IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. 111 OF 2010

BETWEEN

ROSE NJOKI KINGAU

MICUGU WAGATHARIA ……..…… APPLICANTS

AND

SHABA TRUSTEES LIMITED

CITY COUNCIL OF NAIROBI …….. RESPONDENTS

(Application for stay of execution pending the hearing and determination of an intended appeal from the entire ruling and order of the High Court of Kenya (Sitati, J.) dated 29th April, 2010

in

H.C.C.C. NO. 986 of 2006

****

RULING OF THE COURT

The motion before us seeks an order under **Rules 5 (2) (b)** of the Rules of this Court that:

"1. The Orders made on the 29th day of April, 2010 in High Court Civil Suit Number 986 of 2006 – Rose Njoki King'au and Micugu Wagathara –vs- Shaba Trustees Limited and City Council of Nairobi striking out the Applicants' suit and entering judgment in favour of the 1st Respondent herein and all consequential orders be stayed pending the lodging, hearing and determination of the Applicants' Intended Appeal".

The short background to the application is this:

The 1st applicant *(Rose)* filed suit against the 1st respondent (Shaba) and the 2nd respondent *(the Council)*

in September 2006. In that suit she pleaded that in 1994 she purchased from the original allottee, half-share of Plot No. 209/10/94 *(the disputed plot)* situate in Nairobi West, off Ngong road, measuring approximately 0.12 hectares. She took physical possession of the disputed plot in 1995 and commenced a motor vehicle garage business. Two years later in 1997, the Council issued her with her own letter of allotment and she satisfied all the requirements made in the said letter. Since then she openly and peaceably occupied the property until September, 2006, when to her shock and surprise, she received a notice from lawyers stating that Shaba was the registered owner of the property which they described as L.R. No. 209/9968 and demanding that Rose should vacate it. The other half of the disputed Plot was occupied by the 2nd applicant, Micugu, who received a similar demand notice. The two decided to amend the plaint and jointly sue Shaba and the Council. Micugu's claim was that he received a direct allotment of half the disputed plot from the Council in 1992 and he paid all that was demanded by the Council pending issuance of Titles. He took possession in that year and commenced construction work which was incomplete before the threats of eviction were made.

Contemporaneously with the main suit, Rose and Micugu took out a Chamber Summons seeking a temporary injunction pending the hearing of the suit. The Chamber Summons, however, does not appear to have been heard. Instead, on 8th December, 2006, Shaba filed its defence denying the averments in the plaint and made a counterclaim for the disputed plot contending that they were issued with a grant of Title by the Commissioner of Lands in March 2001. They sought a mandatory injunction to compel Rose and Micugu to vacate and also a permanent injunction to restrain them from further construction and encroachment on the disputed plot. On the same day, Shaba took out a Chamber Summons seeking an order for striking out the suit under **Order VI Rule 13 (1) (b)** and **(d)** and for summary judgment under **Order XXXV r 1 (1)** of the Civil procedure Rules. Their contention was simply that they had in their possession a Title deed for the disputed plot which title was indefeasible and therefore the suit by the two applicants was vexatious and frivolous. That was the application which was decided on the basis of written submissions of counsel for the parties and was granted by the superior court (Sitati, J.). The learned Judge held that Shaba had a superior title and she issued orders compelling the two applicants to vacate the disputed plot and restrained them from constructing any building or other structures.

Aggrieved by that ruling, the applicants filed a notice of appeal and are now before us for an order of stay as stated earlier. It is now settled in broad principle, that in order to succeed in an application as this, the applicants ought to show not only that the intended appeal is arguable, but also that if the order sought is not granted, the success of the intended appeal would be rendered nugatory. A solitary issue which is not frivolous will avail the applicants.

The main issue as submitted by learned counsel Mr. Mutuli who appeared for the applicants is whether fraud was committed in the purported allocation and grant of title to Shaba by the Commissioner of Lands when the disputed plot had already been alienated to the Council who in turn gave out allotments of sub-leases to the applicants. The statutory definition of fraud under **Section 2** of the *Registration of Titles Act, Cap. 281* (RTA) and the powers of the Court under **Section 56** of the same Act will be central to the determination of that issue. The case was, *prima facie*, not therefore open to determination in summary manner. In opposing the application, Mr. Bundotich, learned counsel for Shaba, submitted that the issue was non-existent because fraud was not pleaded or particularized against Shaba. Furthermore, the applicants had no title to show for their claim to the disputed plot and had not sued the Commissioner of Lands who issued the Title to Shaba. The council, in his submission, had no title superior to that of the Commissioner of Lands and therefore the provisions of **Sections 23** and **24** of RTA fully protected Shaba. The council made no appearance or submissions before us although they were served and they did not file any defence or other response to the claims made by the applicants in the superior court.

We have considered the issue and the submissions of counsel and we think for ourselves that the issue is not frivolous. This Court has had occasion to consider the provisions of **Sections 2**, **75** and **23** of RTA in a case involving the exercise of statutory power of sale and whether it can be set aside on the grounds of fraud. That was the case of **Elijah Kipngeno arap Bii vs. Samwel Mwehia Gitau & Another** – *Civil Appeal No. 155 of 2006* (UR). The Court stated in part:

"The suit land is registered under the RTA. Section 2 of the Act defines what constitutes fraud as including proven knowledge by a person obtaining registration, of the existence of unregistered interest on the part of some other persons whose interest he knowingly and wrongly defeats by that registration. That definition refers to statutory fraud.

Further Section 75 of RTA provides:

'Nothing in this Act shall take away or affect the jurisdiction of the court on the ground of actual fraud'.

Lastly, Section 23 (1) of RTA provides that a certificate of title issued to a purchaser of land upon transfer or transmission by a proprietor is conclusive evidence that the person so registered is the absolute and indefeasible owner thereof and that the title cannot be impeached except on the ground of fraud or misrepresentation to which the registered owner is proved to be a part".

The Court also cited the following passage from **Russel Co. Ltd. vs. Commercial Bank of Africa Ltd. & Another** [1986] KLR 633:

"The second observation that we would make is that section 75 of the Registration of Titles Act was not brought to the attention of the learned Judge which provides that nothing contained in this Act shall take away or affect the jurisdiction of the court on the ground of actual fraud. Therefore it could be argued that section 23 of Cap 281 may refer not only to fraud as defined but to actual fraud as referred to in section 75. It is possible to argue that if the Court's jurisdiction remains intact, it could set aside registration apart from damages which may be claimed under Section 24 of the Act. It is for consideration whether Section 75 preserves common law fraud ……

Thirdly, we would notice that although *Jandu vs. Kirpal[1975] EA 225)* **is an** *obiter* **decision of the High Court, it is some authority that even fraud as defined in Section 2 of the Act could have the effect of setting aside the registration".**

All those provisions of the law were not considered by the superior court, we think they are genuine to the issue of law raised in the intended appeal. It is arguable.

As for the nugatory aspect, Mr. Mutuli contended that the ensuing decree is for eviction of the applicants who have been in possession for several years and had developments on the disputed plot. Their eviction would extinguish their interest and render the intended appeal meaningless. Not so, according to Mr. Bundotich, since the applicants' only recourse is damages and these will be available to them whatever the outcome of the intended appeal. He cited several authorities in aid of his submissions which we have considered.

We think in the circumstances of this case, that the *status quo ante* ought to be maintained until the hearing and determination of the intended appeal. Shaba may have the grant of Title, but in their own pleadings and affidavits, it is apparent that they were aware of the occupation and the activities carried on by the applicants in the disputed plot. In view of our finding that the intended appeal is arguable, we think the success of it will be rendered nugatory if we do not issue the order sought and we accede to the applicants' plea.

In the result, the application is granted as prayed. The costs thereof shall abide the result of the intended appeal.

Dated and delivered at Nairobi this 22nd day of October, 2010.

S. E. O. BOSIRE

…….

JUDGE OF APPEAL

P. N. WAKI

……

JUDGE OF APPEAL

J. G. NYAMU

……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR