



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, GATEMBU & J. MOHAMMED, JJ.A)

CIVIL APPLICATION NO. NAI 5 OF 2014 (UR 3/2014)

BETWEEN

LAWRENCE P. MUKIRI MUNGAI

ATTORNEY OF FRANCIS MUROKI MWAURA.....APPLICANT

AND

ATTORNEY GENERAL.....1ST RESPONDENT

JAMES NDIRANGU.....2ND RESPONDENT

JOSEPH NDIRITU MUGI.....3RD RESPONDENT

ANNAH WANGARI NDIRITU.....4TH RESPONDENT

LYDIA MUTHONI NDIRITU.....5TH RESPONDENT

(An application for injunction pending lodging, hearing and determination of an intended appeal from the judgment and Decree of the High Court of Kenya

at Nairobi (Mary M. Gitumbi, J) delivered on 10th May, 2013

in

HIGH COURT CIVIL CASE NO. 169 OF 2008)

RULING OF THE COURT

1. The applicant, Francis Muroki Mwaura, through his attorney Lawrence Mukiri Mungai seeks an order, under rule 5(2)(b) of the Rules of this Court to restrain the 3rd, 4th and 5th Respondents from alienating, transferring, charging, sub-dividing, or otherwise dealing with land L.R No. Ruiru/Ruiru East Block 7/13, (the property) pending the lodging, hearing and determination of the intended appeal.

Background

2. In 1988, whilst employed at Kenyatta University, the applicant purchased the property from Varsity Villa Limited and was issued with a title deed in 1992. The title deed got lost and in 1994 he applied for and was issued with another title deed. On leaving Kenyatta University the applicant migrated to the United States of America where he resides in the State of New Jersey. Back here in Kenya, he entrusted his affairs on his attorney, Lawrence Mukiri Mungai.(Mungai)

3. In the course of handling a different transaction with respect to a property that adjoins the property in the year 2008, Mungai who is a practising advocate fortuitously discovered that the property was being developed. On carrying out a search at the lands office in Thika, Mungai discovered that the property had been transferred. Based on that information the applicant filed suit in the High Court against the Attorney General, James Ndirangu, Joseph Ndiritu Mugi, Annah Wangari Ndiritu and Lydia Muthoni Ndiritu naming them as 1st to 5th Defendants (the respondents) respectively. He claimed they fraudulently transferred the property. The applicant sought judgment for:

“A declaration that he is the legal registered owner of the parcel of land known as Ruiru/Ruiru East Block 7/13; cancellation of the title document purportedly issued to the 3rd, 4th and 5th Defendants; his reinstatement as the rightful legal owner; eviction of the 3rd, 4th and 5th Defendants from property and mesne profits.”

4. In their defence, the 3rd to 5th respondents contended that they legally acquired the property having purchased it from the 2nd respondent and are therefore innocent purchasers for value without notice. According to the 3rd respondent a retired teacher residing in Nyeri, he responded to a newspaper advertisement in the Daily Nation Newspaper in the year 2005 inviting offers for the purchase of the property; that he met with the 2nd respondent who, according to a search he conducted at the lands office was registered as owner of the property; that he concluded the purchase of the property with the 2nd respondent for the price of Kshs. 850,000.00; that he procured the requisite land control board consent and had the property transferred into his name jointly with his daughters the 4th and 5th respondents.

5. After hearing the parties, the High Court in a judgment delivered on 10th May 2013 dismissed the applicant’s suit holding that the 3rd to 5th respondents as joint proprietors were not privy to any fraud and that their title to the property is absolute and indefeasible.

6. Aggrieved by that decision the applicant filed a notice of appeal and now seeks an injunction under rule 5(2)(b) of the Rules of this Court as alluded to earlier in this ruling.

Submissions by counsel

7. In a bid to demonstrate that the applicant meets the requirements for the grant of the orders sought, learned counsel Ms. Margaret Kabuthi, instructed by the firm of Lawrence Mungai & Company advocates for the applicant, referred us to the case of **Reliance Bank Ltd V Norlake Investments Ltd (2002) 1 EA 227** and submitted that it is arguable whether the learned trial judge was right in holding that the 3rd to 5th respondents’ title to the property was valid when it was established that the 2nd respondent from whom they purportedly acquired title, obtained the same fraudulently; that the learned trial judge erred in failing to appreciate and give effect to the provisions of section 26(1)(b) of the Land Registration Act under which title to land can be challenged where it has been acquired illegally, un-procedurally or through a corrupt scheme; that the learned judge ignored that the applicant retains in his possession a valid title to the property and that the judge also erred in holding that the 3rd to 5th respondents were innocent purchasers of the property without notice of fraud.

8. Referring to the case of **Stanley Kangethe Kinyanjui v Tony Ketter and 5 others (2013) eKLR** Ms. Kabuthi argued that it is sufficient if a single *bonafide* arguable ground of appeal is raised and that an arguable appeal is not one which must necessarily succeed but one which ought to be argued fully before

the Court.

9. On the question whether the appeal will be rendered nugatory if we do not grant the orders sought, Ms. Kabuthi submitted that the property is a prime parcel of land and nothing prevents the 3rd, 4th and 5th respondents from disposing it off and that should the property change hands then the intended appeal would be rendered nugatory. Ms. Kabuthi likened the circumstances in this case to those in **Peter Njuguna Njoroge v Zipporah Wangui Njuguna (2013) eKLR** where this Court granted orders to safeguard the interests of the parties to an appeal.

10. Opposing the application Mr. Samuel Karanja learned counsel for 3rd, 4th and 5th respondents referred us to the replying affidavit sworn by the 3rd respondent and submitted that the applicant has not demonstrated that he has an arguable appeal in that he has not presented before us a draft memorandum of appeal setting out the grounds on which the intended appeal will be based; that although the applicant's claim before the trial court was based on fraud, the particulars of alleged fraud were not set forth or particularised in the amended plaint; that the grounds set out by the applicant on the face of the application do not constitute triable issues for determination on appeal; that the applicant's remedy, if any, lies as against the 2nd respondent and that the trial judge cannot be faulted for holding that the 3rd to 5th respondents are innocent purchasers for value without notice.

11. Turning to the question whether the intended appeal will be rendered nugatory if we decline to grant the orders sought, Mr. Karanja cited the case of **Shimmers Plaza Ltd V National Bank of Kenya Ltd [2013] 2013** and also **Freight in Time Ltd V Rosebell Wambui Muthee [2014] eKLR** and submitted that as the property can be valued, the applicant can adequately be compensated by an award in damages and the question of the appeal being rendered nugatory does not therefor arise.

12. Mr. Karanja went on to say that as the applicant has also based his application on Section 3A and 3B of the Appellate Jurisdiction Act, he must also show that he has complied with earlier orders of the court and that he has come to court with clean hands; that by reason of the applicant having disobeyed orders of the High court, by trespassing on the property, he should be denied the orders sought. Mr. Karanja concluded by urging us to dismiss the application with costs.

13. On the issue that a draft memorandum of appeal was not presented before us, Ms. Kabuthi submitted that the grounds on which the impugned judgment will be challenged appear on the face of the application.

Determination

14. We have considered the application, the affidavits and the submissions by learned counsel. To succeed in his quest, the applicant must satisfy us that the intended appeal is arguable and that if we decline to grant the order he seeks, the intended appeal will be rendered nugatory. In **Ishmael Kagunyi Thande V HFCK Civil Application Nai No. 157 of 2006** this Court held that:

“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 application 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.”

15. On the question whether the applicant has demonstrated that the intended appeal is arguable, we are satisfied that he has. The High Court determined that the 2nd respondent's title to the suit property was acquired fraudulently but that the 3rd to 5th respondent's title was protected under S. 80(2) of the Land Registration Act in that the 3rd, 4th and 5th respondents received title from the 2nd respondent and are innocent purchasers for value without notice of fraud. We are persuaded that it is arguable whether, under S. 26(1)(b) of the Land Registration Act as it was then that title could in the circumstances of this case, be challenged and whether the learned trial judge erred in not considering the import, if any, of that

provision. We need not consider the other intended grounds of appeal as a single *bonafide* arguable point is sufficient. See **Stanley Kangethe Kinyanjui v Tony Ketter and 5 others** (supra).

16. Whereas it may be desirable for an applicant to annex a draft proposed memorandum of appeal to an application such as the present one, the omission to do so is not fatal. The same is curable. The applicant has sufficiently set out his grievances on the face of the application. We find this to be sufficient demonstration as the applicant's grievances against the judgment sought to be impugned.

17. As to whether the intended appeal will be rendered nugatory if we decline the orders sought, this Court stated in **Stanley Kangethe Kinyanjui v Tony Ketter and 5 others** (*supra*) that whether or not an appeal will be rendered nugatory depends on whether what is sought to be stayed if allowed to happen is reversible. The applicant contended that if the 3rd to 5th respondents dispose of the property, his right to own the property with respect to which he still possesses the original title deed would be irreversibly lost with the consequence that the appeal will be rendered academic.

18. We observe from the witness statement of the 3rd respondent before the trial court that the intention of the 3rd, 4th and 5th respondents was to subdivide and develop the property. As this Court held in the case of **Reliance Bank Ltd V Norlake Investments Ltd (2002) 1 EA 227**;

“...What may render a successful appeal nugatory must be considered within the circumstances of each particular case. Considerations such as the expense and length of time it may take to reverse or recover what has changed hands pending the appeal are relevant considerations.”

19. In the circumstance of the present case we think the disposal of the property before the appeal is determined would cause the substratum of the intended appeal to disappear, as it is ownership of the property that is in question.

20. For those reasons, we exercise our discretion in favour of the applicant and order that there be an order of injunction restraining the 3rd, 4th and 5th Respondents by themselves, their servants and/or their agents from alienating, transferring, charging, sub-dividing, or otherwise dealing with land L.R No. Ruiru/Ruiru East Block 7/13, pending the lodging, hearing and determination of the intended appeal.

21. On his part the applicant shall not interfere with the possession of the suit property by the 3rd, 4th and 5th respondents pending the hearing and determination of the appeal.

22. The costs of the application shall abide by the outcome of the appeal.

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

R. N. NAMBUYE

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JUDGE OF APPEAL

S. GATEMBU KAIRU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

/ewm