



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: WAKI, NAMBUYE & G.B.M. KARIUKI, II.A)

CIVIL APPLICATION NO. NAI.308 OF 2013

MACHARIA KAGIO.....APPLICANT

VERSUS

HABIBA AHMED MOHAMMED.....RESPONDENT

(Being an application for injunction pending hearing and determination of Nairobi Civil Appeal No.235 of 2013 against the orders of High Court at Nairobi (J. M. Mutungi J) dated 21st August 2013

in

H.C. ELC. CASE NO.489 OF 2013)

RULING OF THE COURT

1. On 14th November 2013, the applicant, Macharia Kagio, lodged in this court an application by way of Notice of Motion dated 13th November 2013 premised on sections 3A and 3B of the Appellate Jurisdiction Act, Cap 9, and Rules 5, 47 & 53 of this court's Rules seeking orders;

1. (spent)

2. That pending hearing and determination of this Application the Respondents either by themselves, their agents, servants or in any manner howsoever be restrained from possessing, occupying, remaining on, constructing and/or interfering with the Plaintiff's quiet possession, occupation, enjoyment, ownership, legal, contractual and equitable rights and interest on all that parcel of Land known as L.R. No.36/1/871 and/or claiming interests, rights or in any way dealing with or trespassing onto or continuing further trespass on the land.

3. That pending hearing and determination of Nairobi Civil Appeal No.235 of 2013 the respondents whether by themselves, their agents, servants or in any manner howsoever be restrained from possessing, occupying, remaining on, constructing and/or interfering with the Plaintiff's quiet possession, occupation, enjoyment, ownership, legal, contractual and equitable rights and interest on all that parcel of Land known as L.R. No.36/1/871 and/or claiming interests, rights or in any way dealing with or trespassing onto or continuing further trespass on the land.

4. That the costs of this application abide with the result of the said Appeal.

2. As is discernible from the prayers, prayer No.2 for injunction to restrain the Respondents "from possessing, occupying, remaining on, constructing and/or interfering with the plaintiff's quiet possession occupation etc" of the land known as L.R. 36/1/871 is not sought in the context of any pending appeal or intended appeal while the prayer for order No.3 seeking a similar injunction is being sought pending the hearing and determination of Civil Appeal 235 of 2013 against the Ruling of Mutungi J delivered on 21.8.2013 in Suit No.ELC 488 of 2013.

3. The application shows that it was precipitated by the imminent eviction of the applicant and the Applicant's daughter Catherine Njeri Macharia, from the premises known as LR 36/1/871, in Eastleigh, Nairobi.

4. It is indicated that the injunction is sought pending the hearing and determination of Nairobi Civil Appeal No.235 of 2013 against the orders of Mutungi J delivered as aforesaid on 21st August 2013 in Nairobi High Court case ELC 488 of 2013.

5. It is not clear why the applicant has annexed a memorandum of appeal to the application titled "Civil Appeal No.308 of 2013" as no such appeal seems to exist between the parties to the instant application. One would have expected the memorandum of appeal in Civil Appeal No.235 of 2013 against the ruling of Mutungi J delivered on 21st August 2013 in NBI H.C. ELC. case 488 of 2013 to have been annexed instead.

6. As always, it is necessary to examine carefully the circumstances in which the application has been brought and to determine its merit or otherwise.

7. The application shows that suit NO.NBI.H.C.ELC.488 of 2013 involving the applicant as plaintiff and the respondent as defendant was struck out with costs and the ex parte injunction granted in the suit on 24th April 2013 was vacated and discharged.

8. In the meantime an order of eviction from Eastleigh Property No. L.R. 36/1/871 Nairobi was issued on 28.1.2014 in Nairobi H.C. ELC. Suit No.576 of 2009 against Catherine Njeri Macharia, Mwangi Macharia and Joshua Mogaka following an application made in that suit.

9. The 1st respondent filed a replying affidavit on 4.2.2014 opposing the application before us.

10. When the application came up for hearing on 31st March 2014, Mr. Odawa, Advocate, held brief for Mrs. Kawa, for the applicant, and Mr. Gatundu, Advocate appeared for the 1st Respondent, while Mr. Raja, advocate, appeared for the 2nd respondent. There was no representation for the 3rd respondent.

11. Mr. Odawa urged the court to grant the injunction orders prayed for and contended that the applicant has had continuous possession of the premises (Eastleigh property No.LR 36/1/871, Nairobi) without interruption. He contended that the issues in suit No.Nbi. HC.ELC.488 of 2013 are totally different from the issues in Nbi H.C. 481 of 2010. His client had not annexed pleadings or orders in the latter case to enable the court to peruse the same to determine the correctness or otherwise of the submission by counsel for the applicant. It was contended by the applicant's counsel that there are issues of law to be canvassed in the appeal which include determination of the question whether there was fraud in relation to the transfer of the suit property. He contended that the transfer of the property was contested. Although counsel for the applicant further contended that the appeal shall be rendered nugatory if stay is not granted, the application before the court does not seek orders for stay. Perhaps counsel was alluding to an injunction. But no matter. It was the said counsel's submission that his client is elderly and if the tenants in the said premises are evicted, the applicant should be left in situ on humanitarian grounds.

12. Mr. Gatundu, objected to the application and urged the court to dismiss it with costs on the ground that it had no merit. He pointed out that Civil Appeal No.235 of 2013 is in respect of the ruling delivered on 21.8.2013 and submitted that there is no existing appeal on the basis of which stay can be granted. He drew the attention of the court to the memorandum of appeal attached to the application which is shown

to be in appeal No.308 of 2013. He referred the court to High Court suits Nos.576 of 2009, 488 of 2013 and 481 of 2010 and contended that the matters raised in the suits Nos. 481/2010 and 488/2013 are res judicata and that the application amounts to an abuse of the court process especially as eviction orders have already been issued but have not been complied with. The attention of the court was drawn by counsel to another appeal No.338 of 2013 which was prompted by a ruling delivered in H.C.C. Suit No.576 of 2009. Counsel contended that the High Court had refused to grant an order for stay to the applicant, but this was neither here nor there.

13. On his part, Mr. Rajah, counsel for the 2nd respondent urged the court to dismiss the application on the ground that it had no merit. First, he contended that the appeal has no merit. Issues of fraud, he said, had been canvassed in suits Nos.576/2009 and 481/2010 and a finding made that the matter was res judicata. The appeal was not arguable, he contended, and the application had no merit.

14. In reply, Mr. Odawa maintained that appeal No.235 of 2013 was against the ruling of Mutungi J delivered on 21st August 2013 in suit No.488 of 2013. He maintained that his client was in occupation of a portion of the said premises and asked for the court's protection through the issuance of the orders prayed for.

15. We have perused the application and the replying affidavit and duly considered the rival submissions made by counsel.

16. The application did not specify whether it was made under sub rule (1) or sub rule (2) of Rule 5 and if the latter whether it was under subparagraph (b). Though not elegantly drafted, we take it that the application as drafted was premised on rule 5 (2) (b). For an application for stay of execution, or for an order of injunction or for an order for a stay of any further proceedings, to succeed, an applicant must satisfy the twin principles by showing that the appeal is arguable and that it will be rendered nugatory if stay is not granted should the appeal succeed. As this is a discretionary relief, an applicant must also exhibit candour in the application not only by placing all the germane facts known to him before the court but also by not concealing the truth or facts that are relevant to the issue for determination if such facts bear directly or indirectly on the twin principles.

17. The application shows that the property that is the subject of the litigation is known as L.R. No.36/1/871, Eastleigh Nairobi. It is registered in the name of the 1st respondent as the proprietor or the legal owner. The transfer of the property to the 1st respondent was pursuant to a sale following monetary consideration. The applicant subsequently tried without success to rescind the sale. The injunction orders now sought are designed to stop or prevent acts that have already occurred. The title to the property is in the name of the 1st respondent and it is not now possible in the circumstances of this case to restrain the 1st respondent from dealing with the suit premises nor is it possible to describe the applicant as having legal rights to the property in the absence of proof of his registration as the legal owner or an order of the court to that effect. In effect, the applicant seems to be seeking to close the stable door after the horse has already bolted. The applicant has not established justiciability of his claim, much less the arguability of the appeal.

18. Moreover, even if the appeal eventually succeeded, it would not be rendered nugatory, not least because the land remains there.

19. The replying affidavit in this application shows that the applicant did not exhibit full candour. He did not allude to the eviction order issued in suit No.576 of 2005 in which his daughter, Catherine Njeri Macharia, had filed suit against him and the 1st respondent. The history of the litigation disclosed by the documents in the replying affidavit and the rulings of the High Court made in suits Nos. Nbi H.C.ELC No.488 of 2013 and H.C. ELC. No.576 of 2009 show that there has been a running legal battle between, on the one hand, the applicant and his daughter and on the other hand the 1st respondent who is registered as the legal owner of the property and who hitherto has been prevented from taking possession of the property. A litigant who is not candid or who conceals germane facts or who knowingly paints a distorted picture of the matter which is the subject of the legal contest in court disentitles himself from

discretionary reliefs.

20. But as the applicant has also failed to satisfy the twin principles, to wit, that the appeal is arguable and that it will be rendered nugatory if the injunction and/or stay is not granted in the event that the appeal succeeds, the application must fail. And, at any rate, the applicant has disintitiled himself of the discretionary relief as there has not been full candour on his part.

21. For these reasons we have no hesitation in dismissing the application which we hereby do. The applicant shall pay the costs of the 1st and 2nd respondents in the application.

Dated and delivered at Nairobi this 14th day of November 2014.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL G. B. M. KARIUKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR