi Kamau** in her capacity as secretary of the second Respondent, **Kianda Self Help Group**. The agreement was for the sale of one hundred (100) acres of land out of the 120 acres of land comprising the expected share, then held by the applicant in the Group Ranch.
3. The consideration was Ksh. 750,000.00 payable by installments, which installments are confirmed by both sides to have been fully paid to the applicant directly. This money has never been refunded to the 2nd respondent. Nor has it ever been held in any neutral interest earning account for the benefit of whoever will be adjudged the ultimate rightful owner and winner at the conclusion of the current litigation.
 4. It is undisputed, and we have been so informed, that the land was agricultural land. In order for the transaction to be valid, the transaction needed to receive the blessings of the area Land Control Board. This was a requirement of the repealed Land Control Act, Cap 302 but neither party appears to have initiated this process. The transaction therefore legally lapsed.
 5. In a bid to breath life into the sale transaction, the second respondent through one **Sarah N. Theuri** in her capacity as the then chairlady of the 2nd respondent went before the Kajiado Land Disputes Tribunal and filed Land Disputes Tribunal case No. T.C.337/12/06, against the applicant. The parties were heard on merits and the tribunal rendered a verdict on 15th February, 2007 allowing the 2nd respondents' claim at 30 acres out of the 100 acres initially claimed. The tribunal also gave leave to any aggrieved party within thirty (30) days of that decision.
 6. The decision of the land disputes tribunal formed the basis of proceedings in Kajiado Senior Resident Magistrate's Land Dispute Tribunal case No. 13 of 2007. A perusal of these proceedings reveals that the elders' award was received and read to the 2nd respondent in the absence of the applicant on 27th March, 2007. Thirty (30) days right of appeal was explained. Apparently this award was not adopted as an order of the Court.
 7. The second respondent through the same **Sarah Nyakinyua Theuri** filed Rift Valley Provincial Appeals Committee Civil Appeal No. 24 of 2007 dated the 9th of April, 2007. Once more, the parties were heard on their merits. The Appeals Board reversed the decision of the Kajiado Land Disputes Tribunal and awarded the total acreage of 100 acres stated in the agreement to the second respondent. The decision is dated 4th January, 2008. The Appeals Board also gave any aggrieved party leave to appeal to the High Court within sixty (60) days of the decision.
 8. No appeal was filed in the High Court by either party. The 2nd respondent returned to the same Senior Resident Magistrates' Court at Kajiado and presented a chamber summons under Section 7(2) of the Land Disputes Tribunal Act No. 18 of 1990 (now repealed), dated the 26th day of January, 2009 seeking firstly, that the Court be pleased to adopt the Land Disputes Appeals Committee decision in Rift Valley Province Appeals Board decision dated 4th November, 2008 and make it the judgment of the Court; secondly that the respondent be ordered to sign application forms for Land Control Board consent, mutation, transfer, or any other documents necessary to effect transfer of the 100 acres of Land in NTABHATI/27 Saikeri Group Ranch Ngong Kajiado in favour of the 2nd respondent and in default, the executive officer of the Court be authorized by the Court to execute the said documents on behalf of the applicant.
 9. The applicant herein opposed that application which gave rise to a ruling by **W.N. Kabaria SRM** dated 26th March, 2009 in which the learned trial Magistrate delivered himself, inter alia, thus:-

“I have considered the application and the arguments by both sides. The role of this Court under the Land Disputes Act No. 18 of 1990 is thereby to issue a decree to clothe the award of the Land Disputes Tribunals with the necessary ability to be executed. The Act does not give powers to override these tribunals. That power lies with the High Court of Kenya. The objection by the respondent is therefore bereft of any merit and I hereby dismiss it.”

10. The applicant moved to the seat of justice in the High Court by way of Judicial Review. The notice of motion is dated the 22nd day of April, 2009. In summary, it sought an order of certiorari to quash the reliefs that had been awarded by the SRM Kajiado aforesaid. It also sought orders to prohibit, firstly the adoption of the decision of the Rift Valley Provincial Appeals Board; and secondly the execution of any transfer documents in favour of the 2nd respondent.

11. The Judicial Review application was opposed by the second respondent, and was heard on its merit by **Sitati J.** who in a ruling delivered on the 27th day of September, 2010, dismissed the application. The applicant was aggrieved by that decision and he has filed and served a notice of appeal dated the 28th day of September, 2010 on which the application under review is anchored.
12. The grounds in support are contained in the body of the application as well as the supporting affidavit of the applicant filed on the 11th day of October, 2010. In summary, the applicant concedes entering into an agreement with the 2nd respondent for the sale of one hundred (100) acres out of the 120 acres that were beneficially due to him out of Group Ranch Land Title No. KAJIADO/NTABHATI/27; that no consent of the area Land Control Board was ever obtained to sanction the said transaction but the purchase price of Kshs. 750,000.00 was fully paid.
13. The above original title was subsequently subdivided and the applicant was allotted his 120 acres which he has further subdivided into two, one portion of twenty (20) acres known as KAJIADO/NTASHART/2582, and the other one measuring one hundred (100) acres as KAJIADO/NTASHART/2581. It is the applicant's further contention that all the proceedings that took place before both the Kajiado Land Disputes Tribunal and the Rift Valley Appeals Board were illegalities and nullities and the High Court should not have withheld the Judicial Review orders sought by them; that the orders granted by the subordinate Court and confirmed by the High Court are incapable of being enforced on the ground as they are directed at a non-existent title; that he has a genuine grievance to take up on appeal; that he moved diligently and with speed to file and serve the notice of appeal and apply for a copy of the typed proceedings; that he has been consistent in resisting the 2nd respondent's claim culminating in a judgment sought to be impugned in the intended appeal.
14. In his oral submissions before us, **Mr. J.P. Machira** learned counsel appearing for the applicant maintained that the intended appeal is arguable as demonstrated by the draft memorandum of appeal because both the District Land Dispute Tribunal as well as the Rift Valley Land Appeals Board did not have jurisdiction to adjudicate the dispute; that the learned Judge of the High Court, having found on a point of law that the two tribunals had no jurisdiction to determine the dispute, should have allowed the Judicial Review application; that the learned trial judge should not have used the powers under the inherent jurisdiction of the Court ignoring clear provisions of the Land Control Board Act requiring consent and those of the Land Disputes Act No. 18 of 1990 which provided that the Land Disputes Tribunal as then constituted had no jurisdiction to adjudicate over matters touching on title to land.
15. Furthermore he submitted, the learned trial Judge should not have ignored the fact that the applicant was now the registered owner of two parcels of land, totally different from the subject property forming the subordinate Court's judgment.
16. On the second ingredient of the success of the intended appeal being rendered nugatory should the relief sought be declined, **Mr. Machira** maintained that this ingredient too has been demonstrated to exist as the subject matter of the judgment sought to be enforced is non-existent; that allowing the judgment of the subordinate Court to stand will render the clear provisions of the law nonsensical; and that no prejudice will be suffered by the second respondent as parties have maintained the current status quo since 1988. On the other hand if the relief is withheld, the applicant will be greatly prejudiced as he stands to lose his land through a process which he has clearly demonstrated flouted the law. Lastly he stated the applicant is amenable to a conditional order for stay.
17. The application was opposed by the 2nd respondent on the basis of a replying affidavit filed on the 11th day of March, 2014 and the submissions of learned counsel **Mr. R.M. Mutiso**. In summary, these are that an application under Rule 5(2) (b) of this Court's Rules can only lie where there is an appeal in place; that the decision intended to be appealed against was made on the 27th day of September, 2010 by **Sitati J.**; that it was a dismissal order and therefore a negative order; that three years since the making of the said order an appeal has not yet been filed; that the dispute stems from a transaction which took place in 1988; that the full purchase price was paid to the applicant and to date, no transfer has ever been effected in favour of the 2nd respondent; and that the applicant has been frustrating every effort made by the 2nd respondent to execute the judgment of the subordinate Court.
18. Further **Mr. Mutiso** argued that the learned trial Judge was right when she made observations

- firstly, that the applicant squandered his chances when he failed to challenge the Land Disputes Tribunal and the Provincial Appeals Board decisions in time; and secondly despite lack of jurisdiction by both the Tribunal and the Appeals Board, the learned Judge exercised inherent jurisdiction to withhold the relief sought on Judicial Review as that the applicant received the money way back in 1988 and put it to his own use but refused to transfer the land to the 2nd respondent. In the premises, **Mr. Mutiso** urged us not to aid the applicant to keep the money as well as the land. Alternatively, he urged, if the Court found any justification to grant the relief sought, then it should do so on terms which meet the interests of justice on both sides.
19. The parties also relied on case law to fortify their submissions. The applicant relied on the case of **East African Power Management Limited versus the Owners of the Vessels "Victoria Eight" [2010] eKLR** for the proposition that, where there is a likelihood of the intended appeal being rendered nugatory a stay order would be granted; the case of **Yellow Horse Inns Limited versus Nduachi Company Limited and 2 others [2011] eKLR** wherein the relief under Rule 5 (2) (b) of the Court of Appeal Rules was granted where the applicant had demonstrated to the Court that the intended appeal raised arguable points and was not frivolous and that if the Court withheld the relief sought then the intended appeal would be rendered nugatory; the decision in the case of **Peter Maina Maingi versus Lucy Kagure Wanjohi [2011] eKLR** wherein the Court of Appeal granted the relief because the annexed draft Memorandum of appeal raised substantial points of law on the one hand, and on the other hand, the applicant had the certificate of title in his name and it was therefore prudent to maintain that status quo pending the hearing and determination of the intended appeal, and lastly the decision in the case of **M' Marete versus Republic & 3 others [2004] eKLR** for the proposition that Land Disputes Tribunals have no jurisdiction to adjudicate over matters which do not relate to boundaries, claim to occupy or work the land.
20. The 2nd respondent on the other hand relied on the decision in the case of **Wamwea versus Catholic Diocese of Muranga Registered Trustees [2003] KLR 389** for the proposition that although Tribunals and Land Disputes Appeals Committees do not have jurisdiction to hear disputes over title to Land, where any decision of the tribunal or Appeals Committee has been adopted by the magistrate's Court in accordance with the provisions of the Land Disputes Tribunals Act, it becomes a decision of the Magistrate's Court and ceases to exist as a separate entity challengeable alone; the decision in the case of **Kenya Pipeline Company Limited versus Stanley Munga Githunguri [1988] KLR 838** for the proposition that the jurisdiction of the Court of Appeal under Rule 5(2) (b) of the Court of Appeal Rules to grant either a stay of execution, an injunction or stay of any further proceedings arises if a notice of appeal has been lodged against the decision or ruling appealed from in accordance with Rule 74; that the rule confers an original and independent discretion on the Court; and lastly that the general principles on which the Court would base its unfettered discretion were first, that the appeal should not be frivolous or the applicant must show that he has an arguable appeal, secondly, that the Court should ensure that the appeal, if successful should not be rendered nugatory.
21. We have taken into consideration the background information, the rival pleadings and submissions assessed above, and applied principles of case law relied upon by either side. We now proceed to perform our simple task namely, to either grant or withhold the relief sought by the applicant and to give reasons either way.
22. Rule 5(2) (b) on the basis of which our jurisdiction has been invoked provides inter alia thus:-

"Subject to sub rule (1) the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may:-

(b) In any civil proceedings where a Notice of appeal has been lodged in accordance with Rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.

23. We are satisfied that the applicant indeed filed and served a Notice of appeal dated the 28th day of September, 2010 and lodged on the 5th day of October, 2010 and that our jurisdiction has been properly invoked. On arguability, the general rule is that even one arguable point will suffice and need not be one which will ultimately succeed. But it should be one which merits the Court's interrogation. The applicant has fronted nine (9) intended grounds of appeal which **Mr. Machira** submits are serious arguable points.

24. We have perused the intended grounds and identified the following issues:- **One**, whether the agreement for the sale of Land admittedly executed by the parties in 1988 is enforceable in the absence of any consent by the area Land Control Board. **Two**, whether acknowledgment by the learned trial Judge of lack of jurisdiction by both the Kajiado Land Disputes Tribunal and the Rift Valley Land Tribunal Appeals Board to determine the dispute should have been sufficient reason for the granting of the relief of Judicial Review. **Three**, whether the learned trial Judge exercised her discretion judiciously in ignoring the apparent glaring procedural irregularities and illegalities when dismissing the Judicial Review application. **Four**, whether the *Wamwea* case (supra) is good law or is distinguishable from the circumstances obtaining herein. **Five**, whether the subordinate Courts' judgment as allowed is enforceable considering that it has now transpired that land, title number KAJIADO/NTABHATI/27 Saikeri Group Ranch, Ngong Kajiado no longer exists after subdivision of the Title and **Six**, whether the two resulting parcels of land currently owned by the applicant, namely KAJIADO/NTASHART//2581 and 2582 as currently registered in the names of the applicant are capable of being substituted in the place of the aforementioned original title without further litigation. On the basis of the above issues, we are satisfied that the intended appeal is arguable.

25. Turning to the second requirement under the Rule, we are satisfied that this ingredient too has been satisfied. Our reason for saying so is that, in view of the glaring issues identified above it is prudent to maintain the status quo pending a determination on those issues.

26. However, considering that the applicant has admittedly been keeping both the purchase price money and the land, we are of the view that a conditional relief will serve the ends of justice on both parties. We are therefore inclined to grant the applicant an order of stay of execution of the orders issued by the 3rd Respondents' Court as well as stay of further proceedings in that Court on condition that the applicant deposits into an interest-earning account in the joint names of counsel for the applicant and counsel for the 2nd respondent in any reputable financial institution of the parties' choice, a sum of Kshs. 2,340,000.00 (Two million, three hundred and forty thousand shillings) within sixty (60) days of the date of the delivery of this ruling. Upon compliance with the order, costs of the application shall abide the result of the intended appeal.

2. In default of compliance with the above order, the order for stay shall stand vacated and the application dismissed with costs.

Dated and delivered at Nairobi this 30th day of May, 2014

P.N. WAKI

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JUDGE OF APPEAL

R.N. NAMBUYE

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JUDGE OF APPEAL

P.M. MWILU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR