REPUBLIC OF KENYA

Court of Appeal at Nairobi

Civil Application 239 of 2012

MIRIAM MUTHONI MAHIHU*(sued on her own behalf and as Executor of the Estate of*

ELIUD MUCHOKI MAHIHU *(deceased)*…….....……1ST APPLICANT

NGARI MAHIHU…….....……2ND APPLICANT

LUCY YINDA …….....…… 3RD APPLICANT

WACHIRA MAHIHU…….....……..4TH APPLICANT

WANJERI MAHIHU…….....…….……...5TH APPLICANT

BUSINESS LIAISON COMPANY LIMITED…….....……...……..6TH APPLICANT

AND

AFRICAN SAFARI CLUB LIMITED…….....…….....……...RESPONDENT

(An application for stay of execution of an intended appeal from the ruling & orders of the High Court of Kenya at Mombasa (Muriithi, J) delivered on 21st September, 2012

in

HCCC NO. 586 OF 2011)

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RULING OF THE COURT

Before us is an application dated 27th September, 2012, expressed to be brought under ***rule 5 (2) (b) of the Court of Appeal Rules*** (the Rules) seeking the following orders

1.Pending the lodging, hearing and determination of the intended appeal, there be stay of execution of the orders made in the decision of the superior court [sic] delivered on 21st September, 2012 (Muriithi, J) in H.C.C.C No. 586 OF 2011.

*2. In the alternative and without prejudice to the above, in the event the applicants herein have already vacated the suit properties, **L.R NOs. MN/1/856, MN/1/5902**, and land referred to as **No. 31500/XII/108 plan No. 122149/22A** whereon stands the Flamingo Beach Hotel as at the hearing of this application,*

then there be an order made directing that the 6th Applicant herein be reinstated thereunto forthwith and to take vacant possession thereof unconditionally pending hearing and determination of the intended appeal.

The background to this application is that there exists a dispute regarding the ownership of the suit property, which is presently registered in the name of the 6th applicant. The 6th applicant herein claims that it had acquired interest over ***L.R NOs. MN/1/856, MN/1/5902*** an unsurveyed plot at Shanzu, Mombasa Reference ***No. 31500/XII/108*** on ***plan No. 122149/22A*** [the suit property] by purchase; that it entered into a loan agreement dated 2nd March, 1989, with the respondent whereby the respondent was required to construct a hotel and develop the suit properties within one year; that thereafter, on the basis of a lease agreement dated 1st May, 1989, the 6th applicant leased the hotel to the respondent for a period of fifteen [15] years to enable the respondent set off the cost of construction over the 15 year lease period. That it was an express term of the said lease agreement that the respondent [the lessee] had an option to renew the said lease which would be exercised by a written request to the 6th applicant herein [the lessor] three calendar months before the expiration of the term of the lease. The said lease agreement also provided that at the expiry of the term of the lease the respondent would peaceably surrender and yield upto the 6th applicant [the lessor] the suit properties. The said lease took effect from 1st May, 1989 and expired on 30th April, 2004. The 6th applicant contended that it took possession of the hotel after the lease expired when the respondent failed to apply for renewal of the lease.

The respondent herein claims that it purchased the suit properties in the name of the 6th applicant in 1989 with the understanding that all the shares of the 6th applicant would be transferred to the respondent and its nominees. The respondent developed the suit properties by building the Flamingo Beach Hotel (the hotel) and a large complex containing offices, parking area and a workshop thereon. The respondent continued in occupation of the suit property till 17th June, 2011, when police officers forcefully took over the hotel and the workshop chasing away the respondent's employees under the guise of preventing terrorist attacks thereon. The respondent perceived the aforementioned actions as unlawful and tantamount to infringement of its right to property under the Constitution.

As a result of the foregoing, the respondent filed a Constitutional Petition in the High Court at Mombasa on 1st July, 2011 being **Petition No. 35 of 2011** (the Petition), seeking redress for alleged contravention of its fundamental rights and freedoms enshrined under the Constitution.

The High Court *(Okwengu, J as she then was),* in a ruling delivered on 2nd August, 2011, dismissed the said application and held *inter alia* that*:*

"The court has however not been asked to restrain the respondents from dealing with the suit property nor has the applicant specifically requested for an order to reinstate it back into the suit property. Indeed that is an order which could have been appropriately obtained by way of mandatory injunction if the circumstances so justified. Nonetheless the applicant has chosen not to go that way. The court cannot give what has not been sought."

The respondent being aggrieved with the said ruling filed a Notice of Appeal on 10th August, 2011 and an application before this Court under ***rule 5 (2) (b) of the Rules*** being Civil Application No. NAI 248 of 2011. The said application was heard by this Court in July 2012 and the ruling thereon was delivered on 24th January, 2013. The learned judges declined to grant the orders sought and dismissed the motion with costs and ruled as follows:

"We are skeptical about the arguability of the applicant's intended appeal. It is, of course, the applicant's right to pursue the intended appeal and upon the appellate court to pronounce itself finally on that appeal. In our view, granting the mandatory injunction sought at this stage would leave nothing further to await in the intended appeal and we are not inclined to do so. We are also of the view that the success of the intended appeal will not be rendered nugatory."

Aggrieved by the dismissal of the application in Petition No. 35 of 2011, the respondent also filed HCCC NO. 586 OF 2011 in the High Court at Mombasa on 3rd November, 2011, in which the 6th applicant herein is named as the 6th defendant.

By a plaint dated 3rd November, 2011, the respondent as plaintiff in the said HCCC NO. 586 OF 2011 claimed to be the true owner of the suit property and sought declarations of ownership and an order for reinstatement to the suit property, or alternatively compensation therefor following alleged unlawful dispossession by the defendants on 17th June, 2011.

The plaintiff as respondent also sought by notice of motion of the same date the following principal orders:

"2. That this Honourable Court be pleased to grant an order restraining the defendants or any of them whether by themselves, agents, servants or otherwise howsoever occupying and or remaining upon the suit properties plot Nos. MN/1/5902, MN/1/856, unsurveyed plot no. 31500/XII/108 on plan no. 122149/2A whereon stand Flamingo Beach Hotel and a workshop or interfering therewith pending hearing and determination of the suit filed herein.

3. That this Honourable Court do by way of a mandatory interlocutory order compel the defendants/respondents together with their agents, servants or anybody claiming under them forthwith vacate the suit properties being plot Nos. MN/1/5902, MN/1/856, unsurveyed plot no. 31500/XII/108 on plan no. 122149/2A whereon stand Flamingo Beach Hotel and a workshop thereon pending hearing and determination of the suit filed herein. "

Muriithi, J delivered the court's ruling on 21st September, 2012 and granted the plaintiff's [respondent herein] prayer 3 above. The learned trial judge delivered himself *inter alia* thus:

"… it is the duty of the court to uphold the rule of law and reinstate the wrongly disposed Applicant into the suit property. The mission of the Court under the Constitution to rehabilitate the rule of law as one of the basic principles of the constitution under Article 10 thereof exists for the remedy of such situations by pursuing the triumph of the rule of law over the Defendant's impunity in stealing a march on the Plaintiff. The order of the court will take effect on the expiry of 30 days from the date of this ruling to allow for smooth take over/hand over between the parties."

Aggrieved by the said ruling, the appellants filed the instant application for stay of execution the subject of this ruling.

The application for stay of execution was heard before this Court on 23rd January, 2013. Mr Paul Buti, learned counsel appeared for the applicant while Mr Mwakisha, learned counsel appeared for the respondent. Mr Buti in his submissions before us, submitted that the intended appeal raises several arguable points. Firstly, that the learned Judge (Muriithi, J) in directing that the order requiring the applicants to vacate the suit properties would take effect on the expiry of thirty [30] days from the date of the ruling to allow for the smooth take over or hand over between parties was tantamount to the learned Judge acting beyond his jurisdiction, because the said order of taking over or handing over was never sought in the said application; secondly, that the orders that were sought in the said application were *res judicata* because the same orders were considered and determined in the Petition; thirdly, that the learned judge in the High Court erred in law and in fact in ordering and granting the respondent herein a mandatory injunction when there existed no material evidence on record to enable him grant such an order; fourthly, that he issued an order for reinstatement of the respondents into the suit property which orders had not been prayed for; fifthly, that the learned judge erred in law by giving an order that directly contradicted an earlier order given by the same court in the Petition in which the issues therein were the same and involved the same parties, and in the process reversing an earlier decision of the same court [of concurrent jurisdiction] on the same matter litigated between the same parties in the same capacities; sixthly, that the learned judge failed to appreciate that the same matters before him were the subject of a pending determination by the Court of Appeal in Civil Application No. NAI 248 of 2011 [UR 161/2011]

between the same parties; and also failed to consider that the respondent had claimed for compensation and in the alternative, damages; seventhly, that the learned judge erred in both fact and law by failing to consider that the 2nd to 5th applicants were not shareholders in the 6th applicant company and the shareholding of the 6th applicant had radically changed and was under the ownership of persons who were not made parties in the suit and application before him.

With regard to the appeal being rendered nugatory learned counsel argued that the 6th applicant had spent in excess of KShs.200,000,000/= in carrying out renovations in the said hotel and is apprehensive that its investment will be wasted if the respondent takes over the running of the hotel on account of the various claims against the respondent. One such claim in point as pointed out to us by Mr Buti is that just four days after the ruling which is the subject of the intended appeal was delivered, Tip Top Auctioneers visited the hotel to execute a warrant of attachment and sale issued by the Industrial Court against the respondent in Industrial Cause No. 648 (N) of 2009 for recovery of a sum of KShs.24,539,133/= being the decretal amount therein, which amount if realised alongside other pending claims against the respondent then the substratum of the intended appeal will be obliterated and the resulting appeal if successful, will be an empty shell.

Mr Moses Mwakisha, learned counsel for the respondent in opposition to the application urged us not to grant the orders sought because if the order sought in the instant application is granted, the same would result in an infringement of the respondent's right to the suit properties since the respondent had developed and been in occupation of the suit properties for a period of twenty years prior to the unlawful dispossession. He maintained that the learned Judge, did not act in excess of his jurisdiction by issuing directions as to the handing over of the suit properties bearing in mind that the respondent had sought a mandatory injunction for reinstatement onto the suit properties after being ejected by the applicants. He further submitted that the said directions ensured that there would be a smooth handing over of the property.

Mr Mwakisha maintained that the application was not *res judicata* because, the Petitioner sought a constitutional remedy for violation of its rights after the unlawful take over of the suit properties; while the dispute which is the subject of the suit giving rise to this application is in relation to ownership of the suit properties and the alleged fraud by the applicants which could not be determined in a Constitutional Petition. Consequently, counsel urged us to dismiss the instant application.

We have carefully considered the application, the submissions by the learned counsel, the authorities 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. This Court clearly elucidated the said principles in the case of ***REPUBLIC V KENYA ANTI-CORRUPTION COMMISSION & 2 OTHERS, (2009) KLR 31*** as follows:

"The law as regards the principles that guide the court in such an application brought pursuant to Rule 5 (2) (b) of the Rules are now well settled. The court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the court, first, that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds, the result or the success would be rendered nugatory. In order that the applicant may succeed, he must demonstrate both limbs and demonstrating only one limb would not avail him the order sought if he failed to demonstrate the other limb. [See also this Court's decisions in the cases of ***RELIANCE BANK LTD V NORLAKE INVESTMENTS LTD (2002) 1 EA 227 & GITHUNGURI V JIMBA CREDIT CORPORATION LTD & OTHERS (NO. 2) 1988 KLR 828; WARDPA HOLDINGS LTD & OTHERS V EMMANUEL WAWERU MATHAI & HFCK (CIVIL APPEAL NO. 72 OF 2011*** *[unreported]."*

In addition to the above, the Court is also obligated by statute to consider and apply the overriding objective of litigation, that is, to facilitate the just, expeditious, proportionate and affordable resolution of the appeal - ***Sections 3A and 3B of the Appellate Jurisdiction Act***. On the point as to whether the intended appeal is arguable, we reiterate what this Court recently said in ***DENNIS MOGAMBI MANG'ARE V ATTORNEY GENERAL & 3 OTHERS, CIVIL APPLICATION NO. NAI 265 OF***

2011 [UR 175/2011]:

"… an arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court's consideration. …"

In addition to the above principles we also wish to be guided by the decision in the case of ***NAIROBI CITY COUNCIL V THABITI ENTERPRISES***, ***CA 264 OF 1996*** where the court held *inter alia*:

"A judge had no power or jurisdiction to decide an issue which had not been pleaded unless the pleadings were suitably amended. ***SHEIKH V SHEIKH AND OTHERS*** *[1991] LLR 2219 (CAK);* ***SANDE V KENYA CO-OPERATIVE CREAMERIES LTD*** *[1992] LLR 314 (CAK) followed;* ***ODD JOBS V MUBIA*** *[1970] EA 476."*

Also the decision in the case of ***R V UNIVERSITY OF NAIROBI, EALR [2002] 2 EA 572*** where this court stated at page 575:

"The point to be canvassed in the intended appeal is whether in the exercise of his admitted jurisdiction, the learned judge was in fact entitled to, in effect, issue an order of ***mandamus*** *against the university when neither the applicants nor the university had asked for such an order. We think that this point is clearly arguable."*

Applying the above set out case law principles to the rival arguments herein, we are of the view that the intended appeal raises arguable points touching on the issue of ownership of the suit properties which to us is a pivotal issue that has to be determined with finality; the issue whether the learned judge in HCCC No. 586 of 2011 dealt with matters that were *res judicata* the same having been dealt with in Petition No. 35 of 2011 is one that is deserving of the court's consideration. Also, the fact that the said two matters were heard by judicial officers of concurrent jurisdiction and who gave rulings that were diametrically opposed to each other is another arguable point as is the issue that the learned judge [Muriithi, J] gave orders for matters not prayed for. It is now trite that only one arguable point suffices to sustain an application under ***rule 5 (2) (b) of Court of Appeal Rules***. Herein where we have identified several arguable points.

We are, therefore, satisfied that the applicant has satisfied the requirement of arguability.

On the nugatory aspect, it is trite law that this Court must weigh and balance the competing claims of both parties and that each case must be decided on its own particular facts.

As this Court held in ***RELIANCE BANK LTD V NORLAKE INVESTMENTS LIMITED*** ***[supra]***:

"In determining the second limb of the test, the court in ***ORARO AND RACHIER ADVOCATES V CO-OPERATIVE BANK OF KENYA LIMITED*** *(supra) had not been enunciating a third principle but merely stating that, in making its decision, it was bound to consider the conflicting claims of both sides where a decree for the payment of money was issued, the inability of the other side to refund the decretal sum was not the only thing that would render the success of the appeal nugatory. The factors that could render the success of an appeal nugatory thus had to be considered within the circumstances of each particular case* ***(ORARO AND RACHIER ADVOCATES V CO-OPERATIVE BANK OF KENYA LIMITED*** *(supra) explained and followed).* ***Rules 5 (2) (b)*** *conferred on the court original jurisdiction based on the exercise of discretion by the Judges of the court."*

See also ***AFRICAN SAFARI CLUB LIMITED V SAFE RENTALS LIMITED, NAIROBI CIVIL APPEAL [APPLICATION] NO. 53 OF 2010 (Unreported)***, where the Court stated that:

"… with the above scenario of almost equal hardship by the parties it is incumbent upon the Court, pursuant to the overriding objective to act justly and fairly. The first role we have undertaken in this regard is to consider the hardships of the two parties before us. The second role is to put hardship on scales. … We think that the balancing act as described in the analysis of the parties before us, is in

keeping with one of the principle aims of the oxygen principle of treating both parties with equality or in other words placing them on equal footing in so far as is practicable. … We believe that the rules of procedure including ***rule 5 (2) (b)*** *have considerable value in terms of administration of justice but new challenges brought about by the enactment of the oxygen principle brings into focus the fundamental purpose of civil procedure which is to enable the court deal with cases justly and fairly."*

We have accordingly weighed the competing interests of both parties as presented to us in the parties' rival arguments. We have noted that although the respondent had initial possession of the suit property, he was dispossessed of the same albeit unlawfully as asserted by them. The ruling intended to be appealed against was meant to reverse that alleged unlawful dispossession and restore the respondent back into the suit premises. We have also been informed there are *status quo* orders in place whose effect is to keep the respondent out of the premises. We also recognise that both counsel during the *inter partes* hearing confirmed to us that the 6th applicant was still in possession of the suit properties. There is, therefore, likelihood that the 6th applicant may be evicted by the respondent from the suit property, if the stay order sought is not granted and once the respondent is restored in the premises, there is a likelihood that the warrant of attachment issued by the Industrial Court in Cause No. 648 (N) of 2009, to recover a claim of KShs.24,539,133/=, against the respondent may be effected. Execution of this warrant alongside other warrants in waiting mentioned by learned counsel for the applicants and not denied by the respondent's counsel may in essence obliterate the substratum of the intended appeal and in effect, render it nugatory should it ultimately succeed.

We are also alive to the overriding objective principles which we have also applied in balancing the competing interests herein.

In the result, the applicant has demonstrated existence of both limbs of ingredients as required by ***rule 5 (2) (b) of the Court of Appeal Rules***.

Accordingly, we allow the application and order that the orders issued by the High Court (Muriithi, J) dated 21st September, 2012, be and are hereby stayed pending the hearing and determination of the intended appeal herein. We further order that the *status quo* be maintained in respect of this matter until the intended appeal is heard and determined. Costs shall be in the appeal.

Dated and delivered at Nairobi this 19th day of April, 2013.

R. N. NAMBUYE

JUDGE OF APPEAL

W. OUKO

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

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