



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. NAI. 280 OF 2010 (UR. 197/2010)

BETWEEN

YELLOW HORSE INNS 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. CO. 347 OF 2009)

RULING OF THE COURT

Before us is an application by way of notice of motion expressed as having been brought “Under Rules 5(2)(b) and 42 of the *Court of Appeal*” in which the applicant, **YELLOW HORSE INNS LTD.** seeks the following orders:-

“1. **THAT** this application be heard urgently and on priority basis.

2. **THAT** this Honourable Court be pleased to order a stay of execution of the order of the superior court made on 30th November, 2010 effectively ordering the preservation of the suit property known as L.R. No. 209/11803/2 in the name of the 2nd Respondent so as to stop the 2nd Respondent from dealing and/or interfering with the same in any manner whatsoever pending the hearing and determination of the intended appeal.

3. **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 premises known as L.R. No. 209/11803/2 in any manner whatsoever and/or making any document of title and/or 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.

4. ***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. 209/11803/2 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 property to the 1st Respondent or any other person whomsoever pending the hearing and determination of the Applicant's intended appeal.

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

6. ***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 one, *Mary Njuku* who described herself as a director of the applicant is based on the following grounds:-

“a. By a Ruling delivered on 30th November, 2010, the Applicant's injunction application was dismissed by the Superior Court and while dismissing the same, the Court ordered that the suit property be preserved in the name of the 2nd Respondent pending the hearing and determination of the suit whereas there was no counterclaim and/or prayer for such an order by the Respondents.

b. The way the learned Judge's order of preservation is worded is likely to cause irreparable harm to the applicant which is the registered proprietor of the suit property in possession in that the 2nd and 3rd Respondents are likely to alienate, sub-divide and/or allot the same to the 1st Respondent as it had intended to do and which action prompted the filing of the suit at the Superior Court by the applicant.

c. The learned Judge acting on a mere allegation contained in a purported letter dated 5th November, 2009 addressed to the 3rd Respondent allegedly by the Commissioner of Lands erred by concluding that the Applicant's title of the suit property was forged whereas allegations of forgery need to be proved beyond balance of probability at a full trial.

d. The said order of preservation of the suit property made by the learned Judge was not only ex-gratia but the same had also not been sought by any of the Respondents and the Respondents are therefore likely to use the same to alienate, sub-divide and/or allot it to the 1st Respondent as the 2nd and 3rd Respondents had indeed issued a Temporary Occupation License (TOL) to the 1st Respondent and were in the process of issuing a lease to that respect had it not for the injunctive orders previously issued by the Superior Court but which collapsed at the dismissal of the Applicant's application aforesaid.

e. The 3rd Respondent is the Chief Valuer of the 2nd Respondent and is colluding with the 1st Respondent to grab the suit property and he is therefore likely to use his position and the said order of preservation to alienate the suit property so as to frustrate and/or defeat the Applicant's intended Appeal which has high prospects of success.

f. The 3rd Respondent unlawfully and in blatant abuse of his office caused the applicant's name as the rateable owner of the suit property to be changed 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.

g. The purported letter of allotment dated 25th 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.

h. 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.”

Briefly, the background to this application is that the applicant (*as the plaintiff*) filed a suit against the three respondents (as defendants) in the superior court in respect of a parcel of land known as L.R. No. 209/11803/2 situate in Nairobi. It was the plaintiff's case that it was allocated the said parcel of land by the Commissioner of Lands in 1996 and subsequently a title was issued in its name in the form of a Grant registered under the Registration of Titles Act (**Cap 281 Laws of Kenya**). Sometime in July 2009 the applicant discovered that the suit land had been allocated to the 1st respondent **NDUACHI CO. LTD**. The applicant now alleges illegality, fraud and criminality on the part of the three respondents and in particular the 3rd respondent, **JOHN KICH AYIECHO** in changing the records in his personal capacity.

It is the applicant's prayer in that suit that it be granted a permanent injunction against the respondents restraining them from alienating, entering into, subdividing, taking possession and or interfering with the suit property in any manner whatsoever. The applicant also sought a declaration that the purported allocation of the suit premises to the 1st respondent by the 2nd respondent and the alteration, or change of the applicant as the rateable owner in the valuation and rates records kept by the 2nd respondent is illegal, null and void, and of no legal consequence.

As is usual with this type of litigation, the applicant did not only file the plaint seeking the prayers we have alluded to but an application by way of Chamber Summons under **Order XXXIX Rules 1, 2 and 3** of the *Civil Procedure Rules* seeking interim orders as follows:-

“1. THAT this application be certified as urgent and the same be heard urgently and on priority basis.

2. THAT a temporary injunction order do issue to restrain the defendants 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 premises known as L.R. No. 209/11803/2 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 application.

3. THAT a temporary injunction order do issue to restrain the Defendants 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 premises known as L.R. NO. 209/11803/2 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.

4. 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. 209/11803/2 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 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 the application herein and the suit.

5. THAT the cost of this application be provided for.

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

The application for interim orders was placed before Mbogholi Msagha, J. for consideration. The learned judge considered the rival submissions presented by counsel appearing for the parties and in a ruling delivered on 30th November, 2010, the learned judge dismissed the applicant's chambers summons by

stating:-

“I am alive to the provisions of Section 23(1) of the Registered Titles Act Cap 281 Laws of Kenya. However, I cannot close my eyes to the very serious allegations that the titles held by the plaintiff are said to be forgeries. That alone would show that the plaintiff does not have a prima facie case with a probability of success. The 1st defendant on the other hand holds a temporary occupation licence upon the suit property said to be owned by the 2nd defendant. Whatever the case, the order that commends itself is the preservation of the subject matter in the name of the 2nd defendant.

In the end I find that the plaintiff has not established a prima facie case with a probability of success. Since the principles set out in the case of Giella vs. Cassman Brown Ltd. (1973) EA. 358 are sequential I do not deem it necessary to consider the other two principles. The application is therefore dismissed and the temporary orders granted on 16th July, 2009 are hereby vacated. The plaintiff shall pay the defendants the costs of this application. Orders accordingly.”

Being dissatisfied with the foregoing, the applicant filed a notice of appeal on 2nd December, 2010. Pursuant to that notice of appeal the applicant now brings this application seeking the orders set out at the commencement of this ruling.

This being an application under **rule 5(2)(b)** of this Court’s Rules, it is upon the applicant to satisfy us, 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. In **Bob Morgan Systems Ltd. & Another v. Jones** [2004] 1 KLR 194 at p. 195 this Court said:-

“The powers of the Court under rule 5(2)(b), aforesaid, are specific. The Court will grant a stay or an injunction, as the case may be if satisfied, firstly, that the applicant has demonstrated that his appeal or intended appeal is arguable; and secondly, that unless a stay or injunction is granted his appeal or intended appeal, if successful, will be rendered nugatory.”

The advocates appearing for the parties appreciated the above stated principles and confined themselves to these principles, in their submissions.

Mr. A.B. Shah (who appeared with Mr. Mubea), for the applicant, submitted that the learned judge of the superior court overlooked the fact that at the time the application was heard before him neither a defence had been filed by the 2nd respondent nor a counter-claim and yet the learned judge did not only dismiss the application for injunction but proceeded to grant orders which had not been sought by any of the respondents. Mr. Shah took issue with the learned judge’s finding that the title was a forgery and yet this will be one of the issues to be decided in the main suit and in the intended appeal. Mr. Shah took us through various documents in a bid to show that the title was not forged.

It was further submitted that it is arguable that the 2nd respondent (City Council of Nairobi) has no title to give, as what it has is a letter of allotment, which is not a title. Finally, Mr. Shah submitted that if the orders sought are not granted and the City Council of Nairobi proceeded to alienate the property, then the intended appeal even if successful, would be rendered nugatory.

In response to the foregoing submissions, Mr. C.N. Njenga, the learned counsel for the 1st respondent, submitted that the learned judge was right in coming to the conclusion that no prima facie case had been established by the applicant. Mr. Njenga further submitted that it was only the Commissioner of Lands who could confirm a title and that the learned judge did not make a finding that the title had been forged.

On the nugatory aspect of the application, Mr. Njenga submitted that there was no allegation that the respondents were likely to alienate the suit property, hence he asked us to dismiss this application.

On his part, Mr. L. Mosoti, the learned counsel for the 2nd and 3rd respondents, associated himself with the submissions of Mr. Njenga and he, too, urged us to dismiss this application.

We have considered the rival submissions in this application and it would appear that according to the record the applicant has been in possession of the suit property since **1996** and that the applicant has documents showing that it (applicant) has been a rateable owner of the suit property and it has been paying land rates.

The main dispute in this matter is sufficiently captured by the learned judge who in the course of his ruling stated:-

“The plaintiff has exhibited a title under the Registered Titles Act Cap 281 Laws of Kenya while the 1st defendant has what he calls a Letter of Allotment. The said title has been challenged by the defendants and there is on record a letter by the 3rd defendant addressed to the Commissioner of lands dated 3rd November, 2009 inquiring about the authenticity of the plaintiff’s title. In reply to the said letter, the Commissioner of Lands in a letter dated 5th November, 2009 said that the leases which were forwarded to him in respect of the said parcels of land are forgeries. The said letter also states that the land belongs to the 2nd defendant, the City Council of Nairobi.

The Commissioner of Lands is the custodian and also the only issuing authority under whose hand all documents flow. If the said officer states that the documents held by the plaintiff are forgeries then, that is not a matter that can be taken lightly. On the other hand, a letter of allotment does not confer title to any party and therefore also the 1st defendant cannot rely on the said letter of allotment to claim title thereon.”

Thus taking a broad view of justice in the circumstances of this case, we do not think we can ignore the fact that the applicant has been in possession since 1996 and has exhibited a title under the Registration of Titles Act (**Cap. 281 Laws of Kenya**). It is this title which is being challenged and the applicant has produced documents to show that it has been a rateable owner. It has to be pointed out that a dispute has arisen because the applicant has discovered that the respondents were interfering with the title and purporting to allocate the suit premises to the 1st respondent. That being the case it will be arguable whether the learned judge was entitled to make an order to the effect that the property would be in the name of the 2nd respondent.

It was argued by Mr. Njenga that as the learned judge dismissed the application, then this Court could not issue the orders sought. There appears to be a misunderstanding of the nature of the applications before us. The applicant has not asked for stay but for an injunction as well. This Court has jurisdiction to consider such an application and grant the prayers if satisfied that the applicant has demonstrated the twin principles under **rule 5(2)(b)** of this Court’s Rules. In ***Ruben & 9 Others v. Nderito & Another [1989] KLR 455 at p. 467*** this Court said:-

“In dealing with rule 5 (2)(b) applicants, this Court exercises original jurisdiction and this has been so stated in a long line of cases decided by this Court. Once an applicant has properly come before the Court, the Court has jurisdiction to grant an injunction or make an order for a stay on such terms as the Court may think just. We have to apply our minds de novo (anew) on the propriety or otherwise of granting the relief sought. And as we have always made clear, this exercise does not constitute an appeal from the trial judge’s discretion to ours. In such an application, the applicant must show that the intended appeal is not frivolous, or put the other way round, he must satisfy the court that he has an arguable appeal. Secondly, it must be shown that the appeal, if successful, would be rendered nugatory: See *Stanley Munga Githunguri v. Jimba Credit Corporation Ltd. Civil Application NAI. 161 of 1998.*”

In view of the foregoing and having been satisfied that the applicant’s intended appeal raises arguable points and is not frivolous; and that if we refused to grant the prayers sought the success of the intended appeal would be rendered nugatory, we are of the view that it would be in the interest of justice to grant the prayers sought. Accordingly, we order that this application is granted in **terms of prayers 2 (except as regards the part concerning the preservation order which is put in negative form) 3 and 4** 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