



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL**

**AT NAKURU**

**CORAM: KOOME, M'INOTI & MURGOR JJA)**

**CIVIL APPLICATION NO.107 OF 2019**

**BETWEEN**

**KIPSIGIS TRADERS LIMITED.....APPLICANT**

**AND**

**MWANGI MUHERIA.....1<sup>ST</sup> RESPONDENT**

**HON.ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**NATIONAL LAND COMMISSION.....3<sup>RD</sup> RESPONDENT**

*(Application for stay of execution of the judgment and decree of the*

*Environment and Land Court delivered by Hon. Jane Onyango J.*

*on 23<sup>rd</sup> May, 2019 at Kericho in ELC No. 53 of 2014)*

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**RULING OF THE COURT**

In this Notice of Motion dated 4<sup>th</sup> July 2019 predicated on *rule 5(2) (b)* of *Court of Appeal Rules*, the applicant, *Kipsigis Traders Limited* has sought orders for stay of execution against the judgment and decree of the Environment and Land Court (*Onyango, J*) pending hearing and determination of *Nakuru Civil Appeal No. 45 Of 2019* to restrain the respondent from alienating, transferring, disposing off or interfering in any manner with the titles of *Kericho/Municipality Block 5/441 and 442 (the suit properties)*.

The Motion is premised on the grounds set out in the application and the affidavit in support sworn by *Prakash B. Patel* and the applicant's written submissions, with the applicant's contention being that following their allocation, the suit properties were sold by the original allottees to the applicant in 1994. The applicant was thereafter registered as proprietor of the suit properties under the Registration of Titles Act. Later the titles were converted to Leases in the year 2014 under the Land Act of 2012. So as to secure the ownership of the suit properties, the applicant filed a suit in the Environment and Land Court. In response, the respondents' denied the applicant's claim and at the same time filed a counterclaim seeking a declaration that the suit properties were public land; orders of cancellation of the titles issued to the applicant; and orders for a permanent injunction to restrain the applicant from interfering with the respondents' peaceful enjoyment of the suit properties.

Upon determining the dispute, the learned judge dismissed the applicant's suit, found in favour of the respondents' counter claim and granted the orders as sought. The applicant was aggrieved, by the judgment and lodged an appeal against the lower court's decision.

It also filed this motion seeking a stay of execution of the trial court's orders. The applicant contends that, the appeal is arguable and has high chances of success. According to the grounds set out in the draft Memorandum of Appeal, the applicant faults the trial judge for concluding on the one hand that the 1<sup>st</sup> respondent failed to comply with the mandatory provisions of the law only to thereafter turn around and allow the respondent's counter-claim over ownership of the suit properties; that furthermore, the learned judge did not consider the evidence that was before the court.

The applicant also asserted that in view of the trial court's orders, it is apprehensive that the respondents will proceed to effect a transfer of the titles in their favour, and there is every danger that they will dispose of the suit properties which would render the appeal nugatory or relegate it to an academic exercise in futility if the application was not allowed.

None of the respondents filed any replying affidavit or submissions. In so far as applications filed under **rule 5 (2) (b)** of this Court's rules are concerned, the threshold to be satisfied, as exemplified in the case of **Republic vs Kenya Anti-Corruption Commission & 2 others [2009] eKLR**, is that;

***“The Court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the Court that first, that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the Court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds the results or success could be rendered nugatory.”***

Upon considering the application, the affidavit in support of the application and submissions, the applicant's grievances are that the learned judge failed to consider all the evidence that was before the court. If indeed this is the case, then, we satisfied that the appeal is arguable.

As concerns the contention that the respondent will transfer the suit properties into its name and proceed to dispose of them, we consider that, highly unlikely from the evidence on record. This is because, the suit properties are currently home to the Kericho Vocational and Rehabilitation Centre, which provides vocational training to persons living with disabilities in the Rift Valley and which has been in existence since 1972; the Centre is operational, and the 1<sup>st</sup> respondent is a Manager who resides in one of the houses. We are persuaded that the applicant's fear that the respondents will transfer the titles and later dispose of the suit properties on which stands a vocational training facility for disabled persons is rather farfetched. We accordingly do not see how the appeal would be rendered nugatory.

As such, the applicant having failed to satisfy the second criterion, we decline to grant the order of stay of execution sought. The motion dated 21<sup>st</sup> December 2021 fails, and is dismissed with costs to the respondent.

***It is so ordered.***

**DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021.**

**M.K. KOOME**

.....

**JUDGE OF APPEAL**

**K. M'INOTI**

.....

**JUDGE OF APPEAL**

**A. K. MURGOR**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**