IN THE COURT OF APPEAL

AT NAIROBI

CORAM: WAKI, KARANJA & M'INOTI, JJ.A.

CIVIL APPLICATION NO. NAI. 326 OF 2009

BETWEEN

NJOROGE NJUGUNA……APPLICANT

AND

RUTH WANJIKU KAMAU……1ST RESPONDENT

CYRUS KOMO CHEGE……2ND RESPONDENT

MUCHAI KARU……3RD RESPONDENT

JOSEPH NGIGI WANJIKU……4TH RESPONDENT

PAUL CHEGE KAMAU……5TH RESPONDENT

PETER NJOONGE……6TH RESPONDENT

LANDS REGISTRAR KIAMBU……7TH RESPONDENT

(An application for an injunction pending the hearing and determination of an intended appeal from the order of the High Court of Kenya at Nairobi (Mugo, J.) delivered on the 27th day of October 2005

in

HCCC NO. 912 OF 1975)

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RULING OF THE COURT

In this notice of motion dated 13th October 2009 brought under **Rule 5(2)(b)** of this **Court's Rules**, the applicant seeks an order of injunction against the seven (7) above named respondents.

When the motion came up for hearing before us however, Mr. P. K. Njoroge, learned counsel for the applicant informed us that some of the respondents have since

passed on and they have not been substituted. He therefore, with the leave of the court withdrew the application against 3rd and 6th respondents under **Rule 52** of the **Rules of this Court.**

The applicant entreats this Court to restrain the remaining respondents, " *their agents, servants or any other person whatsoever and howsoever acting under them jointly and severally from selling, alienating, wasting, charging, transferring and interfering in any manner with land parcel numbers* ***Githunguri/Gathangari/1720, 1721, 3061, 3062, 3063, 3106, 3107, 3108, 3109, 3110, 3111, 3112*** *and* ***3113*** *until the determination of the intended appeal."*

In order to put this application in its proper perspective, it is necessary to recapitulate its history albeit briefly. This matter has a long history going way back to

1960s. By an agreement of sale dated 21st September, 1963 between Kamau son of Kinuthia and Gichohi son of Njuguna, Kamau sold Gichohi Njuguna 2 acres from **Land parcel No. Githunguri/Gathangari/355** which comprised a total of 16.7 acres. For some reason or other, this transaction was not completed and transfer was not done.

Gichohi Njuguna therefore, went to court vide **Civil Suit No. 1632 of 1968** seeking orders of specific performance against Kamau Kinuthia for the transfer of his portion. The matter was heard and judgment was entered in favour of the plaintiff with the court ordering that the said portion be transferred to Njuguna. Before the decree emanating from that suit could be executed, the defendant died. That decree was never appealed against.

Following Kinuthia's death, his wife (Ruth Wanjiku Kamau) who is the first respondent herein filed **Succession Cause No. 27 of 1973** in the Githunguri District Magistrate's Court. The matter was heard with several persons staking claims on the land as purchasers. The learned trial Magistrate after hearing the parties made the following findings:-

> ***"I cannot see who else should legally inherit the deceased person other than his wife. The other claimants who claim to have interest over the land by way of purchase can only pursue their respective interests in the land either through the Land Control Board or another court with appropriate jurisdiction after this court has appointed a heir*** *(sic)* ***as laid down in Section 120 Cap 300."***

The land was consequently transferred to the respondent.

That transfer ignited a flurry of Civil Suits against Ruth as each claimant sued her for his share. No sooner had the land been transferred to the respondent than she started sub-dividing it, transferring some portions to her children as well as selling it to other people and this compounded the matter even further.

As the matters were pending in court, the applicant's father died and the applicant took over the matter. According to learned counsel for the 2nd respondent, the applicant took over the matter without first obtaining a Grant of Letters of Administration in respect of his father's estate and his *locus standi* in this matter is challenged on that basis. We shall revert to that issue shortly.

George Njuguna Gichohi (who describes himself in this application as an interested party), was the plaintiff in **HCCC No. 1702 of 1976**. His matter was listed for hearing before Visram, J (as he then was) on 26th September, 2005. The matter did not proceed to hearing and the learned Judge made the following observation:-

> ***"Clearly, this case is not ready for hearing. There are three cases consolidated. Documents have not been exchanged, nor issues agreed. The parties shall have 30 days to complete all procedures, failing which this suit, which is more than twenty (20) years old, shall stand dismissed."***

The learned Judge directed that the matter be mentioned before any Judge on 27 th October, 2005. On the said date, the parties appeared before Mugo, J. who upon perusal of the said files made the following order:-

> ***"It seems to me that the orders made by the Hon. Justice Visram have not been complied with in that whereas exchange documents have been done in part the issues have not been agreed upon. None of the plaintiffs have complied with this requirement. The result therefore is that the suits filed by the three plaintiffs stand dismissed as of today. I so order."***

That is the order that is challenged by the applicant in his intended appeal on which this application is predicated.

Aggrieved by that order, the interested party herein, moved the court by way of review under the then **Order 44 Rule 1** of the **Civil Procedure Rules**. That application was heard by Mbogholi Msagha, J. who dismissed it vide his ruling rendered on 30th September, 2009. The interested party's preferred course shut him out from pursuing an appeal against that ruling pursuant to **Order 45(2)** of the **Civil Procedure Rules**.

He has nonetheless sneaked into these proceedings by filing a 'replying affidavit' to this application under the guise of an 'interested party'. We heard him in the larger interests of justice as his participation was also not prejudicial to the respondents in any way. He was effectively supporting the applicant's motion.

We now proceed to consider the merits or otherwise of the motion before us.

The law in this area is well settled. The applicant needs to establish both twin principles on arguability and nugatory aspect. That is to say that he has an arguable appeal, and secondly that if the orders sought are not granted, in the event of his intended appeal succeeding, the same would be rendered nugatory. See **RELIANCE BANK LTD VS NORLAKE INVESTMENTS LTD (2002) 1 EA 227**, **SILVERSTEIN VS CHESONI** (supra) and **KENYA COMMERCIAL BANK LTD VS BENJO AMALGAMATED LTD & ANOTHER, Civil Application No. Nai 50 of 2001).**

It is the contention of learned counsel for the applicant that their appeal is arguable. On the limb of arguability, he submitted that since the land in question had already been decreed to his late father by a court of competent jurisdiction, then there was no land capable of being inherited by the 1st respondent, and therefore no land to be transferred or sold to the respondents herein. The subsequent sub-divisions were consequently illegal.

His other arguable point was that there was no formal order for consolidation of the four suits and that the same were just handled together for the convenience of the parties. On this point however, we note that Mbogholi, J. in his ruling dated 30 th September, 2009 observed that:-

> ***"I have taken some time to go through the record before me and noted that whereas the applicant says that the three suits were never consolidated, there is at page 12 of the handwritten notes by Sheikh Amin J, in HCCC No. 1702 of 1976, that the suits were actually consolidated. If the learned counsel for the plaintiff/applicant had taken the trouble to peruse the court record, this would not have been a contentious matter…"***

We are unable to fault this finding as we do not have the record of appeal or the files in question before us. Although we must eschew making a definitive finding on that issue, we are not convinced that anything turns on that point. We nonetheless hasten to state that as has been held by this Court on numerous occasions, an arguable appeal is not necessarily one that will succeed. An applicant only needs to show that his intended appeal is not frivolous and that the same raises serious issues or reasonable argument deserving consideration by this Court. See **(KENYA RAILWAYS CORPORATION VS. EDERMANN PROPERTIES LTD, Civil Application No. Nai 176 of 2012)**. (**KENYA TEA GROWERS ASSOCIATION & ANOTHER VS. KENYA PLANTERS & AGRICULTURAL WORKERS UNION**, **Civil Application No. Nai. 72 of 2001).**

The issue as to whether there was any land available for 1st respondent's disposal in view of the decree of the court in **Civil Case No. 1632 of 1968** is an arguable one. An applicant only needs to

establish one arguable point in order to satisfy the 1st limb of the twin principles. We are satisfied that the applicant has an arguable appeal. The issue as to whether a court's decree was enforceable after twelve (12) years as submitted by learned counsel for the 2nd respondent is an issue for determination by the court that will be seised of the intended appeal. Learned counsel for the 2nd respondent also raised the issue of the applicant not having the requisite *locus standi* on account of his not having been properly substituted for his late father.

We note that according to the respondents the applicant's father died many years ago and the applicant only obtained a Grant of Letters of Administration on 14 th February 2001. We find that submission curious as it was never raised before the trial court before the suits were dismissed. We also note that by the time the applicant filed the Notice of Appeal (which we found was not on record, though said to have been filed), he already had the requisite *locus standi* to file the same. That is an issue that can nonetheless be taken up on appeal.

From the foregoing, it is clear that we are satisfied that the applicant's intended appeal is arguable.

On the nugatory aspect however, we note that the subject matter herein is land. We are informed that although some of the respondents hold title deeds to some of the portions, the applicant and interested party among others are in physical possession of the plots in question. Even assuming for the sake of argument that they are not, we do not see how their appeal if successful would be rendered nugatory if the order of injunction is not granted. We say so because land does not dissipate and can only appreciate and any loss if at all can well be compensated by way of damages which can be quantified. In this case, the land had no other intrinsic, sentimental or cultural value. It was purchased and therefore had an attached commercial value to it. The same is still capable of valuation to determine its current worth.

We hold the view that the applicant has failed to satisfy the second limb of the twin principles as required of him under **Rule 5(2)(b)** of this **Court's Rules.** We also note that this is an embarrassingly old matter weaving its thread from one court to another for the last almost 46 (forty six) years. We impress upon learned counsel for the applicant the need to have this matter laid to rest. It is almost a decade since the notice of appeal was filed and the appeal itself has yet to be filed. No plausible reasons were given for this lack of promptitude.

In all, our finding is that the applicant has failed to meet the threshold set out for applications of this nature. The application is therefore dismissed with costs in the intended appeal. We direct that the said appeal be filed within 60 (sixty) days from the date of this ruling.

Dated and delivered at Nairobi this 3rd day of October, 2014.

P. N. WAKI

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

K. M'INOTI

……..……..

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR

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