



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appli 103 of 2006

**DIAMOND TRUST BANK KENYA LIMITED.....
.....APPLICANT**

AND

**1. MARTIN NGOMBO
2. MAKANGA MITINGI
3. KALUME ALI
4. KATANA ALI
5. KATANA KAHIVA
6. KATANA MSUKO
7. SULUBU MITINGI
8. SHIDA TUNE
9. LEONARD MURUMBA.....
RESPONDENTS**

(Application for injunction pending an intended appeal against the decision and orders of the High Court of Kenya at Malindi (Ouko, J) made on 9th March, 2006

in

H.C.C.C. NO. 43 OF 2006)

RULING OF THE COURT

This application for an order of interim injunction pending the determination of an intended appeal is made under *Rule 5 (2) (b)* of the Rules of this Court.

The applicant's case as pleaded in the plaint and as stated in the affidavit in support of the application, is in essence that it is the registered owner of all that property known as *Portion NO. 575* situate West of Mambui Town, Kilifi District (hereinafter referred to as "the suit property"). The applicant wants to develop the suit property but it is unable to do so because the respondents have continued to issue threats to the applicant's servants and independent contractors and have in the process completely frustrated the applicant's right of quiet possession or user over the suit property. Again, it is pleaded that the respondents have indeed occupied parts of the suit property. The applicant has prayed for a mandatory injunction to compel the respondents to deliver up to it parts of the suit property which they occupy and a permanent injunction to restrain them from going into or in any way interfering with the suit property.

The respondent's case on the other hand is quite brief. They are squatters resident on the suit property. They, their families and others not named in the suit have had physical possession of the land for a long time. They aver that they have a claim of entitlement to the suit property by way of adverse possession under the Limitation of Actions Act.

The learned Judge in the court below, *Ouko J.*, declined to strike out the respondents' defence. Similarly, on 9th March, 2006, the learned Judge dismissed the applicant's application for orders of mandatory injunction and permanent injunction against the respondents. The orders sought in the application before the learned Judge are similar in all respects to those pleaded in the plaint.

It is plain that the dismissal of the applicant's application before the superior court has triggered the motion now before us.

We affirm that the principles upon which this Court exercises jurisdiction under *Rule 5 (2) (b)* are now firmly settled. The discretion is unfettered. However, before the court can exercise its discretion in favour of the applicant in this case (like in others) the applicant should satisfy the court, firstly, that the intended appeal or appeal is not frivolous, that is, it is arguable and secondly, that unless, the order of injunction is granted the intended appeal, if successful, would be rendered nugatory.

We appreciate that the intended appeal is against an interlocutory and discretionary order and that before an appellate court can interfere with the exercise of a discretion by a judge, the stringent conditions enunciated by the predecessor of this Court in *MBOGO V SHAH* [1968] EA 93 and in other subsequent decisions of this court should be satisfied.

The applicant has stated the grounds of the intended appeal in the draft memorandum of appeal. *Mr. Amoko*, learned counsel for the applicant has forcefully and persuasively identified the arguable grounds in the appeal as including the grounds that, the title to the suit property was not subject to any lawful challenge and that the defence of adverse possession was not available to the respondents. *Mr. Amoko* has also submitted that the learned Judge had ignored and refused to follow and apply binding decisions of this Court.

Mr. Odongo for the respondents on the other hand submitted that the intended appeal is not arguable for several reasons including, the averment that applicant or its predecessors in title have never possessed the suit property.

We are satisfied on our consideration of the rival submissions canvassed before us that the intended appeal is indeed arguable and is not frivolous.

The respondents are not in physical occupation of the entire suit property and some of the squatters have moved out after being given some *ex-gratia* payments for their crops and developments. It is manifestly clear that the applicant is now the registered proprietor of the suit land, though it appears that the validity of its title is being challenged. It wants to carry out development but it cannot do so in view of the opposition by the respondents. In our view there are no convincing reasons why the applicant cannot be allowed to proceed with the development of the suit property.

In the result we allow the application, but, with the following conditions:-

1. The respondents shall confine their occupation only to the portions of the suit land they now occupy;
2. The respondents, their families, agents and/or servants shall not trespass on any new portions of the suit land;
3. The respondents shall not interfere with the applicant's quiet possession and/or improvements carried out by the applicant or its agents until the determination of the intended appeal;

4. The respondents are restrained from carrying out any development on the portions they occupy until the determination of the intended appeal;

5. The costs of this application shall be in the intended appeal.

DATED and DELIVERED at NAIROBI this 26th day of May, 2006.

P.K. TUNOI

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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