



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, WAKI & VISRAM, JJ.A)

CIVIL APPLICATION NO. NAI. 305 OF 2010 (UR.214/2010)

BETWEEN

**SULEIMAN RAHIMTULLA OMAR
ZARINA SULEIMAN OMAR.....APPLICANTS**

AND

**MUSA HERSI FAHIYE
MUHAMMED OMAR
REPUBLIC OF SOMALIA
ATTORNEY GENERAL
REGISTRAR OF TITLES
COMMISSIONER OF LANDS.....RESPONDENTS**

(An application for an injunction pending the hearing and determination in an intended appeal from the judgment and

decree of the High Court of Kenya at Nairobi (Mbogholi, J) dated 7th December, 2010

in

**H. C. C. C. No. 1618 of 1995)

RULING OF THE COURT

In this application, brought under **Rule 5 (2) (b)** of this Court’s Rules, the applicants seek the following orders:

“1. THAT the court be pleased to grant a stay of execution of judgment delivered on 7th December, 2010 in Nairobi HCCC No. 1618 of 1995 and the resultant decree pending the hearing and determination of the Appellants’ intended appeal against the said judgment on terms as are fit and just in the circumstances.

2. IN THE ALTERNATIVE the court be pleased to order the 3rd Respondent to deposit in court or in a joint interest earning account held by the Applicants and the 3rd Respondents Advocates the sum of Kshs.400,000,000.00 or such other sum as may be found to reflect the present market value of LR No.

1870/111/ pending the hearing and determination of the intended Appeal from the Judgment and Decree delivered on 7th December, 2010 in Nairobi HCCC No. 1618 of 1995.

3. THAT there be an injunction restraining the defendants, by themselves, their servants and or agents from selling, transferring, interfering or in any way dealing with all that property known as LR 1870/111/50 pending the hearing and determination of the intended appeal from the Judgment and Decree delivered on 7th December 2010 in Nairobi HCCC No. 1618 of 1995.

4. THAT costs of this application be provided for.”

The facts giving rise to the suit in the superior court, and to the intended appeal herein, are briefly as follows:

In 1972, the Government of the Somali Democratic Republic (Somalia) purchased a prime residential property located in the Spring Valley area of Nairobi known as L. R. No. 1870/111/50 and measuring about 2.5 acres (the suit property). The property is said to be worth Kshs.400 million today.

In 1991, the Government of Somalia collapsed, and all its diplomats sought refuge in the countries of their residence or accreditation. The diplomats based in Nairobi at that time moved into the suit property. In 1994, a former Ambassador of Somalia, Mr. Ahmed Sheikh Mohamed, entered into an agreement for the sale of the suit property to the appellants herein for Kshs.15 million. The title was registered in the applicants' names on 25th June, 1995 at which time they took possession and moved into the suit property. Soon, thereafter, in 1995 Somalia commenced legal proceedings in the superior court to recover the suit property which, it claimed through its authorized officials, had been disposed unlawfully, and contrary to the principles of international law and Conventions protecting the properties of sovereign states.

By a judgment delivered on 7th December, 2010, the superior court (Mbogholi Msagha, J) found that the suit property had been disposed of unlawfully, and declared the whole transaction null and void. In so doing, the learned Judge stated, in part, as follows:

“I am aware of the provisions of Sections 23 and 24 of the Registration of Titles Act. I am also alive to the authorities that have been cited by both counsel in respect of the issue of indefeasibility of a title. I am however, persuaded by the authorities that provide that that position is not absolute and where, like in this case, the whole transaction is void, then that section cannot be invoked such that a party is compelled to resort to a claim for damages as a remedy.

And so, having considered the evidence on record and the positions taken by the parties herein, I am persuaded that the plaintiffs have proved their case against the 1st and 2nd defendants on a balance of probability to warrant the granting of the main orders of this suit, that is to say that, the transfer of the property known as LR.NO.1870/111/50 situated in Spring Valley within Nairobi Area to the 1st and 2nd defendants was illegal, unlawful and null and void *ab initio*. I have also found that the said transaction was fraudulent. I have also found that the plaintiffs have proved that the ownership and all proprietary interests and rights in that property known as LR No.1870/111/50 situated in Spring Valley Nairobi Area vests in the sovereign State of Somalia represented by the Government of the Republic of Somalia.

Accordingly, there shall be a permanent injunction against the 1st and 2nd defendants in terms of prayer (h) of the Further Amended Plaintiff.”

It is against that decision that an appeal is intended herein. For now, the applicants seek stay of execution of the orders issued by the superior court.

Mr. Mohammed Nyaoga, learned counsel for the applicants, submitted before us that the intended appeal is arguable in that the learned Judge erred in disregarding the provisions of **section 23 and 24** of the

Registration of Titles Act, which conferred on the applicants absolute and indefeasible ownership, which could be denied to them only on grounds of fraud or misrepresentation to which they were a party. He argued that the sale of the suit property was lawful; that the applicants were bona fide purchasers for value; and that damages was an adequate remedy. With regard to whether this appeal would be rendered nugatory in the event the orders sought are not made, he argued that indeed if the ownership of the suit property reverted to the respondents, it would be impossible to recover it given their diplomatic status, and their ability to dispose the same.

On his part, Mr. Athuok, learned counsel for the respondents vehemently opposed the application submitting that the appeal was not arguable; that the respondents had lost possession of the suit property for 15 years; and that, in any event, the Government of Somalia had the ability to pay the damages should the applicants succeed eventually. He submitted therefore, that the appeal would not be rendered nugatory if the orders sought are not made.

On our part, we have carefully considered the conflicting claims of both parties; and especially the history of the dispute and the litigation before the superior court. We are prepared to assume, without making any definitive statements, that the appeal is arguable, and is not frivolous. However, we are not of the view that this appeal would be rendered nugatory in the event we do not grant the orders that are sought. We say so because the suit property is located in this country and is indeed available to whoever is ultimately entitled to the same. Clearly, the applicants' fear is that the respondents might dispose of the same. The respondents have assured the Court that this is Government property and that there is no such intention to sell. They appear not to be averse to an order prohibiting any further sale or disposition of the suit property pending the hearing and final determination of this appeal.

Accordingly, and in the interest of justice, we allow the application to the extent that we hereby restrain the 3rd respondent from selling or disposing the suit property pending the final hearing and determination of the intended appeal herein. Costs shall be in the appeal.

Dated and delivered at Nairobi this 3rd day of June, 2011.

E. M. GITHINJI

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR