



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: O'KUBASU, ONYANGO OTIENO & NYAMU, JJ.A.)

CIVIL APPLICATION NO. NAI. 281 OF 2010 (UR. 198/2010)

BETWEEN

BROOKSIDE STUDIOS LTD. APPLICANT

AND

NDUACHI COMPANY LIMITED 1ST RESPONDENT

CITY COUNCIL OF NAIROBI 2ND RESPONDENT

JOHN KICH AYIECHO 3RD RESPONDENT

(Application for injunction in an intended appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Mbogholi Msagha, J.) delivered on 30th November, 2010

in

H.C.ELC. NO. 346 OF 2009)

RULING OF THE COURT

The facts giving rise to this application are similar to those in Civil Application No. Nai. 280 of 2010 – *Yellow Horse Inn Ltd. vs. Nduachi Company Ltd. & 2 Others*. Both applications came up for hearing on the same day – 26th January, 2011. The lawyers in both applications were the same. That is why Mr. A.B. Shah (*appearing with Mr. K. Mubea*) for the applicant told us that he would adopt what he had said in the previous application being Civil Application No. Nai. 280 of 2010. Similarly, Mr. C.N. Njenga, Counsel for the 1st respondent adopted his submissions in the earlier application. Lastly, Mr. L. Mosoti, counsel for the 2nd and 3rd respondents supported M. Njenga's stand in this application.

What is before us is an application under **Rule 5(2)(b)** of this Court's Rules in which the applicant, **BROOKSIDE STUDIOS LIMITED** seeks the following orders:-

***“2. THAT an urgent injunction do issue forthwith restraining the respondents by themselves, their agents, servants and/or employees or any other person or group of persons purporting to act on their behalf from alienating, entering into, subdividing, taking possession and/or interfering with the suit property known as L.R. No. 209/11803/3 in any manner whatsoever and/or making any document of title and/or any lease relating to the suit property in favour of the 1st Respondent or any other person whomsoever pending the hearing and determination of the Applicant's intended appeal.*”**

3. ***THAT a temporary mandatory injunction do issue directing and/or commanding the 2nd and the 3rd Respondents to unconditionally and forthwith reinstate the name of the Applicant as the rateable owner of the suit property known as L.R. No. 209/11803/3 in the Valuation and Rates records kept and held by the 2nd Respondent in respect of the suit property and to forthwith call for cancellation any document purporting to convey the ownership of the suit premises to the 1st Respondent or any other person whomsoever pending the hearing and determination of the Applicant's intended appeal.***

4. ***THAT the cost of this application be provided for.***

5. ***THAT such other and/or further relief be granted as this Honourable Court may deem fit and just to grant.***

The application which is supported by the affidavit of Joseph Gathuku a director of the applicant is brought on the following grounds:-

a. By a Ruling delivered on 30th November, 2010, the Applicant's injunction application dated 15th July and filed in Court on 16th July, 2009 respectively was dismissed by the Superior Court with costs whereas the Applicant is the registered proprietor of the suit property under the provisions of the Registration of Titles Act, Cap. 281 Laws of Kenya ("the Act") and in possession thereof.

b. The 3rd respondent who is the Chief Valuer of the 2nd Respondent vide a memo dated 29th June, 2009, unlawfully and in blatant abuse of his office caused the Applicant's name as the rateable owner of the suit property to be changed (along with another property known as L.R. NO. 209/11803/2 of a different party) to that of the 1st Respondent, that is NDUACHI COMPANY LIMITED, without any notice to the applicant which is the registered owner and in possession of the same.

c. Pursuant to substitution of the Applicant as the rateable owner of the suit property on the basis of the 3rd Respondent's memo aforesaid, the 2nd Respondent issued a Temporary Occupation License (TOL) to the 1st Respondent and was in the process of preparing the necessary lease in respect thereto had it not been for the restraining orders issued by the superior court on 16th July, 2009 and which have been extended from time to time until the injunction application was dismissed on 30th November, 2010, hence the application herein.

d. The aforesaid conduct of the 3rd Respondent along with his co-respondents herein is a gross violation of the law as the Applicant's title of the suit property is protected under the provisions of the aforesaid Act and the same can only be impeached on grounds of fraud which requires to be proved beyond balance of probability at the trial by calling evidence but not on mere allegation alone.

e. The 3rd Respondent has been colluding with the 1st Respondent to grab the suit property and in view of the fact that the 2nd Respondent had issued a Temporary Occupation License to the 1st Respondent, the 3rd Respondent is likely to use his position as the Chief Valuer of the 2nd Respondent and alienate and/or convey the suit property to the 1st Respondent so as to frustrate and/or defeat the applicant's intended appeal which has high prospects of success and thus render it nugatory.

f. The purported letter of allotment dated 20th August, 1992 allegedly issued by the Commissioner of Lands to the 2nd Respondent and on the basis of which the 2nd Respondent is claiming ownership of the suit property is in respect of "unsurveyed tankers deport" with no reference whatsoever to the suit property..

g. The applicant which has already filed a Notice of Appeal and also applied for proceedings has an arguable appeal which would be rendered nugatory if the orders sought herein are not granted.

The applicant herein filed a suit against the three respondents in the superior court in respect of a parcel of land known as L.R. No. 209/11803/3 (hereinafter referred to as "the suit premises"). It is the applicant's

case that sometime in July, 2009 it discovered that the 1st respondent had allegedly colluded with the 2nd and 3rd respondents to have the suit premises allocated by the 2nd respondent to the 1st respondent. In that suit, the applicant sought the following reliefs from the superior court:-

“3.(a) *THAT a temporary injunction order do issue to restrain the defendants by themselves, their agent, servants and/or employees or any other person or group of persons purporting to act on their behalf from alienating, entering into, subdividing, taking possession and/or interfering with the suit premises known as L.R. NO. 209/11803/3 in any manner whatsoever and/or making any document of title and/or lease relating to the suit premises in favour of the 1st Defendant or any other person whomsoever pending the hearing and determination of this suit.*

(b) *THAT a temporary mandatory injunction order do issue directing and/or commanding the 2nd and the 3rd defendants to unconditionally and forthwith reinstate the name of the plaintiff as the rateable owner of the suit premises known as L.R. No. 209/11803/3 in the valuation and rates records kept and held by the 2nd Defendant in respect of the suit premises and to forthwith call for cancellation of any document purporting to convey the ownership of the suit premises to the 1st defendant or any other person whomsoever pending the hearing and determination of this application and the suit herein.*

(c) *A permanent injunction order to issue to restrain the defendants jointly and severally, their agents, servants and/or employees or any other person or group of persons purporting to act on their behalf from alienating, entering into, subdividing, taking possession and/or interfering with the suit premises known as L.R. No. 209/11803/3 in any manner whatsoever and/or making any document of title and/or lease relating to the suit premises in favour of the 1st Defendant or any other person whomsoever.*

(d) *A declaration that the purported allocation of the suit premises known as L.R. No. 209/11803/3 to the 1st Defendant by the 2nd Defendant and the alteration and/or change of the plaintiff as the rateable owner in the valuation and rates records kept and held by the 2nd Defendant is illegal, null, void and of no legal consequence.*

(e) *General damages.*

(f) *Cost of this suit.*

(g) *Such other and/or other further relief as this Honourable Court may deem fit and just to grant.”*

And as is usual with this type of litigation, the applicant did not only file the plaint seeking the prayers as set out herein but also an application by way of Chamber Summons under **Order XXXIX Rules 1, 2 and 3** of the Civil Procedure Rules seeking interim orders in line with the main prayers in the plaint. The interim orders were granted by the superior court on 16th July, 2009 pending the hearing of the Chamber Summons application inter partes.

The application was placed before Mbogholi Msagha, J. for inter partes hearing. The learned judge considered the rival submissions presented by counsel appearing for the parties and in a ruling dated and delivered at Nairobi on 30th November, 2010, the learned judge dismissed the applicant’s chamber summons by stating:-

“The application is opposed by the defendants and from the affidavits sworn by the 3rd defendant and the representative of the 1st defendant it has transpired that the title documents held by the plaintiff are said to be forgeries. On the other hand, there is a letter of allotment in the name of 1st defendant in respect of the said premises. Whereas the plaintiff has annexed a copy of the title in respect of the said suit premises, the 1st defendant has annexed a letter of allotment. A letter of allotment does not confer title upon any party.

On the other hand, there is a letter dated 5th November, 2009 in answer to a letter dated 3rd November, 2009 by the 3rd defendant showing that the documents held by the plaintiff are forgeries. If that be the case, then it is not possible to determine the matters herein without calling evidence. The nature of the application as set out by the plaintiff would lead to a permanent injunction. I know that this court has jurisdiction in special circumstances to give such an order. However, where there is doubt as to the authenticity of the title held by the plaintiff it is not an appropriate order to address at this point. I find therefore, that the plaintiff has not established a prima facie case with a probability of success to warrant the orders sought. Accordingly the application is hereby dismissed with costs to the defendants.”

Being aggrieved by the foregoing, the applicant, through its advocate’s filed a notice of appeal and pursuant to that notice of appeal the applicant now brings this application seeking orders set out at the commencement of this ruling.

As we have always stated in an application under ***Rule 5(2)(b)*** of this Court’s Rules, it is upon the applicant to satisfy this Court not only that the intended appeal is arguable, and is not frivolous, but also that the intended appeal, if successful, will be rendered nugatory if the orders sought are not granted – see ***BOB MORGAN SYSTEMS LTD. & ANOTHER V. JONES [2004] 1 KLR 194*** and ***RUBEN & 9 OTHERS VS. NDERITO & ANOTHER [1989] KLR 455***.

We have considered the record and submissions which were made in the earlier application and in view of the fact that the applicant herein stands in the same position as the applicant in Civil Application No. Nai. 280 of 2010, it therefore follows that this application has to be granted as the two applications are, indeed, the same except in respect of some of the orders sought.

In view of the foregoing and having been satisfied that the applicant’s intended appeal raises arguable issues and is not frivolous; and that if we refuse to grant the prayers sought the success of the intended appeal would be rendered nugatory, we accordingly grant the application in terms of ***prayers 2 and 3*** of the application dated 6th December, 2010. Costs of the application shall abide the outcome of the intended appeal.

Dated and delivered at NAIROBI this 4th day of March, 2011.

E.O. O’KUBASU

.....
JUDGE OF APPEAL

J.W. ONYANGO OTIENO

.....
JUDGE OF APPEAL

J.G. NYAMU

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR