Case Number:	Civil Application NAI 182 of 1989
Date Delivered:	09 Nov 1989
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Ruling
Judge:	Johnson Evan Gicheru, Richard Otieno Kwach, James Onyiego Nyarangi
Citation:	Montague Charles Ruben & 9 others v Peter Charles Nderito & another [1989]eKLR
Advocates:	Mr Ibrahim for the Defendants.
Case Summary:	**Ruben & 9 others *v* Nderito & another** **Court of Appeal at Nairobi** **November 9, 1989** **Nyarangi, Gicheru & Kwach JJ A** **Civil Application No NAI 182 of 1989** ***Civil Practice and Procedure*** *– stay of execution - by Court of Appeal - Court of Appeal Rules rule 5(2)(b) - principles by which the court is guided - nature of the Court's jurisdiction under that rule - application for stay not to be treated as an appeal from the decision of the High Court.* The applicants who unsuccessfully sought an injunction against the respondents in the High Court, filed the present application in the Court of Appeal. They sought a stay of the order dismissing their application and to restrain the respondents from turning their plot, which was located in the same neighbourhood as them, from residential to

commercial use, pending the hearing and determination of their intended appeal.

The applicant's contention was that developments to plots in the neighbourhood of Rossyln Estate were restricted to residential use only.

They relied on a restrictive covenant which formed part of conditions of purchase of property in the area.

The respondent however contended that the covenant was outdated and was intended to create and preserve a European colony or ghetto.

Held:

1. In dealing with applications under rule 5(2)(b) of the Court of Appeal Rules the Court of Appeal exercises original jurisdiction.

2. Once the applicant is properly 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.

3. This exercise does not constitute an appeal from the trial judge's discretion to the Court of Appeal.

4. In such an application, the applicant must show that the intended appeal is not frivolous, or, 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.

5. It had been shown that the appeal raised a serious question for submission to the Court of Appeal and there was a very real possibility of the appeal beign rendered nugatory if the reliefes sought by the plaintiffs are not granted.

6. The Court would not require the applicants to give an undertaking in damages. They were exercising their undoubted right of appeal and that right was not to be fettered by the imposition of such a draconian measure.

Application allowed.

	Cases *Githunguri v Jimba Credit Corporation Ltd* [1988] KLR 83 **Statutes** 1. Court of Appeal Rules (cap 9 Sub Leg) rules 5(2)(b); 74 2. Civil Procedure Rules (cap 21 Sub Leg) **Advocates** *Mr Ibrahim* for the Defendants.
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	Civil Case No 1097 of 1989
Case Outcome:	Application allowed
History County:	Nairobi
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Nyarangi, Gicheru & Kwach JJ A)

CIVIL APPLICATION NO NAI 182 OF 1989

MONTAGUE CHARLES RUBEN & 9 OTHERS.....APPELLANT

VERSUS

PETER CHARLES NDERITU .....RESPONDENT

ELIZABETH WARIARA NDERITU.....RESPONDENT

RULING

(In an intended appeal from the Ruling of the High Court at Nairobi, Shields J, dated 11th October 1989,

in

High Court Civil Case No 1097 of 1989)

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November 9, 1989, the following Ruling of the Court was delivered.

This is an application under rule 5(2)(b) of the Court of Appeal Rules brought by ten applicants – Montague Charles Ruben, Adriane Pietro Landra, Dodwell & Company (East Africa) Limited, Manaseeh Sidnick, Catherine Margaret Fisher, America Life Insurance Company, Bengt Beckman, The Government of the Kingdom of Sweden and Rosslyn Development Limited – (hereinafter called “the plaintiffs”). The plaintiffs are seeking a stay of the order of Mr Justice Shields made on 11th October, 1989, dismissing their application for a temporary injunction against the two respondents, Mr Peter Charles Nderitu and his wife, Elizabeth Wariara Nderitu (hereinafter called “the defendants”), under Order 39 of the Civil Procedure Rules.

A brief recapitulation of the salient facts as they emerge from the pleadings and affidavits is appropriate. The plaintiffs are registered owners of certain residential premises in Rosslyn Estate, a Nairobi suburb. The estate was developed as a scheme with Rosslyn Development Ltd as the flagship with covenants restricting the use and enjoyment of the individual plots.

The defendants also own a parcel of land in the same estate, Plot LR No 7788/13, which they acquired in September, 1973. Unlike the plaintiffs, who have developed their plots into residential premises, the defendants have decided instead to put the suit premises into commercial use by building a fashion college for about 100 girls, a majority of whom will be boarders at the proposed college. In pursuance of

this objective, the defendants have applied to the Nairobi City Commission for a change of user of the plot from residential to commercial purpose, which has been granted. The plans have been approved and construction work has already started on the suit premises. The plaintiffs claim that the defendants are bound by the covenant in the scheme restricting the use and enjoyment of the plots in the scheme to residential user only and that by changing to commercial user, they are in breach of the covenant in question and ought to be restrained by injunction. The covenant in question bound the purchasers:

“2(b) To use the premises hereby transferred and any buildings for the time being erected thereon for private residential purposes only and not to carry on or permit to be carried thereon any form of business.”

The defendants’ retort is basically that the covenants in question, this one included, are out of date, of no use to the present circumstances and of no benefit to the residents. In dismissing the plaintiffs’ application for temporary relief the learned judge remarked:

“I am not satisfied that the plaintiffs have established a *prima facie* case. The documents show that the basic idea behind the sub-division of the coffee farm was to create and preserve a European colony or ghetto by an attempted application of the rule in *Tulk v Moxhay*.”

A little later in his ruling he said:

“I likewise hold that there was in fact no scheme enabling the plaintiffs to seek the relief they seek in the plaint .... The right to have covenants enforced by injunction may be lost by a change in the character of the neighbourhood which renders the covenant incapable of attaining the object for which it was imposed and of no value. I feel that the defendants have established a *prima facie* defence with a strong probability of success on this ground.”

The plaintiffs have lodged a notice of appeal in accordance with rule 74 of the Rules of this Court and have bespoken proceedings to prepare the necessary record of appeal for filing. And so it is they who have come here in an attempt to stop the defendants from going ahead with the construction of the college pending the hearing and determination of their intended appeal.

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 *denovo* (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.

Applying these principles to the present application the justice of the matter as of now seem to us, without a doubt, to favour the applicants. They will contend at the appeal that the learned judge’s finding that the covenants in question are unenforceable is wrong in law. That in our view is a substantial issue which on any view cannot be said to be frivolous. It is certainly arguable.

And suppose the injunction does not issue and the defendants are allowed to proceed with the

construction of the college it is not hard to contemplate what the scenario would be in the event that their appeal was successful. It would amount to no more than a pyrrhic victory. It would be rendered nugatory. The college would have been built and the plaintiffs would be presented with a *fait accompli* (a thing that is over and done with). Such an unfortunate consequence should not be allowed to befall a litigant exercising his undoubted right of appeal.

On the material before us, we are satisfied that the intended appeal raises a serious question for submission to this Court on appeal. Secondly, in this case there is a very real possibility of the appeal being rendered nugatory if the reliefs sought by the plaintiffs are not granted.

Accordingly, we allow the application and make the following orders:

(1) The defendants by themselves, or their agents or servants or otherwise howsoever are hereby restrained from breaching or attempting to breach the restrictive covenants contained in the Transfer dated 19th day of June, 1952, pertaining to Plot L R No 7788/13 and in particular covenant 2(b) in the said transfer which requires the defendants and other owners:

“To use the premises hereby transferred and any buildings for the time being erected thereon for private residential purposes only and not to carry on or permit to be carried on thereon any form of business.”

until the hearing and determination of the intended appeal or further order;

(2) The defendants by themselves or their agents or servants or otherwise howsoever are hereby restrained from acting or attempting to act in pursuance of the change of user certificate dated 21st August, 1989, granted by the Nairobi City Commission, authorizing the defendants to construct and operate a fashion college on Plot L R No 7788/13, until the hearing and determination of the intended appeal or further order;

(3) Costs of the application to be in the appeal.

Finally, in view of what we have said about the nature of the Court’s jurisdiction under rule 5(2)(b) of the Rules of this Court, we cannot accede to the request by Mr Ibrahim, learned counsel for the defendants, that we should require the plaintiffs to give an undertaking as to damages. The plaintiffs are exercising their undoubted right of appeal and this right should not be fettered by the imposition of such a draconian measure.

These then are the orders of the Court.

Dated and Delivered at Nairobi this 9th Day of November, 1989

J.O NYARANGI

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JUDGE OF APPEAL

J.E GICHERU

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JUDGE OF APPEAL

R.O KWACH

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR