IN THE COURT OF APPEAL

AT NAIROBI

CORAM: WAKI, M'INOTI & J. MOHAMMED, JJ.A.

CIVIL APPLICATION NO. NAI 41 OF 2011

BETWEEN

MAUREEN WAITHERA MWENJE ERIC KAMAU MWENJE

(suing as administrators of the estate of the late

DAVID MWENJE …….....…… APPLICANTS

AND

DAVID KINYANJUI NJENGA

MONICA WANGUI NJENGA

GRACE NJERI NJENGA ….....… RESPONDENTS

(An application for temporary injunction and stay of execution to issue pending hearing and determination of appeal arising from the ruling and orders of the High Court of Kenya at Nairobi (Muchelule, J) dated the 15th December, 2010

in

HCCC NO. 243 OF 2009)

****

RULING OF THE COURT

Before us is a Notice of Motion dated 17th February, 2011 brought pursuant to ***Rules 5(2)(b), 42, 47 & 49(1)*** of the Court of Appeal Rules [the Rules] seeking ***inter alia*** a temporary injunction and stay of execution of the ruling and order dated 15th December, 2010 in Nairobi HCCC No. 243 of 2009 pending the hearing and determination of the intended appeal.

Background

The genesis of this application is that the applicants sued the respondents by way of originating summons, seeking a declaration that they were entitled to properties ***L.R Nos. 10060/8, 10060/9*** and ***10060/12*** (suit properties) which their father, ***DAVID MWENJE*** (deceased) and themselves have been in adverse

possession of since 1992, having lived thereon without any interruption for over twelve [12] years; an order of permanent injunction restraining the applicants from evicting them, levying distress, alienating, transferring, disposing or in any manner interfering with the suit properties; a declaration that the distress for rent levied on 8th May, 2009, by Kindest Auctioneers was unlawful, null and void and an order for general damages for illegal attachment.

The applicants claimed that the deceased, vide an agreement for sale dated 20th March, 1992, entered into a sale transaction in respect of the suit properties with the respondents' father one **Njenga Mathu** (Njenga) for KShs.2,780,000/=; upon execution of the said sale agreement the deceased took possession of the suit properties as a monthly tenant at KShs.7,500/= per month provided for in special conditions 4 and 10 of the said agreement for sale.

By a letter dated 22nd March, 1993, Njenga rescinded the sale and filed a suit HCCC No. 3195 of 1993 seeking the eviction of the deceased from the suit properties. The said suit was discontinued on 26th July, 1996. Thereafter, Njenga sold the suit properties to the respondents for KShs.100,000/= each and transfers were registered in their favour.

It was the applicants' case that the said transfers were questionable and were meant to defeat the deceased's claim to the suit properties.

Subsequently, the respondent instructed Kindest Auctioneers to levy distress for rent, who on the 8th May, 2009 issued a notification of sale of moveable properties.

In opposition to the said application, the 1st respondent swore a replying affidavit on behalf of all the respondents. He deponed that the sale to the deceased was rescinded for breach of the terms of the agreement and that the deceased was in possession of the suit properties as a tenant pending the completion of the agreement; that the deceased failed to pay the purchase price leading to the rescission of the agreement; that Njenga then filled HCCC No. 3195 of 1993 seeking eviction of the deceased; that on the 30th May, 1998 Njenga gave notice to the deceased to vacate the suit properties; and that

Njenga refunded the purchase price, less the outstanding rent whereupon the deceased declined to receive the cheque in payment thereof. Upon the deceased's failure to vacate the suit properties, Njenga filed suit HCCC No.110 of 2000 on the 17th July, 2010, against him; which suit was still pending when the deceased passed on. The respondents denied that the applicants and the deceased have been in adverse possession of the suit properties.

On 16th February, 2010, the respondents applied under ***Order 36 Rule 12, Order 6 Rule 13(1) (a), (b) and (d) of the Civil Procedure Rules and Sections 3A and 63(e) of the Civil Procedure Act*** to strike out the originating summons, to evict the applicants and to have them pay the outstanding rent and interest. On 15th March, 2010, the applicants filed a notice of preliminary objection to the said application on the grounds:

1. ***THAT*** *the applications in incompetent, an abuse of court process and bad in law.*

2. ***THAT*** *the application is fatally defective and does not lie.*

3. ***THAT*** *the application has no basis in law and the orders sought are incapable of being granted.*

The High Court (Muchelule, J) in a ruling dated 15th December, 2010, struck out the applicants' suit with costs. The learned Judge held ***inter alia*** that the applicants' claim had no legal basis and was brought purely with the intention to continue the illegal occupation of the suit properties.

Aggrieved by that decision the applicants filed a Notice of Appeal on 11th January, 2011 and this application seeking a temporary injunction and stay of execution of the ruling dated 15th December, 2010.

The appeal has since been filed as **CA No. 104 of 2011.**

The respondents in opposition to the application filed a replying affidavit sworn by the 1st respondent. The 1st respondent deposed that there has been undue and unexplained delay in bringing the application; that the applicants have continued to approach the court for discretionary relief with dirty hands in that they have refused to pay rent; that the applicants lost the application for temporary injunction and the suit was struck out and that the applicants' application lacks merit.

Submissions by counsel

At the hearing of the application before us, Mr Chebii, holding brief for Mr Nelson Kaburu, learned counsel for the applicants, adopted the 1st applicant's affidavit in support of the application dated 17th February, 2011. He argued that the intended appeal which had been filed is an arguable appeal and had a high probability of success; that the issue of adverse possession was not addressed and that the learned Judge failed to take into account that the applicants' claim of adverse possession entitled them to the suit properties; that the learned Judge erred in finding that the suit was frivolous yet the evidence before him proved otherwise. Counsel urged us to allow the application as the respondent was likely to move in immediately and evict the applicants from the suit properties whereas the respondents do not have the means to compensate the applicants in the event that the suit properties are alienated. Counsel argued that the applicants have an arguable appeal which would be rendered nugatory if the orders sought herein are not granted.

In opposition to the application, Mr Kirimi, learned counsel for the respondents submitted that the applicants have no arguable appeal; that the intended appeal is frivolous and is an abuse of the court's process. It was the respondents' case that there is no justification for claim of adverse possession; that there is no dispute that the applicants have continued to incur huge rent arrears; that there was no order for eviction given by the learned judge but he merely struck out the originating summons; that there was no concession regarding occupation by the applicants and there was ample evidence that the occupation has been contested in court in various suits. Counsel submitted that in the event that this Court grants this application, rent arrears should be paid to the respondents as there is sufficient evidence to prove that rent was payable by the deceased and the applicants; and that the claim for adverse possession is fatally defective. Counsel urged us to dismiss the application with costs.

Analysis and determination

We have considered the application, the grounds in support thereof, the replying affidavit filed on behalf of the respondents, rival submissions by counsel and the law.

The principles applicable for the determination of applications under ***rule 5(2) (b) of the Court of Appeal Rules*** are well settled as was observed by this Court in ***ISHMAEL KAGUNYI THANDE V HOUSING FINANCE KENYA LTD, CIVIL APPLICATION NO. NAI 157 OF 2006 (Unreported):***

"The Jurisdiction of the Court under *rule 5(2) (b)* ***is not only original but also discretionary. Two principles guide the court in exercise of that jurisdiction. These principles are well settled. For an applicant to succeed he must not only show that 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 that appeal will be rendered nugatory. (See***

*Githunguri v Jimba Credit Corporation Ltd, No. 2 (1988) KLR 838 and J.K. Industries Ltd v Kenya Commercial Bank Ltd, (1982-88).***"** Further, in ***SAFARICOM LIMITED V OCEAN VIEW BEACH HOTEL LIMITED & 2 OTHERS, CIVIL APPLICATION NO. 327 OF 2009***, Omolo J.A held:

"At the stage of determining an application under *Rule 5(2)(b)* ***there may be no actual appeal. Where there is no actual appeal already lodged there nevertheless must be an intention to appeal which is manifested by lodging of a Notice of Appeal. If there is no Notice of Appeal lodged, one cannot get an***

order under** Rule 5(2)(b) **because as I have already pointed out the jurisdiction of the Court of Appeal is limited to hearing appeals from the High Court and if there is no appeal or no intention to appeal as manifested by lodgment of the Notice of Appeal the Court of Appeal would have no business to meddle in the decision of the High Court."

As pointed out by Githinji, JA, in the case of ***EQUITY BANK LIMITED V WEST LINK MBO LIMITED, CIVIL APPLICATION NO. NAI 78 OF 2011*** that

the true nature of an application under ***Rule 5 (2) (b)*** is an interlocutory application in an appeal pending before this Court; and that ***Rule 5 (2) (b)*** is a procedural innovation designed to empower this Court to entertain interlocutory applications for preservation of the subject matter of the pending appeal in order to ensure the just and effective determination of appeal.

We have considered the respective position of the parties. It is not in dispute that the applicants lodged a notice of appeal on 11th January, 2011, and therefore, have expressed their intention to appeal against the High Court decision dated 15th December, 2010. Indeed, the main appeal has since been filed. What this court is called to determine is whether the intended appeal is arguable and whether the appeal, if successful will be rendered nugatory, if we decline to grant the orders sought.

Whether or not an intended appeal will be rendered nugatory depends on the particular circumstances of each case. See ***RELIANCE BANK LTD V NORLAKE INVESTMENTS LTD, (2002) 1EA 227***. In the application before us, the issue whether the applicants can claim ownership of the suit properties by adverse possession and the allegation that the learned Judge did not fully address the applicants' claim for adverse possession, is in our view, arguable. The Court has to consider the respective inconvenience and hardship that each of the parties stands to be exposed to. See ***ORARO AND RACHIER ADVOCATES V CO-OPERATIVE BANK OF KENYA LTD, CIVIL APPLICATION***

NO. NAI 358 OF 1999. Appreciating as we do that an arguable appeal is not one that will necessarily succeed, we are satisfied that the applicant has placed before us an arguable appeal.

On the second limb as to whether the appeal will be rendered nugatory unless we grant the interim injunction sought, we are satisfied that the same will not be rendered nugatory. We are of the view that damages would be an adequate remedy if the applicant ultimately succeeds in the appeal. Having considered the interests of both the parties, we find that the application herein, though arguable, will **not** be rendered nugatory if the order sought is not granted.

The applicant is obliged to satisfy both limbs of the principle that we have set out above. It will not suffice to satisfy only one of them. See ***PERIS WANJA & 4 OTHERS V HANNA NJERI MTHUMBI, CIVIL APPLICATION NO. NAI 109 OF 2011***.

In the circumstances, the twin limbs of the principle having not been satisfied, the application must fail. Accordingly, we dismiss this application with costs.

Dated and delivered at Nairobi this 7th day of November, 2014.

P. N. WAKI

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

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

DEPUTY REGISTRAR