



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, MARAGA & MUSINGA, JJ.A.)

CIVIL APPLICATION NO. NAI. 116 OF 2014

BETWEEN

**ALICE KEMUNTO ONDIEKI ..... 1<sup>ST</sup> APPLICANT**

**KENNEDY OBWAYA ONSONGO ..... 2<sup>ND</sup> APPLICANT**

VERSUS

**PETER NJUGUNA GACHIE ..... RESPONDENT**

*(Being an application for stay of execution, stay of proceedings and temporary injunction pending the hearing and determination of an intended appeal from the entire Ruling, decision and/or order of the High Court of Kenya at Nairobi, (Gitumbi, J.) dated 2<sup>nd</sup> May, 2014*

in

**ELC. No. 486 of 2011)**

\*\*\*\*\*

**RULING OF THE COURT**

This application by **Alice Kemunto Ondieki** and **Kennedy Obwaya Onsongo**, hereinafter referred to as **“the respondents”**, is dated 23<sup>rd</sup> May, 2014 and is brought under **Rules 41, 42 and 43** of this **Court’s Rules**. The applicants seek the following orders:

**“1. ....**

**2. That an order for stay of execution be granted to restrain the respondent, his duly authorized agents, servants, employees, assigns and/or personal representatives from executing the judgment and decree granted on the 12<sup>th</sup> day of July, 2013**

***1pending the hearing and determination of this application, appeal, further directions and/or orders of this honourable court.***

**3. That an order of stay of proceedings be granted to restrain the respondent from prosecuting an application for taxation of a bill of costs and/or any other proceedings in the superior court pending the hearing and determination of this application, appeal, further directions and/or**

*orders of this honourable court.*

4. ***That an order for temporary injunction be granted to restrain the respondent, his duly authorized agents, servants, employees, assigns and/or personal representatives from alienating, interfering with the 1<sup>st</sup> and/or 2<sup>nd</sup> applicant's ownership/enjoyment and/or possession of all that parcel of land known as Nairobi Block 62/258 pending the hearing and determination of this application, appeal, the suit in the superior court, further orders and/or directions of this honourable court.***
5. ***That the applicants be and are hereby granted the costs of this application.***”

The application was supported by a lengthy affidavit sworn by the 1<sup>st</sup> applicant. A replying affidavit was filed by the respondent. From the depositions contained in the said affidavits, the background to this application is as follows.

On 16<sup>th</sup> September, 2011 the respondent filed a suit against the defendants in the High Court of Kenya at Nairobi, to wit, **HCCC No. 486 of 2011**. The respondent stated that he was a registered proprietor of a parcel of land known as

**Nairobi Block 62/259** while the applicants were the owners of an adjacent parcel of land known as **Nairobi Block 62/258**. The respondent alleged that the applicants were putting up a storeyed building on his parcel of land and sought a

2 permanent injunction to restrain them from so doing. He also sought a mandatory injunction to compel the applicants to demolish the structure.

Together with the plaint, the respondent also filed an application seeking interim injunctive reliefs against the applicants pending hearing and determination of the aforesaid suit. The respondents were allegedly served with the application, plaint and summons to enter appearance but they neither entered appearance nor filed defence. Consequently, the trial court granted the interlocutory orders as sought and the respondent listed the main suit for formal proof.

In a judgment delivered on 12<sup>th</sup> July, 2013 following the formal proof, the trial judge (Gitumbi, J.) was satisfied that the respondent had proved his case on a balance of probabilities and entered judgment in his favour. The respondent proceeded to extract a decree that was issued on 19<sup>th</sup> July, 2013 which ordered:

- “1. ***That a permanent injunction be and is hereby issued against the defendants, by themselves, their servants, agents and/or employees from building or continuing to build, erecting or continuing to erect, encroaching, entering, remaining or in any other manner whatsoever trespassing upon and/or dealing with the parcel of land known as Nairobi Block 62/259;***
2. ***That a mandatory injunction be and is hereby issued compelling the defendants to demolish the structure erected on the plaintiff's parcel of land known as Nairobi Block 62/259;***
3. ***That the defendants do pay the costs of this suit to the plaintiff.***”

3 In respect of the application now before this Court, the applicants contended that they are the lawful owners of the parcel of land known as Nairobi Block 62/258 and have constructed a 5-storey building on their parcel of land which comprises of 52 residential units including two floors of commercial units which are leased to the Kenya Commercial Bank and Clinix Medical Clinic. On 30<sup>th</sup> July, 2013 the respondents' advocates, **Messrs Mutembei, Gichuru and Company Advocates**, wrote to the Kenya Commercial Bank and stated that the applicants' building known as Jamii Villas had been erected on their client's parcel of land (Nairobi Block 62/259). The respondent's advocates also wrote to all the other tenants on the same lines and demanded that they henceforth remit rent to themselves (the advocates),

failing which distress for rent would be levied by

**Victoria Blue Auctioneering Services.** It is through that correspondence that the applicants got to know of the existence of the High Court case. Subsequently, the respondent threatened to demolish the applicants' building and on 12<sup>th</sup> May, 2014 Victoria Blue Auctioneering Services purported to levy distress for rent against the applicants' tenants at Jamii Villas.

The applicants filed an application in the High Court seeking to set aside the ex parte judgment and decree and to restrain the respondent from interfering with their property. The application was dismissed on 2<sup>nd</sup> May, 2014. The trial court held that the applicants had been duly served with the court process but failed to

4 enter appearance and defend the suit. The court did not consider the nature of the applicants' intended defence.

Although the application before us is not shown to have been brought under

**Rule 5(2) (b)** of this **Court's Rules**, the application is indeed a **5 (2) (b)** application. **Rule 41** explains the process of the Court when exercising jurisdiction under **Rule 5(2) (b)**. An applicant is required to demonstrate that the appeal or intended appeal is arguable and that unless the orders sought are granted the appeal/intended appeal will be rendered nugatory. See **GITHUNGURI v JIMBACREDIT CORPORATION LTD [1988] KLR 838.**

Submitting on the first limb, **Mr. Jaoko**, the applicants' learned counsel, stated that the applicants will be challenging the ex parte judgment and decree and the High Court's refusal to set aside the judgment on the ground that there was no service of the court process. Further, counsel argued that the applicants will also contend that the respondent's title was unlawfully obtained because there is evidence to show that the land was initially a road reserve which was providing access to the applicants' parcel of land. Mr. Jaoko referred the Court to a letter authored by the respondent himself on 21<sup>st</sup> November, 2009 indicating that the respondent's parcel of land was indeed a road reserve. Further, National Housing Corporation had written a letter dated 3<sup>rd</sup> September, 2013 stating, *inter alia*:

***5 "Nairobi Block 62/259 is an open space as per our records. Refer to our attached certified layout plan."***

As to whether the intended appeal will be rendered nugatory if the sought orders are not granted, the applicants' counsel submitted that the respondent has threatened to execute the decree by demolishing the 5-storey building. The applicants are servicing a loan of Kshs.30million borrowed from the Co-operative Bank of Kenya towards construction of their building. If it is demolished before the intended appeal is heard and determined the appeal will have been rendered nugatory.

Opposing the application, **Mr. Mutembei**, learned counsel for the respondent, contended that the proposed appeal is not arguable. Regarding service of the court process, counsel submitted that during the hearing of the application for interlocutory injunction, the trial judge, Koome, J. (as she then was), was satisfied that the applicants had been served and an affidavit of service filed. That was also affirmed by Gitumbi, J. who heard the formal proof as well as the application to set aside the ex parte judgment. Counsel added that in rejecting the application to set aside the ex parte judgment the High Court Judge exercised her discretion and unless there existed special circumstances to warrant setting aside of ex parte judgment, which in his view had not been demonstrated, this Court ought not interfere with the trial judge's discretion.

6 Regarding legality of the respondent's title, Mr. Mutembei argued that there was no evidence that parcel number Nairobi/Block 62/259 had been a road reserve prior to creation of the aforesaid title. He added that the building in question is standing on both plot number Nairobi/Block 62/258 and Nairobi/Block 62/259. Counsel conceded that the respondent was keen on demolishing the part of the

building that was unlawfully standing on his client's parcel of land. But despite that concession Mr. Mutembei firmly argued that that the intended appeal will not be rendered nugatory.

We have carefully considered the affidavits and submissions on record. It is not in dispute that the applicants are the registered proprietors of the leasehold interest over Nairobi/Block 62/258 for a term of 99 years from 1<sup>st</sup> November, 2005. On the other hand, the respondent is also registered as the proprietor of the leasehold interest over Nairobi Block 62/259 for a term of 99 years from 1<sup>st</sup> April, 2011. However, the applicants contended that the respondent's title was unlawfully procured because prior to the respondent's grant of the lease by the Commissioner of Lands on 23<sup>rd</sup> June, 2011, the parcel of land in question was a road reserve and provided access to their adjacent property. That is denied by the respondent. This is clearly an arguable issue.

As to whether the applicants were duly served with the court process, Mr. Jaoko argued that the trial court did not consider the provisions of **Order 5 Rules**

7 **15 and 16** of the Civil Procedure Rules which stipulate the manner in which court process ought to be served. Mr. Mutembei countered that argument by stating that two Judges had found that the applicants had been properly served and that the applicants had not applied to cross examine the process server if indeed they were denying service.

While there is some merit in the respondent's submission regarding service, we think that the applicants' contention that the trial court did not give any consideration to the applicants' intended defence is also very weighty. It is trite law that in an application to set aside an ex parte judgment a court should consider not only the applicants' reason for failure to enter appearance or file defence but also the nature of the defence sought to be advanced by the applicant. In

**SARFARZ MOTORS & ANOR v KISII HARDWARE, Civil Appeal No. 98 of**

**1990**, this Court held that in an application for setting aside a default judgment the nature of the applicant's defence is important even if there is no reason for the default.

We are satisfied that it is an arguable issue whether the trial court exercised its discretion judicially.

Lastly, the respondent conceded that he intends to demolish the applicants' building or at least a substantial part of it. In our view, if the threatened demolition is carried out before the intended appeal is heard and determined, the same will

8 have been rendered nugatory. The applicants are servicing a huge loan from the rents which they are collecting from their tenants in the suit property. The respondent will not suffer undue prejudice if an order of temporary injunction is granted pending hearing and determination of the intended appeal.

We are satisfied that the orders sought by the applicants in terms of prayers 3 and 4 of their application are merited and hereby grant the same. The costs of this application shall abide the outcome of the intended appeal.

***Dated and Delivered at Nairobi this 17<sup>th</sup> day of October, 2014.***

**E.M. GITHINJI**

**JUDGE OF APPEAL**

**D.K. MARAGA**

**JUDGE OF APPEAL**

**D.K. MUSINGA**

**JUDGE OF APPEAL**

I certify that this is a  
true copy of the original

**DEPUTY REGISTRAR**

*/dkm*