



Cosie Holding Ltd v Cabinet Secretary Ministry of Lands, Housing and Urban Development & 3 others (Civil Appeal (Application) E208 of 2023) [2024] KECA 28 (KLR) (25 January 2024) (Ruling)

Neutral citation: [2024] KECA 28 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E208 OF 2023
SG KAIRU, F TUIYOTT & JW LESSIT, JJA
JANUARY 25, 2024**

BETWEEN

COSIE HOLDING LTD APPLICANT

AND

THE CABINET SECRETARY MINISTRY OF LANDS, HOUSING AND URBAN DEVELOPMENT 1ST RESPONDENT

THE CABINET SECRETARY MINISTRY OF TRANSPORT . 2ND RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY 3RD RESPONDENT

CHINA ROAD & BRIDGE CORPORATIONS 4TH RESPONDENT

(An application for stay of execution of the judgment of the Environment and Land Court at Nairobi (Komingoi, J.) delivered on 16th March 2023 in ELC Suit No. 1250 of 2014)

RULING

1. In its application dated August 8, 2023, the applicant Cosie Holdings Limited, seeks the following orders: stay of execution of the judgment by Justice Komingoi in ELC suit No. 1250 of 2014; “stay of execution” restraining the Chief Land Registrar from cancelling the applicants Title L.R. No. 209/11802 until the application and appeal is heard and determined; and “stay of execution” restraining the respondents from proceeding with the taxation of their respective bills of costs until the application and the appeal is heard and determined.
2. During the hearing of the application before us on 1st November 2023, the parties were represented by learned counsel. Mr. Wanjohi appeared for the applicant. Mr. Motari appeared for 1st and 2nd respondents while Miss. Kwamboka appeared for the 3rd and 4th respondents. They relied entirely



on their respective written submissions. We have considered the application, the affidavits, and submissions.

3. In the judgment the subject of the present application delivered on 16th March 2023, the Environment and Land Court (ELC) (Komingoi, J.), dismissed the applicant's suit against the respondents in which the applicant had sought, among other reliefs, orders to restrain the respondents from encroaching or trespassing or building a road on the property known as L.R. No. 209/11802, Mombasa Road, Nairobi along Likoni Road (the property); and a declaration that the respondents had unlawfully trespassed, encroached and unlawfully acquired the said property and the same should be deemed as compulsory acquisition for which the applicant should be compensated at the current market value.
4. In the same judgment, the ELC allowed the 1st and 2nd respondent's counterclaim and declared that the property is a public utility under the custody of the Ministry of Transport and Infrastructure and Kenya National Highways Authority and the same cannot be alienated for private use. The court also declared that the allocation and subsequent registration of the applicant as proprietor of the property was irregular and tainted with fraud and directed the Chief Land Registrar to cancel the applicant's title within 90 days.
5. The learned Judge held that the applicant could not have lawfully acquired the property as it had been set aside for public use before a title was issued to it; that the applicant was aware that the property comprised a portion which was on the road reserve but went ahead to acquire it; that the applicant failed to demonstrate that it was an innocent purchaser who should be compensated; and that the overall public interest outweighs all other interests.
6. Referring to the applicant's memorandum of appeal, counsel for the applicant urged that the appeal is arguable; that the applicant will demonstrate that the Judge erred in failing to find that the applicant was an innocent purchaser for value without notice having undertaken due diligence prior to purchasing the property and that the Judge erred in holding that the property is a public utility.
7. Although, counsel for the respondents contested that the appeal is arguable, based on those complaints, we are satisfied that the intended appeal is not frivolous. We bear in mind that an intended appeal is not one that will necessarily succeed. See *Stanley Kang'ethe Kinyanjui vs. Tony Ketter & 5 others* [2013] eKLR.
8. As to whether the intended appeal will be rendered nugatory, in *Reliance Bank Ltd vs. Norlake Investments Ltd* [2002] 1 EA 227, the Court stated that whether an appeal will be rendered nugatory depends on whether what is sought to be stayed if allowed to happen is reversible. Anthony Kusimba, a surveyor of the 3rd respondent deposed in his replying affidavit that the ELC directed that the title in favour of the applicant be cancelled within 90 days; that the 90 days have since lapsed as the impugned judgment was delivered on March 16, 2023 and the title therefore stands cancelled. It was however not demonstrated that order on cancellation has in fact been executed.
9. Counsel for the 3rd and 4th respondents submitted, without contest, that the Mombasa Road/Likoni Road/Southern By- Pass interchange road situated on part of the property is complete and it would be therefore futile to grant an order of stay of the judgment. We agree. Accordingly, the order we are minded to make, which we hereby do, is an order in terms of prayer 3 of the application dated 8th August 2023 restraining the Chief Land Registrar from cancelling, unless he has already done so, the applicant's title L.R. No. 209/11802 pending the determination of the applicant's appeal. The application dated 8th August 2023 succeeds to that extent only.
10. The costs of the application shall abide the outcome of the appeal.
Orders accordingly.



DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JANUARY 2024

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

