



REPUBLIC OF KENYA  
IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appli 32 of 2006

MUA PARK INVESTMENTS LIMITED ..... APPLICANT

AND

KENYA NATIONAL ASSURANCE COMPANY LIMITED (IN LIQUIDATION).....  
RESPONDENT

*(Being an application for an injunction pending the hearing and determination of an intended appeal from a ruling and decree of the High Court of Kenya at Nairobi Milimani Commercial Courts (Lady Justice Mary Kasango) dated 16<sup>th</sup> November, 2005*

in

H.C.C.C. NO. 355 OF 2005)

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RULING OF THE COURT

This is an application by Notice of Motion dated 2<sup>nd</sup> February 2006 brought by *Mua Park Investments Ltd.* (hereinafter “*the applicant*”) under *rules 5(2)(b), 42 and 47 of the Court of Appeal Rules* (hereinafter “*the Rules*”) seeking the following Orders:

1. *That this Honourable Court do grant an injunction restraining the respondent by itself, its officers or agents from advertising offering for sale, selling, transferring or effecting a change of registration over or otherwise howsoever disposing of or alienating ALL THAT parcel of land known as L. R. Number 209/11214 within Nairobi pending the hearing and final determination of the intended appeal herein.*
2. *That pending the hearing and final determination of this Application, this Honourable Court be pleased to issue a temporary injunction in terms of prayer 1 above.*
3. *That the costs of this application be provided for.*

The grounds of the application were stated to be: -

1. *The superior court (Mary Kasango J.) had dismissed the applicant’s suit on 16<sup>th</sup> November 2005.*

2. *A Notice of Appeal has been filed and served in accordance with rule 74 of the Rules.*
3. *The applicant has an arguable appeal with high chances of success.*
4. *The Appeal will be rendered nugatory and the applicant will suffer loss if the injunction sought is not granted.*

The affidavit in support was sworn by Salim Manji dated 2<sup>nd</sup> February 2006. He is a director of the applicant, which is the Plaintiff in the superior court in Milimani High Court Civil Suit No. 355 of 2005 (hereinafter "*the High Court Suit*") filed against the defendant respondent to the application **Kenya National Assurance Co. Ltd (in liquidation)**.

The plaint in the **High Court Suit** was dated 22<sup>nd</sup> June 2005 and filed the following day in the High Court at Nairobi. In its heading the plaint is stated to be "*Pursuant to leave under section 228 of Cap 486 granted on 20<sup>th</sup> May 2005.*" Such leave was necessary due to the fact that the defendant was in liquidation. A previous similar suit being case No 141 of 2004 between the same parties concerning the same dispute had been struck out due to the fact that the leave granted to institute that suit had been granted by a court which did not have jurisdiction to grant leave in a ruling delivered by Azangalala J. on 25<sup>th</sup> May 2004.

By a Chamber Summons dated 28<sup>th</sup> September 2005 filed in the **High Court Suit** under **Order XXXIX rules 1,2,3 and 4** of the Civil Procedure Rules the applicant sought, together with other ancillary orders, an injunction restraining the defendant being the Kenya National Assurance Company (hereinafter "*the Kenya National*") from selling etc. the parcel of land known as L.R. No. 209/11214 within Nairobi (herein after "*the suit land*") pending the hearing and final determination of the High Court Suit.

The grounds on which this application was based were, in brief, that the applicant was the registered owner of the suit land situated at Imara Daima, Nairobi and that the defendant the **Kenya National** had offered the suit land for sale through an agent, purporting to do so in the exercise of its statutory power of sale. The **Kenya National**, it was feared, would dispose of the suit land unless restrained from doing so to the detriment of the applicant.

On 29<sup>th</sup> September 2005 the **Kenya National** filed a Chamber Summons, under **Order VI rule 13(1) (b), (c) and (d) and section 3A of the Civil Procedure Act**, seeking to strike out the plaint dated 22<sup>nd</sup> June 2005 filed by the applicant in the High Court Suit on two grounds being: -

**(a) *The plaintiff's suit against the defendant is fatally defective and bad in law as the plaintiff's claim in this suit is statute barred and hence unenforceable.***

**(b) *The plaintiff's suit against the defendant is without merit and amounts to persistent abuse of the court process.***

This is the application that gave rise to the ruling of Mary **Kasango J.** dated and delivered on 16<sup>th</sup> November 2005. The application appears to be wrongly referred to in the ruling as being dated 21<sup>st</sup> September 2005 but this does not appear to be of any relevance to the present application before us. In her ruling the learned Judge dismissed the plaintiff's suit as being an abuse of the court process by infringing the limitation period within the **Limitation of Actions Act Cap. 22**.

It has been decided many times by this Court that in deciding whether or not to grant an application for an injunction pending the hearing and determination of an appeal the Court needs first to consider whether the intended appeal is arguable, or in other words not frivolous. If the appeal is arguable the Court then needs to consider whether, if the injunction sought is not granted and the appeal is eventually allowed, that successful appeal would be rendered nugatory as a result of the lack of an injunction.

The draft memorandum of appeal in the record of the current application was short and to the point in

these terms: -

- “1. That the learned judge erred in law and in fact in holding that the plaintiff’s claim offends the limitation period requirement under **section 4 and 7 of Cap. 22.**
2. That the learned Judge alternatively erred in Law and fact in failing to find that there was a fresh accrual of right of action by the defendant’s notice in a Newspaper.
3. That the learned Judge erred in Law in misdirecting herself as to the requirements of **section 24 of Cap.22.**
4. That the learned Judge erred in Law and in fact in failing to hold that if the plaintiff’s action was caught by limitation, then so were the defendant’s rights exercisable under the Charge also time barred.
5. That the learned Judge erred in Law in holding that Cap 22 only deals with actions in court and only lays down the period within which action ought to be commenced in court.”

We have come to the tentative conclusion for the purposes of this interlocutory application that, despite the submissions to the contrary by Mr. K. Kariuki, learned counsel for the respondent, there is, prima facie, an arguable issue raised by paragraph 1 of the draft memorandum of appeal. This is sufficient to cause us to grant the application provided we are satisfied that the intended appeal, if successful, will be rendered nugatory if the injunction sought is not granted. We will not comment on the other grounds in the memo of appeal.

Mr. Thiga learned counsel for the applicant submitted that, in the absence of the injunction sought, the suit land will have been disposed of by the time the appeal is heard and determined. He relied on the decision in Civil Appeal 122/2000 dated 14<sup>th</sup> July 2000 (unreported).

Mr. K. Kariuki submitted that no transfers by the respondent have taken place so far, as far as he was aware, that the application before us for an injunction pending appeal should be dismissed so that the respondent can enforce its rights after so many years. It is clear from these submissions that the respondent wishes to, and would be rendered likely to enforce its rights by sale if no injunction is granted pending appeal. If this happened there would be a real risk that a successful appeal would be rendered nugatory given that there is no suggestion that the Kenya National is likely to be able to meet any claim by the respondent for damages.

We have, for the above reasons, decided that the application should be allowed with costs to be in the appeal. We accordingly make the following orders: -

- 1. That this Honourable Court hereby grants an injunction restraining the Respondent by itself, its officers or agents from advertising offering for sale, selling, transferring or effecting a change of registration over or otherwise howsoever disposing of or alienating ALL THAT parcel of land known as L.R. Number 209/11214 within Nairobi pending the hearing and final determination of the intended appeal herein.**
- 2. That the costs of this application be in the appeal.**

**Dated and delivered at Nairobi this 5th day of May 2006.**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**J. W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

**W. S. DEVERELL**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**