IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, G.B.M. KARIUKI & KANTAI, JJ.A)

CIVIL APPLICATION NO. NAI 156 OF 2015

BETWEEN

PARKSIDE MEDICAL CENTRE LIMITED …… APPLICANT

VERSUS

NAIROBI CITY COUNCIL …… RESPONDENT

(Application for injunction pending the hearing and determination of the Applicant's intended appeal against the ruling and order of the High Court of Kenya at Nairobi (Onguto, J.) dated 20th April, 2015

in

ELC No. 605 of 2014)

****

RULING OF THE COURT

The applicant, **Parkside Medical Centre Limited**, applies under **Rule 5(2) (b)** of this **Court's rules,** and **Sections 3A and 3B** of the **Appellate Jurisdiction Act** that we grant on injunction restraining the respondent, Nairobi City County, through the respondent's officers, servants, agents or any other body or authority from stopping the developments being carried on by the applicant in land parcels number **L.R. No. 209/12614/3** to **209/12614/24** (inclusive) and from interfering in any other manner whatsoever with the applicant's right to quiet user, possession and enjoyment of all rights to the said properties pending the hearing of an intended appeal. It is also prayed that we order a stay of proceedings in **Environment and Land Court Case No. 605 of 2014** pending the hearing and determination of the Motion and the intended appeal.

In the grounds set out in support of the Motion it is stated that the applicant had obtained all necessary consents and approvals from the respondent to commence developments on its said properties but that the respondent was interfering with the developments being carried out on the properties; that the applicant stood to suffer irreparable loss and damage if orders sought were not granted since it had expended large sums of money in developing its properties where it had erected a boundary wall around the properties in readiness to build houses on the premises; that the respondent was harassing the applicant; that a temporary injunction granted by the High Court had since been discharged; that an intended appeal was arguable and would be rendered nugatory if orders were not granted and that the respondent would not suffer prejudice if orders sought were granted.

Also in support of the Motion was an affidavit of **John Njenga Mungai**, a director of the applicant, which deponed to the matters set out as grounds of the application. The deponent deposed further that the applicant had obtained necessary consents and approvals from the respondent and National Environment Management Authority but that after it had erected a boundary wall around the properties in readiness to erect houses the respondent first issued an Enforcement Notice which stopped development and later brought down the boundary wall. Further, that the applicant had filed suit claiming *inter alia* an injunction to restrain the respondent from interfering with the applicant's development plans, that a temporary injunction was issued by the Environment and Land Court but after inter partes hearing those injunction orders were lifted leaving the applicant exposed to interference by the respondent as had happened hitherto.

The respondent filed replying affidavit sworn by its Director, Planning, Compliance and Enforcement **Mr. J.M. Kathenge** who supported the ruling of the High Court and deposed that the applicant was not entitled to stay orders because it had misled this Court by not disclosing all the materials that were before the High Court and further that the applicant had erected a boundary wall on its premises which had not been approved by the respondent.

When the Motion came for hearing before us on 25th January, 2016 **Mr. Njenga**, learned counsel for the applicant, submitted that the intended appeal was arguable because it related to an interpretation of the jurisdiction of the High Court in dealing with a suit as had been filed by the applicant. On the nugatory aspect of the matter learned counsel submitted that the intended appeal would be rendered nugatory as development permission had been granted yet the respondent had demolished the boundary wall that the applicant had erected.

Mr. Odoyo, learned counsel for the respondent in opposing the application submitted that the learned judge of the High Court was right in refusing injunction as the applicant had approached that court and exhibited in evidence development permission that did not relate to the applicant's properties at all.

The principles that guide this Court in applications under **Rule 5(2) (b)** of this **Court's rules** are now well settled. An applicant must satisfy the Court that, first, he has an arguable appeal which is the same as saying that the appeal, or intended appeal, is not frivolous, and, secondly, that the appeal, or intended appeal, would be rendered nugatory if the status quo was not preserved and the appeal eventually succeeded. For judicial pronouncement on this see, **Republic v Kenya Anti Corupton Commission & 2 Others [2009] KLR 31**; **Nation Newspapers Limited v Peter Banza Rabando Civil Appeal No. 1 of**

2007 (ur) or **Titus Gicharu Mwangiv Mary Nyambura Murima & Anor [2014] eKLR.**

It has also been held, on arguability of an appeal, that an applicant need not establish a multiplicity of arguable grounds – a single arguable issue will suffice – see **Transouth Conveyors Limited v Kenya Revenue Authority & Anor Civil Application No. 37 of 2007 (ur).** Also, an arguable appeal does not mean an appeal that will certainly succeed – see **Judicial Commission of Inquiry into the Goldenberg Affair & 3 Others v Kilachi [2003] KLR.**

Those are the principles that will guide us as we consider the Motion before us.

The learned judge of the Environment and Land Court, upon hearing the application for injunction inter partes, dismissed it *inter alia* on grounds that documents exhibited in support of the Summons did not relate to the applicant's properties and also that there was an established appeal procedure under the Physical Planning Act which the applicant ignored but chose to take its grievances to court after receiving an Enforcement Notice from the respondent. These are matters that the bench that will hear the intended appeal will contend with, and we must not embarrass that bench by making any comments here.

Counsel for the applicant tells us that by making remarks in the ruling that seemed to limit the jurisdiction of the High Court the learned judge was off his mark. That point is taken in the draft Memorandum of Appeal as grounds 3 and 4 as follows:

"3. That the Learned Judge erred in law and in fact when he held that the jurisdiction of the High Court could be limited to appellate jurisdiction;

4. That the Learned Judge erred in law and in fact when he held that the Defendant was denied a right to an appellate forum."

Those, to our mind, are certainly arguable points and the applicant has therefore satisfied the first limb of the principles which we have set out on an application such as this one.

What about the nugatory aspect"

Learned counsel for the applicant submits that the applicant received the necessary consents and approvals from the respondent; erected a boundary or perimeter wall which, after being served with an Enforcement Notice, was demolished by the respondent. Which is to say that there was no wall by the time the applicant approached the Environment and Land Court, and there is no wall now. Also, it is not shown that the respondent cannot reconstruct the wall, if it was so ordered. The applicant, therefore, fails to satisfy us that the intended appeal, if successful, would be rendered nugatory.

The Motion fails and is accordingly dismissed with costs to the respondent.

Dated and Delivered at Nairobi this 4th day of March, 2016.

ALNASHIR VISRAM

……..……..

JUDGE OF APPEAL

G.B.M. KARIUKI

……..……

JUDGE OF APPEAL

S. ole KANTAI

……..……..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR