



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, WARSAME & AZANGALALA, JJ.A.)

CIVIL APPLICATION NO. 100 OF 2016

BETWEEN

DOUBLE CLEAN LIMITED.....1ST APPLICANT

DAIMLER ENTERPRISES LIMITED.....2ND APPLICANT

RUORA INVESTMENTS LIMITED.....3RD APPLICANT

MARSTONS ENTERPRISES LIMITED.....4TH APPLICANT

NGINYO ROADWAYS LIMITED.....5TH APPLICANT

AND

JAMBO HOLDINGS LTD.....1ST RESPONDENT

GUARANTY TRUST BANK (KENYA) LTD.....2ND RESPONDENT

CHIEF LAND REGISTRAR.....3RD RESPONDENT

(An application for stay of execution and/or stay of further proceedings of the ruling and order of the High Court at Nairobi (Gacheru J.) delivered on 15th April, 2016 In ELC NO. 219 OF 2015)

RULING OF THE COURT

- 1. Double Clean Limited, Daimler Enterprises Limited, Ruora Investments Limited, Marstons Enterprises Limited, and Nginyo Roadways Limited** the applicants herein, came to this Court under rule 5(2)(b) of the Court's rules for three primary orders namely:

2. That the Honourable Court be pleased to stay the execution of the order of the High Court, Hon. Lady Justice Gacheru, issued on 15th April, 2016 in which the Honourable Judge found **John Mugo Njeru, Mary Muthoni Bernard** and the Directors of the 1st, 2nd, 3rd, 4th, and 5th applicants guilty of contempt of court, issued an injunction against the applicants and declined to hear the applicant's pending applications which prayer the applicants seek pending the hearing and determination of the appeal filed against the said order.
3. That the Honourable Court be pleased to issue an injunction directed against the 1st, 2nd and 3rd respondents whether by themselves or through any of their agents restraining, each or all of them from trespassing, entering, selling, charging, disposing of dealing with, and or interfering with land parcel Nos **Nairobi Block 92/225, Nairobi Block 92/226, Nairobi, Block 92/227, Nairobi Block 92/229** and **Nairobi Block 92/230**, pending the hearing and determination of the appeal filed against the said ruling of the High Court, Hon. Lady Justice Gacheru J, issued on the 15th April, 2016.
4. That if the 1st respondent shall have taken up possession, pursuant to the order of the High Court issued on the 15th April, 2016 then this Honourable Court, be pleased to enter the eviction of the 1st respondent from **Nairobi Block 92/225, Nairobi Block 92/226, Nairobi Block 92/227, Nairobi Block 92/228, Nairobi Block 92/229** and **Nairobi Block 92/230**, pending the hearing and determining of the appeal against the order of the High Court issued on 15th April 2016.

As may be gleaned from the prayers sought by the applicants, the High Court orders being challenged were made in favour of Jambo Holdings Limited, the 1st respondent herein.

5. As aforesaid this application is made under our **Rule 5 (2) (b)** of the rules of this Court and the principles which guide the Court in considering such an application are now well settled. For the applicant to succeed, he must satisfy us that his appeal or intended appeal is an arguable one, that is, it is not frivolous. Secondly that if the order of stay or injunction is not granted and the appeal were to eventually succeed, the same would be rendered nugatory by the refusal to grant the injunction – See **Ishmael Kagunyi Thande v Housing Finance Kenya Ltd. [Civil Application NO. Nai. 157 of 2006] (UR)** and **Reliance Bank Ltd. (in liquidation) v. Norlake Investments Ltd. [Civil Application No. 93/02] (UR)** among many others.
6. Over time further principles have developed on the exercise of the court's discretion under **rule 5(2)(b)** of the Court's Rules.

In **Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others [2003] eKLR**, we stated:-

- i. In dealing with **Rule 5(2)(b)**, the Court exercises a discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this Court. See **Reuben & 9 Others v Nderitu & Another [1989] KLR 459**.
- ii. The discretion of this Court under **Rule 5(2)(b)** to grant a stay order or injunction is wide and unfettered provided it is just to do so.

- iii. The Court becomes seized of the matter only after the filing of a notice of appeal under *Rule 75*. See *Halai & Another v Thomson & Turpin [1963] Ltd [1990] KLR 365*.
 - iv. In considering whether an appeal will be rendered nugatory the Court must bear in mind that each case must depend on its own facts and peculiar circumstances. See *David Thomson Silverstain v Atsango Chesoni [Civil Application No. 189 of 2001](UR)*.
 - v. An applicant must satisfy the Court on both the twin principles.
 - vi. On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. See *Damji Pragji Mandevia v Sara Lee Household & Body Care (K) Ltd., [Civil application No. Nai 345 of 2004] (UR)*.
 - vii. An arguable appeal is not one which must necessarily succeed, but one which ought to be arguable fully before the court; one which is not frivolous. See *Joseph Gitahi Gachau & Another v Pioneer Holdings (A) Ltd. & 2 Others, [Civil Application No. 124 of 2008](UR)*
 - viii. *In considering an application brought under Rule 5(2) the Court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal. See Damji Pragji: (supra).*
 - ix. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. (See *Reliance Bank Ltd. v Morlake Investments Ltd. [2002] IEA 227* at page 232.
 - x. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.
 - xi. Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent’s alleged impecuniosity, the onus shifts to the latter to rebut that claim by evidence. See *International Laboratory for Research on Animal Diseases v Kinyua [1990] KLR 403*.
7. As there is no dispute that a Notice of Appeal was filed by the applicants, this Court has jurisdiction to entertain the application. To put the matter in perspective, however, the background to the application is necessary. The dispute between the parties involves parcel **LR No. 7750** which was allegedly subdivided into six parcels namely: **Nairobi Block 92/225, Nairobi Block 92/226, Nairobi Block 92/227, Nairobi Block 92/228, Nairobi Block 92/229 and Nairobi Block 92/230**, a fact which was conceded by the applicant after intense and thorough questioning by the court.
8. Although the facts are not agreed our perusal of the pleadings and submissions of the parties reveals the following: The Original title in dispute is **LR No. 7750**. According to the 1st respondent

that title was sold and transferred to **Rajnikant J. Desai** and **Nile R. Desai** by **Trilock N. Vohora, V. Vohora, Arvid Vohora** and **Bipin Vohora**. The property was then charged to Guaranty Trust Bank (Kenya) Ltd., the 2nd respondent. The 1st respondent then purchased the same property from the 2nd respondent and charged it to the same 2nd respondent who retained and continues to retain the title documents as security to date.

9. The applicants on their part claim that **Trilock N. Vohora, V. Vohora, Arvid Vohora Bipin Vohora**, by a sale agreement dated 28th June, 2996 sold the same property to **John Mugo Njeru** and **Mary Wanjiru Bernard** (the purchasers). The purchasers sub-divided the property into the said six (6) parcels (Nairobi Block 92/225-230). John Mugo Njeru is a director of the applicants.
10. The 1st respondent has challenged the transaction allegedly made in favour of the applicants and filed affidavits sworn by the Vohora family, denying selling the suit land to the said purchasers vide the said agreement of 28th June, 1996. The Vohoras swore that Trilock N. Vohora died on 20th June, 1991 and could not execute the said sale agreement as claimed by the applicants. The 1st respondent further swore that the advocate who allegedly drew and attested the sale agreement has no practicing certificate then and was deceased. The Vohoras however acknowledged having sold the suit property to Rajnikant J. Desai and Nile R. Desai.
11. Given the conflicting claims made by both sides it was inevitable for the dispute to land in our courts. The applicants filed Environment and Land Court Case No. 536 of 2014 against the 1st respondent claiming ownership and possession of the suit property identified in paragraph 3 above. An order to maintain the status quo was made in the suit. The applicants then withdrew the suit and took possession of the suit property as, in their view, having withdrawn the suit the order maintaining the status quo ceased to exist.
12. The applicants' actions prompted the 1st respondent to file Environment and Land Civil Case No. 219 of 2015. The 1st applicant appeared, *ex parte*, before the learned Judge of the court below under a certificate of urgency on 13th March, 2015. It sought a temporary injunction to restrain the applicants from entering, remaining, interfering, selling, transferring, disposing of or in any way disrupting its possession of LR No. 7750; a mandatory injunction directing the applicants to ceased occupation of and vacate the suit property; and an order directing the OCS of Spring Valley Police Station to ensure compliance with the orders.
13. The learned Judge, on being satisfied with the prima facie merits of the 1st respondent's application, granted interim orders of injunction pending hearing of the application *inter partes*. It would appear that even before the applicants were served, they lodged two Notices of Motion dated 18th March, 2015 and 26th March, 2015. The applicants sought a discharge or variation and stay of execution respectively of the interim orders issued on 13th March, 2015. Their contention was that the interim orders of injunction were issued against a non-existent title ie LR 7750. They claimed that they occupied parcel Nos Nairobi Block 92/225-230 and not LR 7750.

14. The 1st respondent then lodged an application dated 19th May, 2015 in which it prayed that the applicants be cited for contempt of the orders of injunction aforesaid. The 1st respondent further sought an order that the OCS and another had violated the orders of injunction granted *ex parte* on 13th March, 2015 which orders were extended from time to time.
15. The learned Judge considered the applications and ordered as follows: On the contempt application, the learned Judge found that the applicants had knowledge of the orders of temporary injunction since they filed their two applications to vary and/or set aside and/or stay execution of those orders. The applicants' contention that the interim orders of injunction were in respect of non-existent property did not find favour with the learned judge as, in her view, the applicants had knowledge that the injunction orders were in respect of the original title from which the sub-divisions, the applicant claim, were created. John Mugo Njeru was found to be in contempt of court and therefore liable to be sentenced accordingly. The learned Judge however, absolved police officers from blame as, in her view, they had demonstrated their intention to comply with her orders but did not by reason of ambiguity in the title description.
16. With respect to the applicants' applications dated 18th March, and 26th March, 2015, the learned Judge, on the authority of ***Hadkinson v Hadkinson [1952] 2ALL ER 567*** and ***National Corporation of Kenya v Yess Holdings Ltd. [Civil Application No. 30 of 2000] (UR)*** declined to hear the applications until the contempt, she had found was purged.
17. With the applicants' applications out of the way, the learned judge allowed the 1st respondent's application of 12th March, 2015 and confirmed the interim orders of injunction. The orders were granted pending the hearing and determination of the suit. Although the 1st respondent had sought the orders with respect to LR No. 7750 in its plaint and Notice of Motion, the learned Judge, invoking the inherent jurisdiction of the Court codified in **Sections 3A and 63(e)** of the ***Civil Procedure Act***, directed that her orders apply and bind land parcel numbers, Nairobi Block 92/225, 226, 227, 228, 229 and 230.
18. The effect of the orders was substantially to reinstate the 1st respondent to the suit property. We were informed from the bar that the reinstatement had been effected and the directors of the applicants and John Mugo Njeru were due to be sentenced for contempt.
19. The applicants were aggrieved and therefore lodged a Notice of Appeal on 20th April, 2016 and filed the present application principally under, **Rule 5(2)(b)** of this Court's Rules as already stated.
20. Have the applicants shown to us an arguable appeal" We are satisfied that they have. The learned Judge herself found, and we think correctly, that the controversy surrounding how land LR No. 7750 Nairobi was sub-divided into six separate titles could not conclusively be determined at the interlocutory stage.

In her own words:-

“The process of how it was sub-divided would have to be determined by the court whether it was done procedurally or unprocedurally or through fraud as alleged by the plaintiff.

The learned Judge later opined:

At this juncture, the court cannot hold and find that the 1st – 5th Defendants titles were acquired through fraud or unprocedurally as that is a matter to be determined by calling of evidence in the full hearing.”

21. It is significant that the applicants on their part also challenged entries in the 1st respondent's title. Their challenge, according to the learned Judge, could *only be dealt with in the main trial through calling of evidence as the same cannot be dealt with through affidavit evidence. Even if the Chief Land Registrar, through its (sic) letter dated 28th July, 2014 alleged that LR No. 7750 Nairobi ceased to exist after the said land was sub-divided, the Court needs to interrogate the process of the said sub-divisions and registration of the resultant sub-divisions.”*
22. So, despite the parties' respective claims there is uncertainty about the ownership of the suit title. With that uncertainty, it is arguable whether the orders of injunction sought against LR 7750 could apply to sub-divisions Nos Nairobi Block 92/225-230 without amendment to the plaint and Notice of Motion. It is also arguable whether a party who is challenging orders issued, *ex parte*, against him could be denied audience. Indeed, ***Hadkinson v Hadkinson [1952] 2 ALL ER 567*** upon which the learned Judge relied to deny the applicants audience did not set out a rigid rule that a party in contempt cannot be given audience by a court. The rule is hedged with exceptions and is subject to the discretion of the court. Such exceptions include a case where a party is challenging the jurisdiction of the court to make the impugned order.

Romer LJ in ***Hadkinson v Hadkinson (supra)*** stated:

“A person against whom contempt is alleged will also of course be heard in support of a submission that having regard to the true meaning and intendment of the order which he is said to have disobeyed his actions did not constitute a breach of it, or that having regard to all the circumstances he ought not to be treated as being in contempt.”

And Lord Denning, who sat with Romer LJ, stated, *inter alia*;

“It is a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by grave considerations of public policy – when the contempt itself impedes the cause of justice and there is no other effective means of ensuring his compliance.”

23. With the uncertainty about the suit title which uncertainty the learned Judge herself entertained, it is arguable whether a mandatory injunction could issue at the, *ex parte*, interim stage. It is also arguable whether a contempt finding could be made in the absence of service of the order allegedly disobeyed.

24. In those premises, it is our view that the applicants have demonstrated that they have an arguable appeal and their intended appeal cannot be described as frivolous. As we have already stated only one *bona fide* arguable point need be demonstrated.
25. If the intended appeal were to succeed, would that success be rendered nugatory if we do not grant the applicants the stay of execution or injunction which they have sought" Mr. Nyangau, who argued the application before us, contended that that would be the position whilst Mr. Mwangi for the respondents held a contrary view.
26. Our understanding of the situation is that the 1st respondent is in possession of the property in dispute. The order reinstating the 1st respondent having been effected cannot be stayed. On the other hand the injunction sought is a mandatory injunction which would have the effect of evicting the 1st respondent from the property in dispute if granted. If the status quo obtaining now is maintained until the intended appeal is heard, the order of the court below will be reversed if the appeal eventually succeeds and the applicants will be reinstated to the suit property.
27. In any event the orders of injunction granted by the court below were only temporary orders which were given pending the hearing and determination of the suit. Any findings made by the learned Judge at that stage, notwithstanding the language used, were not and could not be definitive or conclusive. Final orders on the parties' respective claims will only be made after hearing the parties and their witnesses and considering their documents in support of their respective claims. Depending on the findings on those claims, the interim orders will either be confirmed or reversed. A dissatisfied party will then have the right to appeal against those final orders.
28. In those premises, we cannot say that unless we grant the applicants the injunction sought the intended appeal, if it eventually succeeds, will be rendered nugatory. That is however, in respect of the orders made on the 1st applicant's application for interim orders of injunction.
29. That is not the end of the story. The directors of the applicants and John Mugo Njeru have been found to be in contempt of the said interim orders of injunction and are due to be sentenced. The applicants' fear that they may be committed to prison in the circumstances, is not an idle one. We are alive to the fact that whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed, if allowed to happen, is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved. In ***Justus Kariuki Mate & Another v Martin Nyaga Wambora & Another [Civil Application No. Nyeri 8 of 2011] (UR) [2014] eKLR***, the Court, *inter alia*, stated:

9. The power of guarding and protecting the authority and dignity of court orders although jealously guarded is also balanced with the prospect of an applicant being subjected to a punishment that may entail loss of his or her liberty. Thus courts always allow the applicant an opportunity to state his or her case."

And in *Ian Leslie Campbell & Another v Canadian Hunger Foundation*, [Civil Application No. Nai 56 of 1994 (NAI 28/940 UR)] (UR), the Court had this to say:

“As to whether the intended appeal if successful, will be rendered nugatory, that will undoubtedly be the consequence because if the applicants are committed to prison, they may serve out the jail terms before the intended appeal is heard and disposed of.”

30. Those remarks apply with equal force to the circumstances of the present motion. If we do not stay the contempt proceedings, the applicants and the said John Mugo Njeru will be sentenced and the sentence may very well be a prison term which term they may serve before the intended appeal is heard and disposed of. If that happens the intended appeal against those committal proceedings will only be of academic interest.

31. The upshot is that this application is allowed, in part. We order that, pending the hearing and determination of the intended appeal, there be a stay of execution of the order of Gacheru J., issued on 15th April, 2016 by which order the learned Judge found the directors of the applicants and John Mugo Njeru to be in contempt of Court.

32. The costs of the motion shall be in the intended appeal and if not filed, will be borne by the applicants.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF JULY, 2016.

H. M. OKWENGU

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

I certify this is a true copy of the original.

DEPUTY REGISTRAR



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