



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIAGE, GATEMBU & MURGOR, JJ.A)

NAIROBI CIVIL APPLICATION NO. 128 OF 2020

BETWEEN

TAMARIND MEADOWS LIMITED.....APPLICANT

AND

WIBESO INVESTMENTS LIMITED.....1ST RESPONDENT

NOVICOME LIMITED.....2ND RESPONDENT

CHIEF LANDS REGISTRAR.....3RD RESPONDENT

DIRECTOR, DIRECTORATE OF

CRIMINAL INVESTIGATIONS.....4TH RESPONDENT

DIVISIONAL CRIMINAL INVESTIGATIONS

OFFICER, CENTRAL.....5TH RESPONDENT

DANIEL NJUKI.....6TH RESPONDENT

THE HON. ATTORNEY GENERAL.....7TH RESPONDENT

(Being an application for a stay of execution of judgment pending lodging, hearing and determination of an intended appeal from the Judgment and Decree of the Environment and Land Court at Machakos

(O.A. Angote, J.) delivered on 24th April, 2020 in Environment and Land Court

at Machakos: ELC Case No. 226 of 2017)

RULING OF THE COURT

1. In a judgment delivered on 24th April 2020 in ELC Case No. 226 of 2017, the Environment and Land Court at Machakos (*O.A. Angote, J.*) upheld the 1st respondent’s title to the property known as L.R. No. 18469 by declaring that a Grant No. IR 72481 issued to the 1st respondent is the valid and genuine title over the property. In the same judgment, the ELC declared that Grant No. IR 71611 in respect of the same property held by the applicant is fraudulent, invalid, null and void. The court ordered and directed the applicant and all those claiming under it to vacate the property within 60 days or face forceful eviction.

2. Intending to challenge that judgment on appeal to this court, the applicant has filed a notice of appeal. It has also filed the present application, dated 18th May 2020, under Rule 5(2)(b) of the Court of Appeal Rules. It seeks an order for stay of execution of that judgment

pending the hearing and determination of the intended appeal.

3. It is the applicant's case that between 2009 and 2010, it constructed 69 houses on the suit property, sold 45 of them and let out 24; and that the houses are occupied by families named in the application, who will be evicted, unless execution of the judgment is stayed. The application is supported by an affidavit and supplementary affidavit sworn by Robert Darby, a shareholder and member of the board of directors of the applicant setting out, at length, the background to the matter and the matters in controversy.

4. Counsel for the applicant has submitted that this is a proper case for this Court to exercise its discretion under Rule 5(2)(b) of the Court of Appeal rules and grant the orders sought; that the intended appeal is arguable as the judgment of the ELC is wrongly based on opinion evidence of a police officer that was expunged from the record and which is non-binding on the court; that unless the orders of stay of execution are granted, the intended appeal will be rendered nugatory; that it is not in dispute that the applicant has been in possession of the property since 2008, obtained a loan to undertake the construction of the 69 houses which are occupied by owners who have bought them as well as by tenants; and that if the orders are not granted the property will be out of reach of the court, should the appeal ultimately succeed.

5. In opposition to the application, it was submitted for the 1st and 2nd respondents, that the prerequisites for the grant of the orders sought have not been met; that there is no dispute that the 1st Respondent was registered on 13th March 1997 as the original grantee of the property, whose user is light industrial purposes, and that it transferred the property to the 2nd Respondent, its sister company, on 8th August, 2003; that the 2nd respondent continues to hold the title to date whilst the applicant is a trespasser; and that allowing the applicant to continue collecting rent while depriving the 2nd Respondent of its property will be gravely unjust.

6. The application is also opposed through replying affidavit sworn by George Gachihi who was a Registrar in the Department of Lands at the material time as well as a replying affidavit by Edwin Wafula, Land Registrar. It is submitted that the intended appeal is not arguable; that the 3rd respondent which has the obligation of making entries and registering dealings on the register has confirmed that person from whom the applicant claims to have purchased the property had no right or interest over the property capable of being transferred to the applicant

7. We have considered the application, the affidavits, and the submissions and authorities cited by counsel. In an application of this nature, the applicant needs to demonstrate that the intended appeal is arguable and that if we decline to grant the orders sought, the intended appeal will be rendered nugatory. As this Court stated in *Ishmael Kagunyi Thande vs. Housing Finance of Kenya Limited Civil Application [2007]eKLR*:

“Two principles guide the Court in the exercise of that jurisdiction [under rule 5(2)(b) of the rules of the Court.] These principles are now well settled. For an application to succeed he must not only show his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of the appeal will be rendered nugatory.”

8. On arguability, some of the complaints raised against the impugned judgment are that it is based on opinion evidence that had been expunged; and that the Judge failed to appreciate that applicant has an indefeasible title to the property. We are satisfied that the intended appeal is not frivolous. It is indeed arguable.

9. As to whether the appeal will be rendered nugatory unless we grant the orders sought, we think it will, considering there are numerous occupants of the property who are at risk of eviction unless the judgment is stayed and the appeal eventually succeeds.

10. We accordingly allow the application dated 18th May 2020 and hereby order that there shall be a stay of execution of the judgment of the Environment and Land Court dated and delivered on 24th April 2020 pending the hearing and determination of the intended appeal to this Court against the said judgment. The costs of the application shall abide the outcome of the appeal.

Orders accordingly.

Dated and delivered at Nairobi this 10th day of July, 2020.

P.O. KIAGE

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR