



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M. KARIUKI, MUSINGA & J. MOHAMMED, JJ.A.)

CIVIL APPLICATION NO. NAI 292 OF 2012 (UR 212/2012)

BETWEEN

STEPHEN KIPKEBUT T/A RIVERSIDE LODGE AND ROOMS...1ST APPLICANT

AMMU INVESTMENT COMPANY LTD 2ND APPLICANT

AND

NATALI OGOLA..... 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

(An application for stay of execution under Rule 5(2)(b) of the Court of Appeal Rule 2010 in an intended appeal from part of the judgment and decree of the High Court of Kenya at Nairobi (G. K. KIMONDO, J) dated 2nd October, 2012.

in

ELC. NO.252 OF 2008)

RULING OF THE COURT

Messrs Stephen Kipkebut T/A Riverside Lodge and Rooms and Ammu Investment Company Ltd. (the 1st and 2nd applicants, respectively) sued Naftali Ogola (the 1st respondent) in 2010 in the High Court at Nairobi in Suit No.252 of 2008 seeking “*vacant possession of land reference No.209/14318 located along Jogoo Road (**the suit land**) and an order of permanent injunction to restrain the respondent whether by himself, his servants and/or agents from trespassing on, possessing, occupying, or in any manner howsoever dealing or interfering with the applicants’ quiet possession and/or enjoyment of the suit land to wit, LR 209/14318 Nairobi.*”

The applicants’ case before the High Court was that the 1st applicant was the proprietor of the suit land and that it transferred its interest in the suit land to the 2nd applicant by an instrument of transfer which was registered on or about 23rd April 2008. Subsequently, the 1st applicant discovered the presence of strangers on the suit land whereupon he caused their removal therefrom and fenced the suit land. But the trespassers regrouped and again moved onto and occupied the suit land. The applicants then moved to the

High Court to seek the aforesaid orders of vacant possession in suit No.252 of 2008.

In his defence, the respondent, Naftali Ogola, denied that the 1st applicant was the legal owner of the suit land and pleaded that he had acquired title to the suit land under the doctrine of adverse possession by dint of his more than 12 years of trespass. He counter-claimed and prayed for orders that:

- 1. a declaration be made that the 2nd applicant's title interest or claim over the suit land No.LR 209/14318 had been extinguished by his adverse possession and*
- 2. the second applicant held the land in trust for the respondent and*
- 3. the Registrar of Titles be ordered to cancel the Title of LR 209/14318 Nairobi and to register the respondent as the proprietor thereof.*

After hearing the parties, the trial Judge gave judgment on 2nd October 2012 in which he dismissed both the suit and the counter-claim and made the orders which the applicants now seek in their notice of motion dated 28th November 2012 to have stayed. The decree ensuing from the judgment of the superior court ordered as follows:

- 1. That the plaintiffs' suit be and is hereby dismissed.*
- 2. That the defendant's counter-claim for the title by way of adverse possession be and is hereby dismissed.*
- 3. That each party shall bear its own costs.*
- 4. That the grant number I.R. 86311 over L.R. No.209/14318 issued by the Government of Kenya under the Registration of Titles Act (now repealed) to Stephen Kipkebut trading as Riverside Lodge and Rooms and registered on 21st June 2001 be and is hereby cancelled.*
- 5. That the transfer of the interest in the above title registered on or about 23rd April 2008 in favour of Ammu Investments Company Limited is declared to be of no legal effect and shall be cancelled.*
- 6. That the Registrar of Titles or his successor shall cancel the above title and transfer and also cause a retransfer or reconveyance to be made to the Attorney General to hold the land in trust for the Kenyan public*
- 7. That for full compliance with the judgment, the Attorney General is enjoined into the suit and shall be served by the Registrar of this Honourable Court with a certified copy of the decree and judgment of this court.*

As is apparent, the application before the court was provoked by the dismissal of the suit No.252 of 2008 on 02.10.2012 and the cancellation of both the grant number I.R. 86311 over L.R No. 209/14318 and the 1st applicant's transfer of the said grant to the 2nd applicant registered on or about 23.4.2008. In the notice of motion dated 28.11.2012 the applicants seek under Rule 5(2)(b) of the Rules of this Court, the following orders:

- 1. that there be stay of execution of judgment and the decree of the superior court dated 2nd October 2012 pending the filing, hearing and determination of the intended appeal by the applicants.*
- 2. that the costs of this application be in the intended appeal.*

The notice of motion dated 28.11.2012 was grounded on the affidavit sworn on 28.11.2012 by Adam Marjan, a Director of Ammu Investments Company Limited (the 2nd applicant) and on the following additional grounds:

- 1. The applicants are aggrieved by part of the judgment and decree of the High Court of Kenya at Nairobi (Hon. Kimondo J.) delivered on 2nd day of October 2012 in H. C. ELC No.252 of 2008 and intend to appeal against part of the said judgment and decree as set out in the notice of appeal dated 11th October 2012 and filed.*

2. *The applicants' intended appeal is arguable and stands a high chance of success as can be gleaned from the draft memorandum of appeal.*
3. *There is the immediate and real danger and threat of the applicants' title to the suit property being formally cancelled and the register rectified to the applicants detriment and the intended appeal being rendered nugatory.*
4. *Pending the filing, hearing and determination of the intended appeal it is the applicants' humble prayer that the notice of motion application annexed hereto be heard as a matter of urgency and conservatory orders be issued so as to render the intended appeal nugatory.*
5. *If the orders sought hereby are not granted then the applicants risk losing the suit property and the investment therein in a manner so prejudicial to the applicants' interest and the intended appeal, if successful will be rendered nugatory and a mere academic exercise.*

The application came up for hearing before us on April 25th, 2013. It was premised on rule 5(2)(b) of the rules of this court. It sought stay of the aforesaid orders. We have perused it and the supporting affidavit. The respondent did not file a replying affidavit. The Attorney General was also joined in the suit on the ground that the suit land being public land, the Attorney General was the repository of the title.

Mr. P. O. Mungla, the learned counsel for the applicants, urged us to allow the application and grant the orders sought. He confirmed that the applicants had compiled and filed the record of appeal, being appeal number 335 of 2012 which he said is already in place.

Mr. Mungla appreciated that for the stay orders to be granted under Rule 5(2)(b), his clients had to discharge the burden of showing that their appeal is arguable and that unless stay is granted, the appeal shall be rendered nugatory. On the question as to whether the appeal is arguable, Mr. Mungla pointed out that the issue of illegality of title to the suit land arose in cross-examination and that it had not been pleaded nor was it contained in the issues framed by the parties through their counsel. It was Mr. Mungla's contention that the trial court erred in introducing the issue which was not pleaded in the filed defence and which only featured in cross-examination. Besides, he said, the applicants had not had opportunity to rebut it by evidence. It was Mr. Mungla's submission that the trial court further erred in pronouncing on a matter that was not pleaded and did not flow from the pleadings and in respect of which evidence had not been adduced. It was his submission that the substance of the judgment was founded on the issue of illegality which was neither pleaded nor buttressed by adduction of evidence. Mr. Mungla contended that the appeal was arguable. He submitted that if stay was not granted, execution would ensue and the suit property would be transferred rendering the appeal, if successful, nugatory and thus an academic exercise. He pointed out that the 1st respondent was *in situ* and was operating a garage.

Mr. Odera, the learned counsel for the 1st respondent, opposed the application. His client, the 1st respondent, had not filed a replying affidavit. He could therefore only submit on points of law. It was his contention that the application was overtaken by events and that no orders of stay could be given under rule 5(2)(b) of the rules of this court. For starters, he said, the grant had already been cancelled by the court order made by the trial Judge and that there was nothing to be stayed in relation to the orders of the trial court in that regard. He pointed out that there was no interim stay and that the Attorney General was the repository of the title to the suit property. He, however, conceded that this court could order stay in respect of cancellation of the grant number IR 86311 over LR No.209/14318 if the applicants satisfied the court that cancellation has physically not taken place. It was Mr. Odera's submission that the amended defence in paragraphs 3A and 3B reflected the issue of ownership of the suit land and the applicants were at liberty to adduce evidence. Paragraph 3A and 3B of the amended defence stated;

3A *The defendant specifically denies that prior to the alleged sale and transfer of the suit property to the 2nd plaintiff, that the 1st plaintiff as the lawful registered and/or lawful registered owner of the suit property as alleged in paragraph 3A of the amended plaint or at all and puts the plaintiffs to strict proof thereof.*

3B the defendant is a stranger of the allegations contained in paragraph 3B and 3C of the Amended plaint and puts the 1st plaintiff to strict proof thereof.

It was Mr. Odera's further submission that the transfer was clearly an issue and that the learned Judge's framing of the issues was apt and that the court decision was in tandem with the issues that emerged. He went on to submit that the court could determine, as it did, a matter emerging from evidence where parties submitted on and dealt with an issue in their evidence. However, he added, the Registrar of Titles was not joined as a party to the suit as a person affected by the orders prayed for in the suit.

The court invited Mr. Mwangi Njoroge, Deputy Chief Litigation Counsel, to respond on behalf of the 2nd respondent, if he so wished. Mr. Mwangi Njoroge associated himself with the submissions of Mr. Odera and in addition contended that the trial court had not gone outside the evidence before it. He contended that the cancellation of the title has already taken place.

In his reply to Mr. Odera, Mr. Mungla conceded that he had no evidence whether cancellation of the title has been effected or not. On ownership, he contended that this was an issue, but illegality was never pleaded.

For an applicant under rule 5(2)(b) of the rules of this Court to succeed in obtaining, inter alia, an order for stay of execution, he must satisfy the court that the intended appeal is arguable and that unless stay is granted, the appeal, if successful, will be rendered nugatory. These are the two principles that guide the court in determining whether or not to grant an application under rule 5(2)(b) of the rules of this Court.

In this application, we have no hesitation in stating that Mr. Mungla has satisfied us that the applicants have demonstrated that they have an arguable appeal. We do not consider it wise to delve into the nitty gritty in this regard as this will be a matter for the court that will hear and determine the appeal. Suffice it to state that an applicant does not have to show that the appeal has every probability of success or overwhelming chances of success. All that an applicant needs to show is that the appeal is not frivolous and that it is arguable. This the applicants have done.

The second consideration is whether the appeal will be rendered nugatory if stay is not granted in the event that the appeal is successful. In making this determination, it is necessary to look at the orders sought to be stayed. Orders numbers 1 & 2 relate to the dismissal of the plaintiffs' suit and dismissal of the defendant's counter-claim respectively. The Court has already dismissed the suit and the counter-claim. There is nothing that arises out of the dismissals which, in an application under Rule 5(2)(b) this Court can stay. The Superior Court in order No.3 required each party to bear its own costs. With regard to order No.4, the Superior Court cancelled the Grant number I.R. 86311 over L.R. NO.209/14318 issued by the Government of Kenya under the Registration of Titles Act (now repealed) to Stephen Kipkebut trading as Riverside Lodge and Rooms and registered on 21st June 2001. Like the dismissal of the suit and counter-claim, the cancellation in order No.4 has occurred. It is notional. It is not a physical act. Having occurred, it cannot be stopped or stayed. Similarly, the cancellation of the transfer of the interest in the said title registered on or about 23.04.2008 in favour of Ammu Investments Company Limited cannot be stayed or stopped as it has already occurred and has been declared to be of no legal effect. With regard to order No.6 directing the Registrar of Titles to cancel the title and reconvey it to the Attorney General, Mr. Mungla conceded that he was not in a position to confirm whether or not the Registrar had effected the cancellation in the Registers. It was incumbent upon the applicants to show whether the Registrar has effected the cancellation. If cancellation has not been effected, the court can stop it. But the court cannot make orders in absence of evidence showing what the position obtaining is. If it transpires that pursuant to the order of the Superior Court the register has been amended, it would be futile for us to order stay. It would be like trying to lock the stable door after the horse has bolted. It is our finding that the applicants have failed to satisfy us with regard to the second requirement for the Grant of an order of stay under Rule 5 (2) (b) (supra).

In the circumstances, we decline to grant the application by the notice of motion dated 28.11.2012 and instead hereby dismiss it with costs to the 1st respondent.

Dated and delivered at Nairobi this 21st day of June 2013.

G. B. M. KARIUKI

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR