



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, MWERA & MWILU, JJA.)

CIVIL APPLICATION NO. NAI 120 OF 2014 (UR 98/2014)

BETWEEN

JAMES MUKURIA NJOROGE.....APPLICANT

AND

JOSEPH MURAYA GACHUHI.....1ST RESPONDENT

JORETH LIMITED.....2ND RESPONDENT

THE COMMISSIONER OF LANDS.....3RD RESPONDENT

*(Being an application for an injunction pending the hearing and determination
of an intended appeal from the ruling of the High Court of Kenya at Nairobi*

(Nyamweya, J.) dated 19th May, 2014

in

E.L.C No.462 of 2012

RULING OF THE COURT

The applicant **James Mukuria Njoroge**, the administrator of the estate of the late **Njoroge Thairu**, filed the notice of motion dated 27th May, 2014 invoking the powers donated by **Rules 5, 41, 47 of the Court of Appeal Rules** with the main prayer:

i. that an injunction do issue restraining the 1st and 2nd respondents from cultivating or interfering with his possession of the parcel of land known as LR 133330/592 until the intended appeal is heard and determined.

From the grounds set out in the body of the motion, the contents of the supporting affidavit and the submissions by **Mr. Mugo**, the learned counsel for the applicant, we gathered that the applicant filed E.L.C No.462/2012 in the High Court together with an application for a temporary injunction to protect his interest in the said Land L.R. 13330/592. It was the applicant's claim that his late father was allocated

Plot No.173 of the larger LR.13330/592 which was once registered in the name of **Thome Farmers No.5 Ltd**. He moved into possession and commenced cultivating and erecting structures on the same. That the applicant made payments towards the purchase of that plot, as the administrator of the estate of the late **Njoroge Thairu**, through **M/S Kimani Kahiro Advocates** as per the bundle of receipts exhibited. While waiting for the transfer, he came to learn that by a document of transfer dated **23rd April, 2012**, the subject plot was transferred by the 2nd respondent, **Joreth Ltd** to the 1st respondent **Joseph Muraya Gachuhi**. That prompted the filing of the said suit along with the injunction application. The orders sought by that application were to restrain the 1st and 2nd respondents from entering, disposing of or in any way interfering with applicant's possession of the said property, until the suit aforementioned had been determined. **Nyamweya, J.** heard the application and dismissed it on the basis that the applicant had not made out a *prima face* case against the two respondents, because the 1st respondent held a better title to the land by way of purchase from the 2nd respondent, while the applicant had not shown any evidence of how his claim was based on the representation that **Thome Farmers No.5 Ltd** sold the said plot to his late father.

The applicant being dissatisfied with that decision, intends to appeal to this Court, hence the present application appropriately falling under **Rule 5(2)(b) of the Court of Appeal Rules**. **Mr. Mugo** submitted that his client would argue on appeal that the subject plot of land could not possibly and legally be transferred on 23rd April, 2012 by the 2nd respondent company, acting through its directors including one **James Njenga Karume** who had died on 24th February, 2010. And that **Thome Farmers No.5 Ltd** which sold plot No.173 to the applicant's father, being the same as **Joreth Ltd**, the 2nd respondent, **Joreth Ltd** could not validly sell and transfer the same land to the 1st respondent thereby occasioning double registration. Having been in occupation of the plot and built on it, the applicant contended that he could suffer greatly if the injunction was not granted. Further, that he could not find a similar plot to buy at an affordable price and damages could not adequately compensate him.

Mr. Kamotho and **Miss Maina**, learned counsel for the 1st and 2nd respondents respectively, opposed the application. Their arguments were that **Thome Farmers No.5 Ltd** and **Joreth Ltd** (the 2nd respondent) were not one and the same entity. They were separate entities as limited liability companies and did not have any working relationship whereby the claimed purchase of the suit plot from the former could be attributed or linked to the latter. Both counsel told us that the 1st respondent validly purchased the suit plot from the 2nd respondent and a due transfer was effected. That the applicant had not adduced sufficient evidence regarding the claim through **Thome Farmers No.5 Ltd**. In any case, so we were told, the transfer to the 1st respondent on 23rd April, 2012 was valid, having been signed by **James Njenga Karume**, a director of the 2nd respondent, before this death. And that finally the applicant had not demonstrated how the appeal could be rendered nugatory if the injunction order was refused and eventually the appeal succeeded.

In determining an application such as this brought under **Rule 5(2) (b)**, it has long been established and held that the applicant needs to satisfy the Court on two conditions, namely that he/she has an arguable appeal and that if the sought order is not granted and eventually appeal is successful, it shall be rendered nugatory. From many cases decided by this Court the common vein and jurisprudence running through them include the aspects that under the said rule this Court exercises original, discretionary, wide and unfettered jurisdiction; whether an appeal is arguable, it is sufficient if a single *bona fide* ground is raised; an arguable appeal need not necessarily be one that must succeed but one which should be fully argued before the Court; whether or not what is sought to be injuncted/stayed, if allowed to happen is reversible or if it is not reversible whether damages will reasonably compensate the applicant and that rendering an appeal nugatory is a feature that is peculiar to each individual case.

Having the foregoing in mind and considering the rival arguments, we are satisfied that at least more than one arguable ground has been made out to be presented for determination on appeal in respect of the parcel of land which parties appear to agree that it is one and the same:

*i. whether **Thome Farmers No.5 Ltd** is one and the same as **Joreth Ltd** (the 2nd respondent) or*

they operated in such a relationship as for the former to give the subject plot to the applicant's father as claimed, so that the latter

ii. could not later transfer the same plot to the 1st respondent.

*iii. whether the transfer dated 23rd April, 2012 signed by one of the directors of the 2nd respondent, **James Njenga Karume** who is said to have died earlier on 24th February, 2010 was valid and therefore capable of being held against the applicant, laying an earlier claim to the suit plot.*

As to whether the appeal will be rendered nugatory, we appreciate that the land in question will always be there. But if the injunction sought is not granted and the 1st respondent moves in, it is quite probable that he will demolish the structures including a garage said to be erected thereon by the applicant. The 1st respondent could as well put the said land to such use as to alter its physical nature or just dispose of it. It is therefore warranted that an injunction do issue, and accordingly we issue the same until the intended appeal herein is heard and determined or further orders of the court issue. We order that the costs of this application be costs in the intended appeal.

Dated and delivered at Nairobi this 18th day of December, 2014

ALNASHIR VISRAM

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JUDGE OF APPEAL

J. W. MWERA

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR