



REPUBLIC OF KENYA

Court of Appeal at Nairobi

Civil Appeal 77 of 2012

NGURUMAN

LIMITED.....APPELLANT

AND

JAN BONDE NIELSEN.....1ST

RESPONDENT

HERMAN PHILIPUS STEYN (Also known as Hermannus Phillipus Steyn).....2ND RESPONDENT

HEDDA STEYN.....3RD

RESPONDENT

(An appeal from such part of the Ruling and Order of the High Court of Kenya at Nairobi (Odunga, J.) delivered on 30th March, 2012 as decides that the plaintiff has satisfied the conditions necessary for the grant of an interlocutory injunction in terms of prayer 8 of the notice of motion dated 30th August, 2010 and accordingly the plaintiff be granted an injunction restraining the defendants, their agents, employees and/or nominees from interfering with the plaintiff’s homestead commonly known as Ol Donyo Laro

in

H. C. C. No. 332 of 2010)

RULING OF THE COURT

(1) At the hearing of this appeal, Mr. George Oraro, learned Senior Counsel for the first respondent, took a preliminary objection on the jurisdiction of this Court to hear and determine the appeal. Although Mr. Oraro had not filed and served on the other parties to the appeal, notice of the preliminary objection, the court nevertheless allowed him to argue the objection for three reasons. First, if the objection was successful, it would determine the entire appeal. Second, as was stated by this Court in the *Owners of the Motor Vessel “Lillian S” vs. Caltex Oil (Kenya) Ltd (1989) KLR, 1* a court seized of a matter in which the question of jurisdiction is raised is obliged to decide the issue right away on the material before it. Lastly, the appellant and the second and third respondents were prepared to argue the objection notwithstanding lack of notice, due to the urgency and importance of the appeal to them. In the event, the objection was strongly resisted by Mr. Ahmednassir Abdullahi, learned Senior Counsel for the appellant and Mr. Pheroze Nowrojee, learned Senior Counsel for the second and third respondents.

(2) At the heart of the preliminary objection is a simple question: does the Court of Appeal have jurisdiction to hear and determine an appeal where, during the pendency of an appeal against an order of injunction, the appellant applies to the High Court under **Order 40 (7)** with some measure of success, for variation of the order appealed from?

(3) Before we address that issue on the basis of the evidence before the court, it is important to set out briefly the background to the preliminary objection.

(4) By a plaint dated 17th May, 2010 the first respondent sought declarations from the High Court that a 50:50 basis partnership existed between him and the second respondent and that the second and third respondents held 50% of their shares in the appellant company in a constructive trust for him. He further prayed for transfer of the said shares to him, the taking of account of the partnership assets and payment to the partnership or to him of any amount found due, an injunction to restrain the first and second respondents from interfering with his participation in the management or operations of the appellant company and other partnership assets, payment of US\$1,917,333 with interest, being money had and received by the second and third respondents to his use and costs of the suit. The appellant, the second and third respondents duly filed their defence to the claim on 17th June, 2010.

(5) On 30th August, 2010, the first respondent took out a notice of motion under **sections 1A, 1B and 3A** of the Civil Procedure Act, **Order 39 Rules 2 and 3** and **Order 50 Rule 17** of the Civil Procedure Rules. The application was supported by an affidavit sworn by the first respondent on the same day and prayed for an interlocutory injunction to restrain the appellant, the second and third respondents, their agents, employees or nominees from interfering with his homestead commonly known as Ol Donyo Laro, a mandatory injunction to compel the said parties to restore water supply to the said homestead, to repair all damage to Ol Donyo Laro Airstrip and to remove all camps established around the said airstrip some two days earlier. He further sought a mandatory injunction to compel his participation in the management and operations of the partnership assets including Title No. Narok/Nguruman Kamorora/1. Lastly he prayed for an interlocutory injunction to restrain the appellant, the second and third respondents from interfering with him in the common management of the partnership assets including the said Title No. Narok/Nguruman Kamorora/1.

(6) On the same day the first respondent obtained ex parte interim orders restraining the appellant, the second and third respondents, their agents, employees and or nominees from interfering with the plaintiff's homestead as prayed. On 27th October, 2011, Moses Loontasati Ololowuaya, a director and chairman of the appellant swore a lengthy 97 paragraph affidavit in opposition to notice of motion. The affidavit set out the history of the dealings between the parties and the deponent contended that the first respondent had not made out a prima facie case to entitle him to the injunctions, sought for among other reasons, non disclosure of material facts, untenable mix up of issues of company law and issues of the law of partnerships and contravention of the Law of Contract Act, Cap 23 Laws of Kenya as well as the Land Control Act, Cap 302 Laws of Kenya. It was further averred that some of the prayers sought were contrary to public policy and that in any event Ol Donyo Laro was an exclusive tourist facility rather than a homestead.

(7) On their part the second and third respondents filed grounds of opposition on 28th October, 2011 contending that the application did not satisfy the conditions for grant of an injunction, did not disclose a reasonable cause of action, was incurably defective and bad in law and was scandalous, frivolous, vexatious or otherwise an abuse of the process of the court. Thus the stage was set for inter partes hearing of the application.

(8) The application was heard by Odunga J, who in a considered ruling dated 30th March, 2012 granted only one prayer in the motion (prayer no. 8) and issued an interlocutory injunction restraining the appellant and the second and third respondents, their agents, employees and or nominees from interfering with the first respondent's homestead commonly known as Ol Donyo Laro.

(9) Aggrieved by the order, the appellant filed a notice of appeal on 12th April, 2012. According to the

notice of appeal, the appellant was appealing only against **“such part of the said decision as decides that the plaintiff (first respondent) has satisfied the conditions necessary for the grant of an interlocutory injunction in terms of prayer 8 of the notice of motion dated 30th August, 2010 and accordingly the plaintiff be granted an injunction restraining the defendants, their agents, employees and or nominees from interfering with the plaintiff’s homestead commonly known as Ol Donyo Laro”**. The record of appeal was lodged on 24th April, 2012.

(10) The preliminary objection was triggered by what happened next. On 5th September, 2012, the appellant filed in the High Court a notice of motion under **section 3 (1)** of the Judicature Act, Cap 6 Laws of Kenya, **sections 1A, 1B and 3A** of the Civil Procedure Act, Cap 21 Laws of Kenya, **Order 40 Rule 7** and **Order 51 rule 1** of the Civil Procedure Rules and **Article 159 (2) (e)** of the Constitution. The application, among other things, sought variation of the order issued by Odunga J. to allow for the definition and delimitation of the extent of the physical boundaries of the Ol Donyo Laro homestead, to limit application of the order to the said boundaries and to allow the appellant unrestricted access to and quiet possession, occupation and enjoyment of Title No. Narok/Nguruman/Kamorora/1 except the Ol Donyo Laro homestead.

(11) The application was heard together with two others by Mabea J, who on 10th December, 2012 dismissed the same but granted prayer nos. 3 and 4 of the application, which were framed as follows:

“3. That the order of interlocutory injunction given by the Honourable Mr. Justice Odunga on 30th March, 2012 be varied so as to grant the 3rd defendant unrestricted access into and out of any and every party of the property comprised in Title No. Narok/Nguruman/Kamorora/1, save for and except the plaintiff’s homestead commonly known as Ol Donyo Laro.

4. That the order of interlocutory injunction given by the Honourable Mr. Justice Odunga on 30th March, 2012 be varied so as to grant the 3rd defendant quiet and unrestricted possession, occupation and enjoyment of any and every party of the property comprised in Title No. Narok/Nguruman/Kamorora/1 to the extent that such possession, occupation and enjoyment does not interfere with the plaintiff’s homestead commonly known as Ol Donyo Laro.”

(12) The learned Judge added a rider to the effect that the orders he had granted were subject to the order made by Odunga J on 30th March, 2012 in that the appellant shall not have access to or purport to exercise its right of enjoyment of quiet possession and occupation in the suit property on the plaintiff’s homestead commonly known as Ol Donyo Laro or some 11 outposts or camps or any other that are currently operated or occupied by the first respondent.

(13) In arguing the preliminary objection, Mr. Oraro submitted that the court must ascertain the prevailing facts as of the date of the hearing and in particular the status of the order or decree appealed from (**Quilter vs. Mapleson (1882) 9 QBD, 672**). He submitted further that a party who is aggrieved by an order of the High Court has several options available to him. Those options are in the alternative, not concurrent. Such a party may opt to appeal against the order to the Court of Appeal if there is a right of appeal. He may also opt for review under **section 80** of the Civil Procedure Act and **Order 45** of the Civil Procedure Rules where there is no right of appeal, or if there is a right of appeal, no appeal has been preferred. Where the order in question relates to an injunction, as in the present case, an aggrieved party may apply for the discharge, variation or setting aside of the order.

(14) Mr. Oraro relied on the following passage from **Mulla on the Code of Civil Procedure (15th Ed., 1997) Pages 2732-273** to show the consequence that a successful application for review of an order has on an appeal against that order:

“Where an application for review has been presented by a party to the suit, and an appeal is afterwards preferred from the same decree, whether by the same party or by other party to the suit, the Court to which the application for review is made is not thereby deprived of jurisdiction to entertain the application. But that power exists so long as the appeal is not heard, because once the appeal is heard,

the decree on appeal is the final decree in the case, and the application for review of judgement of the Court of first instance can no longer be proceeded with. And this is so even if the appeal is dismissed under O.41, r.11. An appeal dismissed as presented out of time is no bar to the hearing of a petition for review which had been filed before the appeal. On the other hand, if the application for review is granted, and a new decree is passed, the appeal cannot be heard and it must be dismissed, for the decree appealed from is superseded by the new decree". (Emphasis added).

(15) Senior Counsel contended that the order of Odunga J was superseded by the order of Mabea J and that the appeal ought to relate to the later rather than the earlier order. He further contended that an order that is discharged or varied is not the original order. Relying on **Article 164** of the Constitution and ***Black's Law Dictionary, 8th Ed. pages 105-106***, he submitted that an appeal means "***a proceeding undertaken to have a decision reconsidered by a higher authority; especially the submission of a lower court's or agency's decision to a higher court for review and possible reversal***". Consequently, where a party has invoked review jurisdiction, an appeal lies from the new order (in this case Mabea J.'s) rather than the original order (Odunga J.'s). He noted in particular that under **Order 43** an appeal lies as of right from an order made under **Order 40 Rule 7**, and that is what the appellant should be pursuing.

(16) Lastly, Mr. Oraro invoked the doctrine of mootness and relied on the ***Canadian case of Borowski vs. Attorney General of Canada (1989) 1 SCR 342*** to make the point that an appellate court will not entertain an appeal if the state of facts to which the proceedings in the lower court related have ceased to exist and the substratum of the litigation has disappeared.

(17) In opposing the preliminary objection, Mr. Ahmednassir Abdullahi, Senior Counsel saw the preliminary objection as a stratagem to delay the hearing and determination of the appeal. He submitted that the order from the High Court which varied the order appealed from had not been produced and therefore the preliminary objection lacked basis. He further submitted that in any event, prayer No 8 of the notice of motion dated 30th August, 2010, granted by Odunga J and which was the basis of the notice of appeal still subsisted after the order by Mabea J. Senior Counsel argued that an appeal lies as of right under **Order 40 Rules 1, 2, and 7** and that the right to apply for discharge, variation or setting aside of an order under **Order 40 (7)** does not require a party to make an election between an appeal and the application. He concluded by arguing that the doctrine of mootness had no application in the present case since the substratum of the appeal still subsists and therefore the court has jurisdiction to hear and determine the appeal.

(18) Mr. Pheroze Nowrojee, Senior Counsel joined Mr. Ahmednassir Abdullahi in opposing the preliminary objection. He addressed previous delays in the determination of the dispute and stated that the preliminary objection was a further delaying tactic. He submitted that the application before Mabea J. was for variation of an order under **Order 40 (7)** and not for review of an order under **section 80** of the Civil Procedure Act and **Order 45** and to that extent, the quotation from Mulla was not relevant to this case. He contended that the first respondent had not presented any authority for the proposition that an application under **Order 40 (7)** is a bar to an appeal.

(19) We are required to determine the preliminary objection on the basis of the evidence before the court. We have considered the pleadings before the High Court, the rulings, the record of appeal, the list of authorities submitted by the parties and the lively and opposing submissions by learned senior counsel.

(20) While the order by Mabea J. has not been extracted and presented to this Court, the application for variation of the order by Odunga J. as well as the ruling by Mabea J were placed before the court. There is no disagreement between the parties that an application for variation of the order granted on 30th March, 2012 was made, argued, heard and determined. The only dispute relates to the effect of the order of variation on this appeal.

(21) We agree with Mr. Pheroze Nowrojee, Senior Counsel, that the authority from Mulla on the Code of Civil Procedure relates to an application for review under the equivalent of our **section 80** of the Civil Procedure Act and **Order 45** of the Civil Procedure Rules rather than an application for discharge, variation or setting aside of an order under **Rule 40 (7)**. We are cautious against applying that authority in

the present appeal because even a plain reading of **Order 45** leaves no doubt that an application for review and an appeal are intended to be alternative remedies. We do not find a similar limitation under **Order 40 (7)**, although it must be plainly obvious whether an appeal can be sustained after a successful application for variation must depend on the extent of the variation of the order appealed from.

(22) In our view, it would be too restrictive an approach, to adopt the position that an appellant who resorts to **Order 40 (7)** by that fact alone, forfeits his right of appeal. First, the law has availed to an aggrieved party the remedy of appeal and that of an application for discharge, variation or setting aside of the order without any express edict that the remedies are available only as alternatives. Secondly, it is conceivable that an application under **Order 40 (7)** may result in the discharge, variation or setting aside of an order, or it may be allowed in part or entirely dismissed. It cannot be the case that in all those eventualities an aggrieved party must forfeit the right of appeal. In our view, the true test of whether an application **under 40 (7)** precludes an appeal is the extent to which the order appealed from has been varied or altered.

(23) Ultimately this preliminary objection turns on the question whether the order that aggrieved the appellant still subsists. The order by Odunga J restrained the appellant and the second and third respondents, their agents, employees and or nominees from interfering with the first respondent's homestead commonly known as Ol Donyo Laro. That is the order that aggrieved the appellant and moved it to file the notice of appeal dated 12th April, 2012. The ruling by Mabea J dismissed the appellant's application for variation of the orders by Odunga J but allowed two prayers granting the appellant:

(1) unrestricted access into and out of any and every party of the property comprised in Title No. Narok/Nguruman/Kamorora/1, save for and except the plaintiff's homestead commonly known as Ol Donyo Laro, and

(2) quiet and unrestricted possession, occupation and enjoyment of any and every part of the property comprised in Title No. Narok/Nguruman/Kamorora/1 to the extent that such possession, occupation and enjoyment does not interfere with the plaintiff's homestead commonly known as Ol Donyo Laro".

(24) The effect of the order by Mabea J was not to vary or fundamentally change the order by Odunga J. In a sense it sought to clarify the earlier order to indicate that the appellant had unrestricted access to, possession, occupation and enjoyment of the suit property **save what was prohibited by the order of Odunga J**. In other words, the order by Odunga J remained and still remains in force, prohibiting the appellant and the second and third respondents, their agents, employees and or nominees from interfering with the first respondent's homestead commonly known as Ol Donyo Laro. This is precisely what aggrieved the appellant according to the notice of appeal.

(25) We find that no variation of the order appealed from has taken place so as to cause the disappearance of the substratum of the appeal. This appeal is not moot. It is still very much alive.

(26) In the premises, we do not find any merit in the preliminary objection and the same is **dismissed with costs**.

Dated and delivered at Nairobi this 12th day of April, 2013.

P. KIHARA KARIUKI

.....
JUDGE OF APPEAL

ALNASHIR VISRAM

.....
JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR