



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, G. B. M. KARIUKI & GATEMBU, J.J.A)

CIVIL APPLICATION NO. NAI 72 OF 2014 (UR 58/2014)

BETWEEN

TRUSTEES OF THE KENYA ASSEMBLIES OF GOD 1ST APPLICANT

AND

SURESH KUMAR SOFAT.....1ST RESPONDENT

SADINA SOFAT.....2ND RESPONDENT

NAIROBI CITY COUNCIL3RD RESPONDENT

(Being an application for stay pending appeal against the Ruling of the High Court at Nairobi (P. N. Nyamweya, J) delivered on 3rd March, 2014 and amended on 19th March, 2014 and amended Order issued on 21st March, 2014

in

HIGH COURT ELC. NO. 402 OF 2013)

RULING OF THE COURT

1. The applicant, Trustees of Kenya Assemblies of God seek orders under rule 5(2)(b) of the Rules of this Court to stay the decision of the High Court (P. N. Nyamweya, J) given on 19th March 2014 restraining the applicant from trespassing on, transferring, constructing, developing or interfering with the 1st and 2nd respondents possession of the property known as Land Reference Number 209/11281 Nairobi and requiring the applicant to vacate the same and yield possession to the 1st and 2nd respondents pending the hearing and determination of the applicant's intended appeal from that decision.

Background

2. In a plaint filed at the High Court in March 2013, the respondents Suresh Kumar Sofat and Sadina Sofat ("the Sofat's") sought judgment against the applicant Trustees of Kenya Assemblies of God (the Church) and the third respondent, Nairobi City Council (the Council), for a permanent

injunction to restrain the Church and the Council from trespassing, transferring, constructing, developing or interfering with the Sofat's possession of the property known as L. R. 209/11281 (the property) situated along Kabithi road, off Mombasa road in Nairobi. In the same suit the Sofat's sought an order against the Church to yield up possession of the property to them and for a declaration that they (the Sofat's) are the bona fide owners of the suit property.

3. The suit was premised on the claim by the Sofat's that they are the registered owners of the property; that they were in control of the property until the year 2005 when they relocated to the United Kingdom; that upon their return to Kenya in December 2012 they discovered that the Church had without their consent taken over the property or encroached on it and erected structures without any right to do so; that the Church has accordingly trespassed upon and wrongfully invaded the property; that the Church's malicious actions are calculated at dispossessing them of the property and that they are therefore exposed to loss and damage.
4. In an elaborate defence filed on 8th May 2013 the Church denied the claim by the Sofat's and contended that Sofat's "illegally processed an illegal title over their property"; that in May 1985 the Church applied to the Commissioner of Lands for allocation of a plot; that on 3rd November 1988 the Commissioner of Lands allocated the property to the Church; that in 1996 it constructed a semi-permanent building on the property and began worshipping there every Sunday and the Church has since been in occupation of the property without interruption; that the Church completed construction of a permanent building on the property and occupied the same in 2005; that Sofat's suit is barred by the law of limitation as the Church has been in occupation, use and enjoyment of the property for over 17 years and has thereby acquired the right of ownership and that the claim by the Sofat's should therefore be dismissed.
5. Without much ado, the Sofat's moved a motion supported by an affidavit and a further affidavit sworn by Suresh Kumar Sofat before the High Court under Order 40 of the Civil Procedure Rules under a certificate of urgency seeking orders against the Church and the Council to restrain them from trespassing, transferring, constructing, developing or interfering with the Sofat's possession of the property. In the same motion, the Sofat's sought an order against the Church to yield vacant possession of the property. That motion was opposed by the Church, which filed a replying affidavit sworn by a reverend of the Church one Fredrick M. Kibuga. The Council also filed a replying affidavit sworn by a director of City Planning of the Council, one Rose Muema, who deposed that the suit by the Sofat's is premature.
6. After hearing the parties on the Motion by the Sofat's under Order 40 of the Civil Procedure Rules, the learned judge of the High Court was not impressed by the Church's claims to the property. In a ruling that is the subject of the intended appeal by the Church dated 3rd March 2014 the High Court stated:

"I find that the plaintiffs have established a prima facie case in this regard, as they have a title issued with respect to the suit property to a third party. The Defendant's letter of allotment on the other hand is with respect to an unidentified property. The plaintiffs will also suffer irreparable harm as it is evident that the 1st Defendant has constructed structures on the suit property, which the 2nd Defendant has confirmed was done without the relevant approvals. The plaintiffs are therefore entitled to the temporary injunction sought."

7. Guided by the decision of this Court in **Kenya Breweries Ltd and Another v Washington Okeyo [2002] 1 E A 109** the learned judge of the High Court was also satisfied that special circumstances exist for the grant of a mandatory injunction. In that regard the judge stated:

"I am therefore of the view that special circumstances exist in this case to warrant the grant of the mandatory injunction sought of vacant possession."

8. The Church was accordingly injuncted, permanently, from trespassing, transferring, constructing, developing or interfering with the Sofat's possession of the property. It was also ordered to yield up vacant possession of the property within 60 days.
9. Aggrieved by that decision, the Church filed a Notice of Appeal on 10th March 2014. Some of the Church's grievances with the decision of the High Court as set out in the draft memorandum of appeal include complaints that the learned judge of the High Court failed to take into account that the Church was in occupation for over 25 years; that the judge should have conducted a full hearing before granting the orders summarily without allowing the parties to adduce evidence; that the learned judge failed to interrogate how the Sofat's acquired the title to the property.

Submissions by Counsel

10. At the hearing of the application before us, Mr. Jaoko Nchoe learned counsel for the applicant submitted that the intended appeal from the decision of the High Court is arguable; that the applicant has been in possession of the property since 1996 and that it is important to preserve that status pending determination of the intended appeal; that on the strength of the case of **Total Kenya Limited vs. Kenya Revenue Authority Civil Application 135 of 2012**, this Court should "strive to preserve the status quo" to prevent the appeal being rendered nugatory.
11. Mr. Nchoe also cited the decision of this Court in **Musa Kipkorir Arap Baringila v Mansoor Nandla Civil Application No. 254 of 2005** and submitted that having regard to the fact that the High court ordered the applicant to vacate the property, it will be difficult for it to be put back in possession should the appeal succeed if the property will have in the meanwhile been disposed off. In effect, the appeal would be rendered nugatory.
12. Mr. Nchoe concluded his submissions by stating that there are special and compelling circumstances in this case, namely the consideration that the applicant has been in possession for a long time, that dictate that we exercise our discretion in its favour.
13. Opposing the application, learned counsel for 1st and 2nd respondents, Ms Njeri Mucheru referred us to the replying affidavit of Suresh Kumar Sofat and submitted that the Sofat's are the registered owners of the property and hold title to the same; that possession, per se, does not give the applicant the right of ownership of the property; that the right of ownership can only emanate from the title; that the applicant is in any case in occupation of the property illegally; that in the circumstances the High Court was right in issuing an order for possession in favour of the Sofat's who are the registered owners of the property; that the intended appeal is therefore not arguable; that it is not correct that the applicant has been in possession of the property as it claims considering that the Sofat's fenced off the property in 2005; that in the circumstances the order granted by the High Court is valid and that the applicant has not demonstrated that the intended appeal will be rendered nugatory if the application is refused. With that Ms Njeri Mucheru urged us to dismiss the application.
14. Mr. Amodi Eddie, learned counsel for the Nairobi City Council wrongly named in the application as the 2nd applicant when it is in fact the 3rd respondent, stated that the Council is not taking a position on the application.

Determination

15. We have considered the application and the rival submissions by the learned counsel who addressed us on the principles upon which we should exercise our discretion in considering the application before us. In **Equity Bank Limited v West Link Mbo Limited Civil Application No. Nai 78 of 2011** Githinji JA stated that:

"It is trite law that in dealing with 5 (2)(b) applications the Court exercises discretion as a court of first instance... It is clear that 5(2)(b) is a procedural innovation designed to

empower the Court to entertain an interlocutory application for preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals.”

16. Earlier in Ishmael Kagunyi Thande v HFCK Civil Application No. Nai 157 of 2006 this Court stated that:

“Two principles guide the Court in the exercise of that jurisdiction [under rule 5(2)(b) of the rules of the Court.] 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.”

17. On the question whether the intended appeal is arguable, the applicant says that some of the grievances with the decision of the High Court include the complaint that the learned judge did not interrogate how the Sofat’s acquired title to the property in light of the averment that they did so illegally; that the learned judge disposed of a contested matter on an application without a full hearing; that the judge did not taken into account the period of time the applicant has been in possession. Appreciating as we do that an arguable appeal is not one that will necessarily succeed, we are unable to say that the intended appeal is frivolous. The intended appeal is arguable.

18. As to whether the appeal, if successful, will be rendered nugatory unless we grant the orders sought, we think the balance tilts in favour of maintaining the status quo pending the hearing and determination of the intended appeal as was the case in Total Kenya Limited vs. Kenya Revenue Authority where the Court held that:

“Rule 5(2)(b) emphasizes the centrality of loss to the parties on both sides of the appeal. That is what the court must strive to prevent by preserving the status quo because any loss may render the appeal nugatory.”

19. We accordingly allow the applicant’s application dated 7th April 2014 in terms of prayer 3 of that application. The ruling of the High Court delivered on 3rd March 2014 as subsequently amended is hereby stayed pending the hearing and determination of the intended appeal.

20. The applicant has Sixty (60) days from the date of delivery of this Ruling to file and serve the record of appeal failing which the orders of stay we have granted shall stand automatically discharged.

21. Costs of the application shall abide the outcome of the appeal.

Dated and delivered at Nairobi this 19th day of September, 2014.

R. N. NAMBUYE

JUDGE OF APPEAL

G. B. M. KARIUKI

JUDGE OF APPEAL

S. GATEMBU KAIRU

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR