



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: TUNOI, O’KUBASU & GITHINJI, JJ.A)

CIVIL APPLICATION NO. NAI. 190 OF 2010 (UR 136/2010)

BETWEEN

KUWINDA RURINJA CO. LTD.....APPLICANT

AND

KUWINDA HOLDINGS LTD. & 13 OTHERS.....RESPONDENTS

(An application for injunction pending the hearing and determination of the pending appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Keiwua, J) dated 5th December, 1997

In

H.C.C.C. No. 5261 of 1998)

RULING OF THE COURT

The applicant, **KUWINDA RURINJA CO. LTD.**, brings this application by way of notice of Motion expressed as having been brought “*under section 3A and 3B of the Appellate Jurisdiction Act and Rule 5 (2) (b) of the Court of Appeal Rules*”. In this application the applicant seeks the following orders:-

“1. THAT there be an order of injunction restraining the 1st and 2nd respondents by themselves, their servants and/or their agents from alienating, transferring, sharing, sub-dividing, or otherwise dealing with L.R No. 10262/2, being a sub-division of the original LR No. 10262 and LR No. 11694 pending the hearing and determination of Civil Appeal No. 8 of 2003.

2. THAT there be an order of injunction restraining the 1st and 2nd respondents by themselves, their servants and/or their agents from further developing, putting up structures, or otherwise dealing with LR No. 10262/2, being a sub-division of LR No. 10262 and LR No. 11694 pending the hearing and determination of the Civil Appeal No. 8 of 2003.”

The application which is supported by the affidavits of Joseph Mwangi Kiarie and Faith Ng'endo, (both directors of the applicant) is brought on the following grounds:-

“a. The applicant’s said appeal is arguable as evidenced by the memorandum of appeal therein dated 27th January, 2003.

b. Unless the prayers of injunction sought are granted, the said appeal will be rendered nugatory in that:

i) The 1st and 2nd respondents have in contravention of section 52 of the Indian Transfer of Property Act and whilst this matter is pending in court, caused to be sub-divided the subject matter of this appeal, being LR No. 10262 and LR No. 11694 in two parcels, being LR No. 10262/2 and 10262/3 and titles issued for each.

ii) The 1st and 2nd respondents have in contravention of section 52 of the ITPA and in purported exercise of the rights of the owner of the suit land, purported to grant and to register water rights over the land the subject matter of the appeal.

iii) The 1st and 2nd respondents have, in contravention of section 52 of the Indian Transfer of Property Act, whilst this appeal is pending in court, started putting up structures on the said land which will change the face and character of the land the subject matter of the appeal.

iv) The 1st and 2nd respondents, despite illegally and deliberately attempting to destroy the substratum of this appeal, have contemptuously applied to this court through the motion dated 12th February, 2010, essentially asking the court to declare that the appeal has been compromised.

c. The applicant is apprehensive that unless restrained, the 1st and 2nd respondents will destroy and completely change the character of the subject matter of the said appeal.

d. The said appeal has been fixed for hearing on 14th October, 2010.

e. The overriding objective of this court is to afford the parties a just, expeditious proportionate and affordable resolution of the appeals before it and the actions of the 1st and 2nd respondents are aimed at subverting this overriding objective.”

The application came up for hearing on 11th November, 2010, when Mr. P. G. Ng'ang'a appeared for the applicant while Mr. Mohamed Nyaoga together with Mr. Kariuki Muigua appeared for the 1st and 2nd respondents.

What has given rise to this application is the ruling of the superior court (Ole Keiwua, J – as he then was) dated and delivered at Nairobi on 5th December, 1997. That ruling was pursuant to an application for a review of consent order(s) on the ground that the advocate had no authority to enter the consent. This was a protracted litigation involving three suits which were consolidated. It would appear that by the consent order of May, 1992 all the three suits were consolidated for purposes of recording a settlement. In the course of his ruling the learned Judge stated:-

“By the consent order of May 5, 1992 all the three suits were consolidated for purposes of recording that settlement. The consent signed by the parties’ advocates provided for the specific performance of the sale agreement of October 31, 1988. It was provided in respect of HCCC No. 3070 of 1989 that it was marked settled with all previous orders pursuant thereto vacated and withdrawn. For HCCC No. 5261 of 1988 was similarly withdrawn while HCCC No. 5262 of 1988 was also withdrawn.”

The learned Judge considered the rival submissions presented before him and concluded his ruling thus:-

“Assuming that the existence of a previously recorded consent order makes any subsequent order a nullity, it is then clear to me that it is the applicants’ subsequent consent order that is a nullity. I have already held in this judgment that the consent order of October 2, 1996 is not at cross purpose with the

consent order of May 5, 1992, there then is no error on the face of the record and the transfer of the suit premises was effected pursuant to a valid court order.

It is also my judgment that the applications in question do not fall within the circumstances that justify review. I agree with the Respondents that it is not for them to go behind the apparent authority of an advocate to represent the opposite party and record any consequential order on that party's behalf.

Additionally to the finding that material facts were withheld at the ex parte stage, I find and hold that a matter alleging fraud as the applicants in these applications do must be sued upon by way of a fresh suit not as was done here. It is also my finding that there is no error on the face of the record and I do dismiss the applications for review with costs of both applications to the Respondents."

The applicant was aggrieved by that ruling of the learned Judge and, through its advocates filed an appeal to this Court – The memorandum of Appeal sets out 62 grounds of appeal. Before that appeal is finally heard and determined, the applicant now comes to this Court pursuant to **Rule 5 (2) (b)** of this Court's Rules seeking the orders set out at the commencement of this ruling.

In his submission in support of the application, Mr. Ng'ang'a stated that there were strong points to demonstrate an arguable appeal as can be seen from the grounds of appeal. He strongly argued that the consent was entered into by an advocate who had no authority to do so. He was of the view that unless the orders sought in the application are granted the success of the appeal would be rendered nugatory as the respondents might dispose of the land which would make it difficult for the applicant to recover it. It is even feared that the land might have been charged to the bank. To buttress his submission, Mr. Ng'ang'a relied on this Court's decision in **OTIENO V. OUGO & ANOTHER (NO. 2) [1987] KLR 400** in which it was held:-

"1. The established rule is that an injunction is granted to preserve the subject matter pending the hearing and determination of the action.

2. The object of granting an injunction pending an appeal is to safeguard the rights of the appellant and to prevent the appeal if successful from being nugatory."

In response to the foregoing, Mr. Nyaoga submitted that the application before the Court was based on conjecture, lamentations and was speculative. Mr. Nyaoga assured the applicant that the respondents had no intention of interfering with the applicant's portion.

It was Mr. Nyaoga's submission that the appeal was not arguable as most of the respondents were dead hence the appeal against them has abated.

On the nugatory aspect of the application, Mr. Nyaoga argued that the applicant has been indolent as it is coming to court after 14 years. He finally submitted that there was no evidence that there was intention to dispose of the property in dispute.

We have put the rival submission on the scales. We remind ourselves that the jurisdiction of this Court under **rule 5 (2) (b)** of its Rules is both original and discretion, and that for an applicant to succeed he should show that his appeal on intended appeal is not only arguable but also that unless the order sought is granted, the intended appeal or appeal, if successful, the success will be rendered nugatory. In **BOB MORGAN SYSTEMS LTD. & ANOTHER V. JONES (2004) 1 KLR 194 at p. 196** this Court stated:-

"The powers of the court under rule 5 (2) (b), aforesaid, are specific. The Court will grant a stay or 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."

And in **RUBEN & 9 OTHERS VS. NDERITO & ANOTHER (1989) KLR 459** 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 1988."

We must bear in mind the foregoing as we consider this application before us. We have shown that the ruling to be challenged was delivered way back on 5th December, 1997! This application appears to have been filed on 2nd August, 2010. One wonders what the applicant was waiting for before bringing this application. We think Mr. Nyaoga is justified in describing the appellant as indolent. However, the applicant might have a valid reason for this apparent unreasonable delay of over ten years.

It is to be observed that the learned Judge was dealing with an application for a review of a consent order. We have reproduced the concluding remarks of the learned Judge on that application. The applicant argues (through his counsel) that it has an arguable appeal in the sense that the advocate who entered the consent order had no authority to do so. We were then referred to the long Memorandum of Appeal running into 62 grounds.

We have carefully considered the filed Memorandum of Appeal together with the submission by Mr. Ng'ang'a and have come to the conclusion that the intended appeal raises some arguable points. We hasten to add that an arguable appeal does not mean that the appeal will certainly succeed. All we can say here is that the intended appeal is not frivolous. In **JUDICIAL COMMISSION OF INQUIRY INTO THE GOLDENBERG AFFAIR & 3 OTHERS V. KILACH [2003] KLR**, 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 the proposal of rule 5(2)(b); there need not be a chain of arguable points to sustain an application."

On our part, we are satisfied that the applicant has demonstrated that the intended appeal is arguable. As regards the nugatory aspect of this application we have noted the submission of Mr. Nyaoga to the effect that there was no intention of selling the suit property. With that assurance the applicant need not fear. Indeed the applicant appears to have gone to sleep for over ten years since the ruling to be challenged was delivered. It was also pointed out that the sub-division has been carried out in accordance with the order of the superior court and hence there is no question of the appeal being rendered nugatory. **Section 3A** of the Appellate Jurisdiction Act (Cap. 9 Laws of Kenya) provides:-

"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).

3. An advocate in an appeal presented to the Court is under a duty to assist the Court to further the overriding objective and, to that effect, to participate in the processes of the Court and to comply with directions and orders of the Court."

Having considered the history of this matter, the submission by counsel appearing for the parties and the foregoing provision of the Appellate Jurisdiction Act, we are of the view that the main appeal should be listed for hearing and final determination in a bid to bring this long litigation to an end. As for this application the order that commends itself to us is that the application for injunction is refused but we order that the status quo prevailing today (10th December, 2010) be maintained until the final determination of the appeal. The costs of this application shall abide the outcome of the appeal.

Dated and delivered at Nairobi this 10th day of December, 2010.

P. K. TUNOI

.....
JUDGE OF APPEAL

E.O. O'KUBASU

.....
JUDGE OF APPEAL

E.M. GITHINJI

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR.