



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, SICHALE & KANTAL, J.J.A)

CIVIL APPLICATION NO. 282 OF 2019

BETWEEN

TARABANA COMPANY LTD.....APPLICANT

AND

HARCHARAN SINGH SEHMI.....1ST RESPONDENT

HARBHAJAN SINGH SEHMI.....2ND RESPONDENT

JASWRAN SINGH.....3RD RESPONDENT

ROSPATECH LTD.....4TH RESPONDENT

THE CHIEF LAND REGISTRAR.....5TH RESPONDENT

THE NATIONAL LAND COMMISSION.....6TH RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....7TH RESPONDENT

THE ATTORNEY GENERAL.....8TH RESPONDENT

(Being an application for stay of execution pending the hearing and determination of

an intended appeal from the judgment of the Environment and Land Court

at Nairobi (Bor, J.) dated 22nd July, 2019

in

ELC Case No 1311 of 2014)

RULING OF THE COURT

[1] The motion before us is brought by *Tarabana Company Ltd* (applicant). It principally seeks an order of stay of execution of the judgment and orders of Bor, J. issued on 22nd July, 2019 in **ELC Case No 1311 of 2014** pending the hearing and determination of the intended appeal. The following orders are the ones the applicant wishes to appeal against: -

1) The court finds that the plaintiffs have proved their claim to the suit property on a balance of probabilities and grants an order of injunction restraining the 1st and 2nd defendants by themselves, their servants, agents, tenants or other persons claiming from them, from occupying, entering, charging, alienating or in any manner dealing with LR. No 209/2759/9 (I.R No 6477).

2) *The proprietorship section of the land register for L.R. No. 209/2759/9 (I.R No. 6477) is to be changed from the 2nd defendant to reflect the plaintiffs as the lessees of this land upon payment by the plaintiffs of the requisite registration and other fees. The 2nd defendant is directed to arrange to have the suit property discharged within 3 months of the date of this judgment to enable the 3rd defendant register the plaintiffs as proprietors of this land.*

3) *The 1st and 2nd defendants and their agent, servants or tenants will be evicted by the plaintiffs three months from the date of this judgment. The eviction will be done in strict compliance with the law.*

4) *The plaintiffs failed to prove the claim for special damages of Kshs.1,000,000/= per month as mense profits, the court declines to grant this prayer. In the court's view, general damages in the sum of Kshs.25,000,000/= is reasonable to compensate the plaintiffs for the loss they suffered when their structures on the suit property were demolished and their equipment destroyed by the 1st defendant's agents. The court awards the plaintiffs this sum against the 1st defendant. The plaintiffs are awarded the costs of this to be borne by the 1st defendant.*

5) *The 2nd defendant derived its title from the 1st defendant whose title to the suit property has been successfully challenged in this suit. The 2nd defendant's counterclaim has no merit. It is dismissed with no order as to costs."*

[2] Aggrieved by the said orders, the applicant filed a Notice of Appeal almost immediately and the instant motion which is brought under the provisions of **Rule 5 (2) (b)** of this Court's Rules. The motion is supported by the grounds stated in the body thereto which are elaborated by the matters deposed to in the supporting affidavit sworn on 27th August, 2019 by **Charles Kiri Thube**, a director of the applicant. It is stated that the applicant is in possession of **LR No. 209/2759/9 (I.R No 6477)** (suit premises); that the applicant borrowed a loan from Prime Bank Ltd using the suit premises as security to construct a mixed use storied building thereon and to use the rental income to service the loan. That if the order of eviction is carried out, the applicant and its tenants will be prejudiced.

[3] On the arguability of the appeal, it was stated that the applicant is the registered proprietor of the property known as **LR No. 209/2759/9 (I.R No 122963)** which they purchased from **Rospatech Ltd** (4th respondent) vide an agreement of sale dated 24th March, 2014. That prior to purchasing the suit property it is deposed that the applicant carried out a search and found the suit property was allocated to the 4th respondent by the Government of Kenya in the year 2010. A transfer was subsequently registered and the applicant took possession of the suit premises and obtained a loan of Ksh. 61 million. The applicant therefore maintains that his title is indefeasible under the provisions of **Section 26(1)** of the Land Registration Act; this is because there was no proof of fraud or misrepresentation on the part of the applicant to warrant the cancellation of title. The Judge is also faulted for usurping the power of the National Land Commission by extending the lease.

[4] The motion was supported by the 4th, 5th, 7th and 8th respondents although none of them filed a replying affidavit. The 6th respondent, the **National Land Commission** did not file a replying affidavit nor did they attend Court during the hearing despite having been served with a hearing notice. The 1st – 3rd respondents opposed the application vide a replying affidavit sworn by **Harcharan Singh Sehmi** on 23rd September, 2019. It is the position of the 1st to the 3rd respondents that the applicant does not have an arguable case.

[5] The 1st to the 3rd respondents maintained that the title to the suit premises was obtained fraudulently through a corrupt scheme of misrepresentation and therefore the ELC Judge had jurisdiction to make the orders it issued which were supported by cogent evidence of ownership of the suit premises from 1968. In addition, there was evidence of a very concerted effort sustained over the years by the 1st - 3rd respondents to renew the lease over the suit property. They further contended that the applicant started construction on the suit property when the suit was pending while it was aware of the risk involved which the applicant ignored so as to gain advantage. Moreover the suit property has always belonged to the 1st - 3rd respondent since 1968 and the claim that the applicant purchased it for value without notice of defect in the title was correctly rejected by the trial court.

[6] As regards the jurisdiction of the ELC Judge to issue the orders complained about, it is stated by the 1st - 3rd respondents that the applicant had refused the **National Land Commission** to investigate the transfer of the title while arguing the matter was before the ELC Judge and now that the court had ruled on the matter, they are merely blowing hot and cold at the same time. Lastly they poured cold water on the proposed grounds of appeal which in their opinion were not arguable as the purchase prices indicated in the sale agreement and the transfer differed with a huge margin which was a manifestation of a fraudulent transaction. Also the applicant obtained a loan when the matter was still pending trial which was meant to give the applicant an advantage.

[7] During the hearing, **Mr. Chivai** and **Ronald Wakhisi** appeared for the applicants and they relied on the applicants affidavit in support of the motion as well as the skeleton submissions and list of authorities. **Mr. Chivai** highlighted the applicant's case by emphasizing that there is an arguable appeal in that the applicant was a *bona fide* purchaser for value without notice of any defect in the title of the property and the trial court did not find any fault on the applicant. Counsel cited a persuasive authority by the Court of Appeal of Uganda in the case of **Katende vs. Haridar & Co Ltd** which was cited as authority in **Lawrence Mukiri vs. Attorney General & 4 Others** [2013] eKLR where it was held that:-

“...A bona-fide purchaser for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on bona-fide doctrine, he must prove the following:-

- a) He holds a certificate of title**
- b) He purchased the property in good faith**
- c) He had no knowledge of the fraud**
- d) The vendor had apparent valid title**
- e) He purchased without notice of any fraud**
- f) He was not party to any fraud.”**

Counsel went on to argue that the applicant's title was indefeasible under the provisions of **Section 26(1)** of the **Land Registration Act**. Moreover even if the Judge had found that the lease issued to the 4th respondent who sold the suit premises to the applicant was irregularly acquired, the court had no jurisdiction to allocate the lease to the 1st to the 3rd respondents.

[8] On the nugatory aspect, counsel argued that if the order of stay is not granted the applicant will be divested of the ownership rights without compensation for the amount spent in the development of the suit premises. The applicant has a loan owed to Prime Bank and the order requiring the applicant to discharge the charge within three (3) months was not only inequitable, impractical but also unconscionable. Counsel cited the case of **Salaries Remuneration Commission vs. Parliamentary Service Commission & 4 Others** [2019] eKLR for the proposition that the key objective in granting an order of stay is to preserve *status quo* pending the hearing and determination of an intended appeal. Thus, counsel posited that if stay is not granted the property shall revert to the 1st - 3rd respondents as proprietors; that if steps towards execution are taken, the applicant will be evicted, and it will be unable to service the loan with Prime Bank.

[9] The motion was also supported by the 5th, 7th and 8th respondents who were represented by their learned counsel **Mr. Njoroge**. Counsel relied on the written submissions and list of authorities to present the position that the intended appeal by the applicant was arguable. Those arguable points being, whether the applicant who was a *bona-fide* purchaser for value and who was not found to be part of the fraud can be dispossessed of the suit property. It was the 4th respondent who was found to be fraudulent and there was no findings of fraud as far as the applicant was concerned. Counsel cited many cases among them the case of **Arthi Highway Developers Ltd vs. West End Butchery Ltd & 6 Others** [2015] eKLR. It stated as follows: -

“The trial court held, following previous court decisions, that an innocent holder of legal title to land cannot be dispossessed of that interest by a fraudster, and that Section 23 protects “Title issued to a purchaser upon the transfer or transmission by the proprietor thereof.”

[10] Counsel for the State went on to submit that the appeal would be rendered nugatory if the orders of stay of execution pending appeal are not granted as that would not serve the cause of fairness until the appeal was heard. Counsel cited the Supreme Court case in **Board of Governors, Moi High School, Kabarak & Another vs. Malcolm Bell** [2013] eKLR for the proposition that a court needs to evaluate the convenience of granting interlocutory reliefs within an appeal so as not to render it nugatory. In this regard counsel urged us to consider the impact of execution where the applicant was ordered to discharge the loan it utilized to construct a multi-story building which generates income to pay a loan and the fact that Prime Bank who charged the property as security are not parties to this application. Moreover the 1st to the 3rd respondents are individuals who might not be able to pay the money should the appeal be successful.

[11] The 4th respondent represented by **Mr. Kamau** learned counsel supported the motion by associating himself with the submissions made by the applicant and the 5th 7th and 8th respondents. In addition, counsel stated that the 4th respondent was also desirous of filing an appeal and in that respect had filed a notice of appeal.

[12] The motion was opposed by **Mr. Gichohi** learned counsel for the 1st and 3rd respondent; he indicated that the 2nd respondent had passed away on the 28th August, 2019. Counsel relied on a lengthy replying affidavit sworn by the 1st

respondent and his written submissions. In his highlights counsel detailed that the 10 grounds of appeal are not arguable; that the 4th respondent who purportedly sold the suit property to the applicant had no property to sell; that it was not also sold for value as the documents produced in court showed the suit property was sold for 12.5 million as per the sale agreement while the transfer indicated a sale price of 24 Million. Thus the applicant's title cannot be said to be indefeasible under **Section 26** of the **Land Act** as it was a product of fraud and misrepresentation. On the order that the lease was to be extended as per the order by court, counsel cited the case being **Judicial Review Case No. 290 of 2016** by which the applicant blocked any investigation on the title to be carried out by the 6th respondent as the applicant conceded the **ELC** Judge was seized with the matter and had jurisdiction to deal with all the issues. The applicant is now reprobating and acrobating.

[13] On the nugatory aspect, counsel submitted that there is no harm to be suffered by the applicant that can be equated to the trauma, inconvenience and a total loss of livelihood that has been suffered by the 1st - 3rd respondents to the extent that the 2nd respondent died while pursuing justice. Further that the applicant knew or had reason to believe that the title to the 4th respondent was fraudulently acquired demonstrated by its impunity when it proceeded to construct on the suit property when the case was going on; taking a loan to secure the property while the case was ongoing and there having been lack of consideration paid as shown by the documents of transfer that demonstrated the property was not bought for value. Counsel urged us to dismiss the motion with costs.

[14] We have duly considered this application and the submissions by learned counsel. It need not be belaboured that in an application for stay of execution under **rule 5(2)(b)** of the Court of Appeal Rules, that the principles which will govern the exercise of our jurisdiction whether to grant stay or not, and bearing in mind that no two cases are alike; are that if stay is not granted, the intended appeal if not a frivolous one will be rendered nugatory. These principles are resolutely enunciated in the case of **Exclusive Estates Ltd. vs. Kenya Posts & Telecommunications Corporation & Another (2005) 1 EA 53** among others.

[15] Applying the principles stated above to the facts before us, we wish to state from the onset that it is not our wish to comment on the merits of the appeal. However, a casual look at the facts as revealed in the material presented before us in this application, we are not persuaded the appeal is arguable. This is because the suit premises was owned by the 1st - 3rd respondents who applied for extension of the lease and while their application was pending at the Lands Office, the same lease was allocated to the 4th respondent who sold it to the applicant. The 1st - 3rd respondents who were the leaseholders were not called by the Registrar of lands for a hearing before they were divested of their title which was purportedly allocated to the 4th respondent. The 1st - 3rd respondents were evicted from the suit land and while their suit was pending for hearing before the **ELC**, the applicant went ahead to charge the same property to procure a loan of Ksh. 60 million and to build a multi-storied building. We also have entertained doubts as to whether the applicant was an innocent purchaser for value in view of the differential values indicated in the sale agreement and the transfer documents of the suit property but that is not for us to determine at this stage.

[16] We need not say more at this interlocutory stage save to say that on the nugatory aspect, the applicant is blowing both hot and cold in that it had no patience to wait for the trial before the **ELC** Judge before embarking on the construction of a multi-storied building and securing a loan with the suit premises. The applicant also objected to any investigations on the way the suit premises was allocated claiming that the **ELC** had jurisdiction to deal with all the issues. Regrettably now that the shoe is on the other side, the applicant claims that there be a stay of execution before the decree is executed. On our part, we find no merit in these arguments.

[17] That being our view of the matter, consequently, the application for stay is and must be dismissed with costs to the 1st - 3rd respondents.

Dated and delivered at Nairobi this 6th day of March, 2020.

M. K. KOOME

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR