



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, GATEMBU & ODEK, J.J.A.)

CIVIL APPLICATION NO.136 OF 2016

BETWEEN

PETER NJUGUNA GACHIE.....APPLICANT

AND

ALICE KEMUNTO ONDIEKI.....1ST RESPONDENT

KENNEDY OBWAYA ONSONGO.....2ND RESPONDENT

(An application for stay of execution, stay of proceedings and temporary injunction pending the hearing and determination of an intended appeal from the entire Ruling, Decision and/or Order of the High Court of Kenya

at Nairobi (Mary M. Gitumbi, J.) dated 2nd May, 2014 in H.C.C ELC NO. 486 of 2015.)

RULING OF THE COURT

1. On 17th October, 2014 this Court granted prayers 3 and 4 of the applicants' application dated 23rd May, 2014 which were as follows:-

“3. That an order of stay of proceedings be granted to restrain the respondent from prosecuting an application for taxation of a bill of costs and/or any other proceedings in the superior court pending the hearing and determination of this application, appeal, further directions and/or orders of this honourable court.

4. That an order for temporary injunction be granted to restrain the respondent, his duly authorized agents, servants, employees, assigns and/or personal representatives from alienating, interfering with the 1st and/or 2nd applicant's ownership/enjoyment and/or possession of all that parcel of land known as Nairobi Block 62/258 pending the hearing and determination of this application, appeal, the suit in the superior court, further orders and/or directions of this honourable court.”

2. On 31st May, 2016, **Peter Njuguna Gachie**, the applicant, filed an application under **rules 42** and **57(2)** of this **Court's Rules** and **section 3A** and **3B** of the **Appellate Jurisdiction Act**, urging this Court to rescind and/or vary the orders issued on 17th October, 2014.

3. The application for variation of the aforesaid orders was made on grounds that the respondents have not filed a record of appeal; the record of appeal has not been filed, that the respondents are duty bound to follow up on the typed proceedings; that the respondents have lost interest in pursuing the appeal; that the applicant continues to be gravely prejudiced by the orders given on 17th October, 2014 as he cannot access his property known as **Nairobi/Block 62/259** where the respondents have partly erected their building; and that the failure to file a record of appeal is against the overriding objectives to facilitate the just, expeditious, proportionate and affordable disposal of the intended appeal.

4. The appeal was supported by the applicant's affidavit that amplifies the aforesaid grounds.

5. **Alice Kemunto Ondieki**, the 1st respondent, filed a replying affidavit on behalf of the respondents. She stated, *inter alia*, that on 6th May,

2014, her advocate applied for certified copies of proceedings and subsequently sent reminders on 6th February and 17th March, 2017; that her advocate's clerk has severally visited the court registry for follow up on the proceedings without any success; that it is apparent that the court file cannot be traced and the 1st respondent reasonably suspects that the file has deliberately been hidden.

6. **Mr. Ogunde**, who held brief for **Mr. Mutembei**, learned counsel for the applicant, urged the Court to find that there has been inordinate delay in filing the appeal and grant the orders sought.

7. **Mr. Jaoko**, learned counsel for the respondents, urged the Court to grant the respondents some time to have the trial court's file reconstructed, adding that it is the applicant who stands to benefit if the lost file will not be traced or a skeleton one opened, since the appeal will not be heard. According to counsel the application to vacate the orders issued on 17th October, 2014 has not been made in good faith.

8. From the record before us, it is evident that the real dispute between the parties herein is the location of a 5-storey building, which the respondents have put up, allegedly on their parcel of land known as Nairobi Block 62/258, but the applicant argues that it partly stands on his parcel of land known as Nairobi Block 62/259.

9. That dispute has in the past led to institution of a criminal case against the applicant where the respondents were the complainants. However, the criminal case was subsequently withdrawn by the Director of Public Prosecutions.

10. The applicant had filed a suit against the respondents for encroachment upon his parcel of land and obtained an order for a mandatory injunction to compel the respondents to demolish the part of the building that is standing on his land.

11. The respondents filed a notice of appeal to this Court, on which they anchored an application for an interlocutory injunction to restrain the applicant from interfering with their property pending hearing and determination of an intended appeal. This Court was satisfied that the intended appeal was arguable and that unless the orders sought were granted, the intended appeal, if successful, would have been rendered nugatory. The Court therefore indulged the respondents.

12. Almost five years thereafter, the intended appeal is yet to be filed. The applicant says that the respondents have been indolent and have not acted diligently. On the other hand, the respondents have argued that the trial court's file is missing and believes that the applicant may have compromised some junior judicial officers at the registry to cause the file to "disappear." We however, hasten to point out that there is no evidence to that effect and the respondents' sentiments remain mere suspicions.

13. The respondents have severally written to the Deputy Registrar, Environment and Land Court, requesting for certified copies of the proceedings. They have even paid a deposit to cover typing charges but there has been no formal response to the said request. It is safe to state that there has been no fair administrative action on the part of the Deputy Registrar in dealing with the request for proceedings in that the proceedings have neither been supplied nor has any written explanation for failure to do so been given. **Article 47** of the **Constitution** guarantees every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

14. **Article 47 (2)** of the Constitution states as follows:-

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action

The Fair administrative Action Act, 2015 amplifies this right.

15. The applicant has a decree in his favour but is unable to enjoy the fruits of his judgment. On the other hand, the respondents have a constitutional right of appeal but are unable to pursue it because they have not been provided with the trial court's proceedings. The court must carefully balance these competing rights.

16. In the circumstances, we do not think that the interests of justice would be best served by vacating the orders that were granted by this Court on 17th October, 2014. In our view, the right thing is to afford the respondents a limited period of time to do all they can to file their appeal.

17. In that regard, we hereby direct that the appeal be filed within thirty (30) days from the date hereof, failing which the orders issued by this Court on 17th October, 2014 shall stand vacated.

Each party shall bear their own costs of this application.

Dated and delivered at Nairobi this 8th day of November, 2019.

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

J. OTIENO ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR