REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT MALINDI

CIVIL APPLICATION 208 OF 2010

MOMBASA TECHNICAL TRAINING INSTITUTE ……..… APPLICANT

VERSUS

AGNES NYEVU CHARO AND 106 OTHERS ……. 1ST–107TH RESPONDENTS

THE COMMISSIONER OF LANDS ……..…….. 108TH RESPONDENT

THE REGISTRAR OF TITLES ……. 109TH RESPONDENT

(Application for injunction and stay of execution pending the hearing and determination of an intended appeal from the Judgment and Order of the High Court of Kenya at Mombasa (Ojwang, J.) given on 15th March, 2010

in

H.C.MISC. APPLICATION NO. 395 OF 2009)
****

RULING OF THE COURT

This is an application by way of notice of motion brought under ***Rule 5(2)(b)*** of the Court of Appeal Rules, in which the applicant, ***Mombasa Technical Training Institute,*** seeks for orders that:-

"2. Pending the hearing and determination of the intended appeal, there be a stay of execution of the order of Hon. Mr. Justice Ojwang dated 15th March, 2010 in High Court Misc. Application No. 395 of 2009 (Mombasa) to the effect that:-

a. An order of prohibition prohibiting the Registrar of Titles from registering a document of title dated 24th April, 2009 or any title for the property known as LR NO. MN/1/14710 in favour of the applicant or any other party.

b. An order for certiorari shall issue removing into the High Court for quashing the decision of the Commissioner of Lands contained in a letter of officer dated 15/12/2007 and referenced 76474/IX granting Mombasa Technical Training Institute the property known as LR. No. MN/1/14710.

c. An order of certiorari shall issue removing into the High Court for quashing the decision of the Commissioner of Lands issuing a grant of the title in favour or Mombasa Technical Training Institution

for all that piece of land known as L.R. NO. MN/1/1470.

d. An order of Mandamus directing the Commissioner of Lands to cancel the letter of offer dated 15th December, 1997 in favour of Mombasa Technical Training Institute.

3. *Save for the immediate families of the Respondent's listed below:-*

(a)Changawa Katana
(b)John Nanjero
(c) Monica Amos Onya
(d)Kadzo Katana
(e) Mama Askari

the rest of the 1st – 107th Respondents by themselves/their agents be restrained by way of injunction from demolishing the perimeter wall, putting up any structures, entering, remaining on or in any other way dealing with all that parcel of land known as L.R. MN/1/1410 pending the final determination of the Applicant's appeal.

4. Further orders and/or directions as this Honourable Court may deem fit and just to grant.

5. Costs of this application to abide the outcome of the intended appeal."

The application which was supported by the affidavit of ***Bashir Hassan Mursal*** who described himself as *"the Chief Principal and Secretary to the Board of Governors of Mombasa Technical Training Institute"* was brought on the following grounds:-

"1. *The intended appeal is arguable and has good prospects of success because:-*

a. The orders appealed from are a nullity as they purport to quash a decision made on 15th December, 2007 vide Judicial Review proceedings in which the leave to commence the proceedings was granted on 11th September, 2009 which was well outside the 6 months period set by Order 53 Rule 2 of the Civil Procedure Rules and section 9(3) of the Law Reform Act.

b. The decree appealed from is also a nullity because it purports to quash a decision allegedly contained in a letter of offer dated 15th December, 2007 and referenced 76474/IX which said letter of offer/decision does not exist.

c. The order of mandamus cannot stand without the order of certiorari in the circumstances of this case.

d. There are substantive issues in dispute which can only be determined through viva voce evidence in a full suit and not by way of Judicial Review.

2. If the orders of stay and injunction are not granted, the appeal will be rendered nugatory because:-

a. The said orders are being or are about to be effected with the effect that:-

(i) The letter of offer to the applicant will be cancelled.

(ii) The Applicants Grant of Title to the suit property will be quashed as ordered.

(iii) The Applicants registration as the proprietor of the suit property will be prohibited.

(iv) The Applicant's suit property may be allocated to another person.

3. *The Applicant stands to suffer substantial loss if this application is not granted because:-*

a. The Applicant is a public institution offering technical courses at Artisan, Craft and Diploma levels plus short term courses in part time programmes in Entrepreneurship training and Industrial attachment and its expansion will be stalled, totally curtailed and frustrated by the loss of the only property reserved for expansion.

b. The operations of the Institution will be greatly hampered and it is in the interest of all the public that the suit property be utilized for the purposes of which it was intended for the advancement of technical education.

c. The 1st – 107th Respondents have since the Ruling started demolishing sections of the Applicants perimeter wall, entering into and building permanent and semi-permanent dwelling houses on the suit property thereby complicating and altering the status of the property.

d. It will be impossible to remove the trespassers once they entrench themselves on the suit property.

The dispute herein can be traced back to the judicial review application dated *23rd September, 2009* brought under ***sections 8*** and ***9*** of the Law Reform Act (Cap. 26 Laws of Kenya) and ***Order LIII***, ***Rules 3, 4*** and ***5*** of the Civil Procedure Rules. The orders sought in that application were as follows:-

"(a) that an Order of Prohibition do issue prohibiting 2nd respondent from registering a document of title dated 24th April, 2009 or any title for the property known as L.R. No. MN/1/14710 in favour of Mombasa Technical Training Institute or any other party;

(b) that an Order of Certiorari do issue removing into the High Court for quashing, the decision of 1st respondent contained in the letter of offer dated 15th December, 2007 and referenced 76474/IX granting Mombasa Technical Training Institute the property known as L.R. No. MN/1/14710;

(c) that an Order of Certiorari do issue to bring into the High Court for quashing the decision of 1st respondent issuing a grant of title in favour of Mombasa Training Institute for all that piece of land known as L.R. No. MN/1/14710 contained in an unregistered document of title dated 24th April, 2009;

(d) that an Order of Mandamus do issue directing 1st respondent to cancel the letter of offer dated 15th December, 1997 issued in favour of the interested party, and to issue a letter of offer in respect of the property known as L.R. No. MN/1/14710 in favour of the applicants.

The application was placed before Ojwang J. (*as he then was*) for determination. The learned Judge considered the rival submissions of counsel appearing for the parties and in the end granted the reliefs sought. In concluding his judgment delivered at Mombasa on *15th March, 2010,* the learned Judge said:-

"I hold that the applicants did have a legitimate interest and expectation which the Commissioner of Lands cannot be allowed to ignore, as he allocates public land. I will make orders as follows:

1. An order of prohibition shall issue prohibiting 2nd respondent from registering a document of title dated 24th April, 209 or any title for the property known as L.R. No. MN/1/14710 in favour of Mombasa Technical Institute or any other party.

2. An order of certiorari shall issue removing into the High Court for quashing, the decision of 1st respondent contained in a letter of offer dated 15th December, 2007 and referenced 76474/IX granting Mombasa Technial Training Institute the property known as L.R. No. MN/1/14710 – and the said decision is hereby quashed.

3. An order of certiorari shall issue removing into the High Court for quashing the decision of 1st respondent issuing a grant of title in favour of Mombasa Technical Training Institute for all that piece of land known as L.R. No. MN/1/14710 contained in an unregistered document of title dated 24th April, 2009 – and the said decision is hereby quashed.

4. An order of mandamus shall issue directing 1st respondent to cancel the letter of offer dated 15th December, 1997 issued in favour of the interested party.

5. The respondent shall bear the costs incurred by the applicants in this application."

The applicant was an interested party in the judicial review application and the foregoing orders of the High Court affected it as it claimed a right in the suit land. Being aggrieved by the foregoing orders, it filed a notice of appeal with the intention of challenging those orders. But before the appeal is finally heard and determined, the applicant has now come to this Court under ***Rule 5(2)(b)*** of this Court's Rules seeking the orders set out at the commencement of this ruling. This is the application that came up for hearing before us on *27th January, 2012* when Mr. Wamuti Ndegwa, appeared for the applicant, Mr. William Mogaka, for the 1st to 107th respondents and Mr. Gabriel Kamau, appeared for the 108th and 109th respondents. As there was a consent recorded by the Court on *22nd July, 2011* to the effect that counsel appearing for the parties file written submissions, these were duly filed and when the matter came up on *27th January, 2012*, counsel were only required to highlight the written submissions.

Mr. Ndegwa took us through the history of the dispute on how the Government had decided to reserve the suit land for the applicant and a letter of allotment issued way back in *1997* which letter was revised in 1997 by reducing the acreage so that part of the land could be given to ***Alidina Visram High School***. On *24th April, 2009*, the Government issued a grant of title to the applicant. It was after that grant of title that the 1st to 107th respondents applied for leave to apply for judicial review. In that judicial review application, the respondents alleged that they had occupied the suit property since 1940 and that they had applied for allocation but their application had been ignored. The respondent challenged the letter of offer and allotment in favour of the applicant.

The gist of Mr. Wamuti's submission was that in view of ***section 9(3)*** of the Law Reform Act, leave for judicial review ought to have been denied since the letters of the Commissioner of Lands being challenged had been written ten years prior to the application.

On the nugatory aspect of the application, Mr. Wamuti submitted that if the orders sought in this application are not granted then the suit property could be allocated to another person hence putting the suit property out of reach of the applicant.

The application was vehemently opposed by Mr. Mogaka who brought to our attention the fact that the applicant had already registered the grant which, in his view, was in disobedience of the court order. Mr. Mogaka further submitted that it would be condoning an illegality if the applicant was to be granted the reliefs sought.

In supporting the judgment of the learned Judge, Mr. Mogaka pointed out that the respondents have been living on that suit land since 1940 and that they had applied for its allocation to them but their letters were not acknowledged; while the allocation to the applicant was conducted in a secretive manner. Mr. Mogaka conceded that the application for review might have been made out of time but he emphasized that the applicant had committed an illegality which in the circumstances should not be ignored.

Both Mr. Wamuti and Mr. Mogaka supported their submissions by referring the Court to various authorities.

On his part, Mr. Kamau supported the applicant, without making any submissions.

We have considered the submissions by counsel and the authorities cited. The principles to guide the

Court in dealing with applications under ***Rule 5(2) (b)*** are now well settled. It is upon the applicant to show that it has an arguable appeal or put the other way, that the intended appeal is not frivolous. Secondly, the applicant must satisfy the Court that if the stay or injunction is not granted, the intended appeal, if it were to succeed, that success would be rendered nugatory. In ***JOHNSONS WAX (E.A.) LIMITED V. MBURU & 2 OTHERS [2005] 2KLR*** 301 at p. 303 this Court stated:-

"The principles for granting a stay of execution, an order of injunction or an order of stay of further proceedings under rule 5(2)(b) of the Rules of this Court are well known – see *BUTT V. RENT RESTRICTION TRIBUNAL* ***[1982] KLR 417,*** *J.K. INDUSTRIES V. KENYA COMMERCIAL BANK LTD. & ANOTHER* ***[1987] KLR 506. In exercising its unfettered discretion, the Court must be satisfied that the appeal or intended appeal is an arguable one, that is, that it is not frivolous, and that if an order of stay or injunction as the case may be, is not granted the appeal or the intended appeal would have been rendered nugatory by the refusal to grant the stay or injunction sought."***

Counsel appearing for the parties were aware of these principles and their submissions were in a bid to show how the applicant had satisfied or failed to satisfy these twin principles. We have set out the salient points raised for and against this application. In a bid to demonstrate arguable appeal, it was argued that the application for judicial review which led to the judgment to be challenged on appeal was filed out of time. This point was conceded by Mr. Mogaka who went on to argue that the applicant had committed an act of illegality hence should not be allowed to perpetuate an illegality. As we have attempted to demonstrate, this is a dispute which relates to a piece of land in which the Commissioner of Lands is alleged to have ignored the pleas of the respondents to be allocated the suit land and instead and in unclear circumstances allocated the land to the applicant. When that was challenged by way of judicial review, the High Court granted the orders sought which meant the allocation of the suit land to the applicant was quashed. Here, we have a scenario where there are two parties with competing interests in the same piece of land. While the 1st to 107th respondent claim that they had been on the suit land since 1940s, the applicant has letters of allocation to show for its entitlement. As the main appeal is yet to be heard, we have to be cautious in our conclusions lest we encroach on the mandate of the bench that will eventually hear and determine the appeal. For that reason, we are satisfied to take the issue of time when judicial review application was made as an arguable point, more so, as the same has been conceded. In ***JUDICIAL COMMISSION OF INQUIRY INTO THE GOLDENBERG AFFAIR & 3 OTHERS V. KILACH*** [2003] KLR 249 at p. 264 this Court said:-

"There may or may not be other arguable points but as we have said before even one arguable point is sufficient for purpose of rule 5(2); there need not be a chain of arguable points to sustain an application."

Our overall view of the matter is that the intended appeal is certainly not frivolous as it raises matters which deserve investigation and determination.

On the nugatory aspect of the matter, we observe that this is a piece of land in dispute and it is only proper that it be preserved until the final determination of the intended appeal. If the parties are not restrained from further dealings in the suit land, there might be further dealings which would mean protracted litigation by bringing in new claimants into the dispute. That would not be in the spirit of ***sections 3A and 3B*** of the *Appellate Jurisdiction Act* which provide:-

"3A. (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the appeals governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

3B. (1) For the purpose of furthering the overriding objective specified in section 3A, the Court shall handle all matters presented before it for the purpose of attaining the following aims-

(a)The just determination of the proceedings;

(b)The efficient use of the available judicial and administrative resources;

(c) The timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(d)The use of suitable technology."

For the foregoing reasons, we are satisfied that the applicant has demonstrated that it has an arguable appeal which is not frivolous and that if this application is refused then the success of the intended appeal would be rendered nugatory. We therefore grant the application and order that there shall be a stay of the order of the High Court made on *15th March, 2010* pending the hearing and determination of the intended appeal.

The costs of this application shall abide the outcome of the intended appeal.

Dated and delivered at Mombasa this 16th day of March, 2012.

E.O. O'KUBASU

……..
JUDGE OF APPEAL

H. OKWENGU

…….

JUDGE OF APPEAL

D.K. MARAGA

……..……

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR