IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: ASIKE-MAKHANDIA, MUSINGA & GATEMBU, JJ.A.)

CIVIL APPLICATION NO. 78 OF 2020

BETWEEN

RIFT VALLEY MACHINERY SERVICES LIMITED.....APPLICANT

AND

AGRO COMPLEX (K) LTD .....1ST RESPONDENT

PETER KIMANI KUMARU..... 2ND RESPONDENT

JANE WAMBUI ..... 3RD RESPONDENT

REGISTRAR OF COMPANIES..... 4TH RESPONDENT

PRINCIPAL REGISTRAR OF TITLES ..... 5TH RESPONDENT

KINGS DEVELOPERS LIMITED..... 6TH RESPONDENT

JOSHUA GITARI MWANGI..... 7TH RESPONDENT

MUTUA MULI..... 8TH RESPONDENT

GEORGE NGUGI ..... 9TH RESPONDENT

ANDREW JACOB ONYANGO ONDIEK..... 10TH RESPONDENT

CHARLES ODHIAMBO AYORO ..... 11TH RESPONDENT

ALFRED OMONDI MOLA.....12TH RESPONDENT

AGRO COMPLEX KENYA LIMITED..... 13TH RESPONDENT

CHRISTOPHER KALE CHETALAM ..... 14TH RESPONDENT

ELISHA CHEBII CHESIYNA..... 15TH RESPONDENT

*(An application for stay of execution of the Judgment of the Land & Environment Court at Nairobi (**K. Bor, J.**) dated 17th January, 2020*

in

ELC Case No. 348 of 2008

as consolidated with

ELC Case No. 1018 of 2014)

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RULING OF THE COURT

Before us is a notice of motion application dated 12th March, 2020 in which the applicant prays for an order for stay of execution of the judgment of the Environment & Land Court **(K. Bor, J.)** delivered on 17th January, 2020 and a temporary injunction restraining the 1st respondent, its servants and agents from selling, offering for sale, disposing of or in any manner dealing with the parcel of land known as **L.R. No. 22140 Embakasi North** hereinafter **"the suit land".**

We shall limit our consideration of this application on the prayer for stay of execution as no submissions were made with regard to the prayer for injunction. The application is brought under Rules 5(2) (b) and 42 of the Court of Appeal Rules, Article 159(2) of the Constitution and Sections 3A and 3B of the Appellate Jurisdiction Act. It is premised on the grounds that; the applicant was aggrieved by the judgment of the trial court in which the learned Judge declared that; the 1st respondent was the true and *bona fide* owner of the suit land, that the applicant had no claim whatsoever upon the suit land and accordingly ordered that the title held by the applicant in respect of the suit land be cancelled.

The applicant pleads that it has an arguable appeal which shall be rendered nugatory if stay of execution is not granted. That the 1st, 2nd and 3rd respondents have extracted a decree of the impugned judgment and have threatened to execute the same, the effect of which will be to revoke/cancel the applicant's title. The applicant is apprehensive that in the event the appeal is successful it will be rendered nugatory as the respondents will alienate the suit property to third parties. That the application was brought without unreasonable delay.

The application was further supported by an affidavit of the same date sworn by **Aram Mbui**, the Managing Director of the applicant, in which he reiterated the grounds set out above, save that the 1st, 2nd and 3rd respondents had since advertised for sale of the suit land.

The application was opposed. In their replying affidavit sworn by the 2nd respondent on behalf of the other respondents and in his capacity as a Director of the 1st respondent, it was deposed that the 1st respondent was the true owner of the suit land. That, one **Mr. Wilfred Mingi Waweru** (deceased), a Director of the 1st respondent reserved the 1st respondent's name with the 4th respondent in 1989 and was issued with a Certificate of Incorporation No. 81005 and commenced business transactions with the said name. That on 27th February, 1990 the deceased applied for allotment of the suit land and was issued with a letter of allotment by the Commissioner of Lands. Through a letter dated 3rd April, 1996 the 1st respondent accepted the allotment and paid the required premiums. The suit land was then surveyed but the Deed Plan got misplaced. The Directors of the 1st respondent then approached the Director of Surveys and a new grant was issued on 30th October, 2007. That the said grant has never been revoked and they have never entered into a transaction for its disposal. That the applicant has not demonstrated that it has an arguable appeal or that it will be rendered nugatory if stay is not granted. That the suit property is underdeveloped and has a specific monetary value. That the present application is a delaying tactic employed by the applicant to deny the respondents enjoyment of the fruits of the judgment.

The application was disposed of by way of written submissions filed by Messrs. Mohammed Mungai, advocates for the applicant, Messrs. Muma and Kanjama, advocates for 1st, 2nd and 3rd respondents, and Messrs. Nyachae & Ashitiva, advocates for the 6th respondent. Those submissions merely reiterated and expounded on the grounds in support of the application and the replying affidavit. We have nonetheless keenly read and considered them. Suffice to add that the 6th respondent supported the application. The other respondents neither filed their responses or submissions.

Having considered the application, the grounds and respective affidavits, the submissions by counsel and the law, we must state from the onset that the jurisdiction of this Court under Rule 5(2) (b) to grant stay of execution, injunction or stay of proceedings is original, independent and discretionary. The discretion is exercised judiciously and with reason; not on the craze of impulse or pity. Rule 5(2) (b) is a procedural innovation designed to enable the court to preserve the subject matter of an appeal where one has been filed or an intended appeal where the notice of appeal has been filed. In the case of **Stanley Kang'ethe Kinyanjui vs Tony Keter & 5 others [20123] eKLR,** this Court stated *inter alia*:

> ***"That in dealing with Rule 5(2) (b), the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the judge's discretion to this Court." The first issue for our consideration is whether the intended appeal is arguable. This Court has often stated that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous; a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable."***

For the applicant to be successful, it must be shown that there is an arguable appeal which is not frivolous. Such an applicant, upon satisfying that principle, has the additional duty to demonstrate that the appeal, if successful, would be rendered nugatory in the absence of an order of stay. (See: **Trust Bank Limited & Ano. v Investech Bank Limited & 3 Others, Civil Application Nai. 258 of 1999** (unreported)).

Further, in determining whether the appeal is arguable or not, it is trite that by arguable appeal, it does not mean the appeal or intended appeal must be one that ought to succeed, but rather one that raises a serious question of law or a reasonable argument deserving consideration by the court. In **Dennis Mogambi Mang'are v Attorney General & 3 Others, Civil Application No. NAI 265 of 2011 (UR 175/2011**) this Court held that:

> ***"An arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court's consideration."***

On whether the applicant has established an arguable appeal, we have considered the applicant's annexed draft memorandum of appeal. Among the issues raised and emphasized by the applicant which we think merit consideration by this Court is whether the learned Judge failed to appreciate the glaring omissions and improprieties by the 1st, 2nd & 3rd respondents in her determination, and whether the trial court erred in holding that the 1st and 13th respondents with strikingly similar names could not have been validly registered as the repealed Companies Act did not allow double registration of companies and that the 1st respondent was able to claim to have held the suit property 12 years before its registration. This position has been vigorously refuted by the 1st, 2nd & 3rd respondents in their replying affidavit and submissions. This can only suggest that it is an ardent issue that deserves a full consideration for it to be effectively determined. Therefore, this and the other issues raised are in our considered view not frivolous.

On whether the appeal will be rendered nugatory should the impugned judgment not be stayed, we appreciate that factors which can render an appeal nugatory should be considered on case by case basis, and in doing so, the court is bound to consider the conflicting claims of both sides. It is common ground that a Decree has been extracted and the 1st, 2nd & 3rd respondents intend to execute the same. Indeed, they have since advertised the suit land for sale. There is no doubt that there is an imminent risk of execution. The applicant is apprehensive that the intended appeal will be rendered academic if the execution of the decree is not stayed and that it will be in the interest of justice that the status quo be maintained. In **Reliance Bank Ltd v Norlake Investments Ltd [2002] E.A. 227**, this Court while faced with almost similar facts stated*:*

> ***"To refuse to grant an order of stay to the applicant would cause to it such hardships as would be out of proportion to any suffering the respondent might undergo while waiting for the applicant's appeal to be heard and determined."*** *(Emphasis ours).*

In **Mukuma v Abuoga [1988] KLR 645**, this Court held *inter alia*:

> ***"The discretion of the Court of Appeal under Rule 5 (2) (b) of the Court of Appeal Rules is at large but the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render it nugatory."***

The applicant has demonstrated that it will be near impossible for them to be compensated in damages should the intended appeal be successful as its title to the suit property would have been cancelled and there is a possibility that the suit property will be transferred to innocent third parties to whom they may not be able to recover.

From the foregoing, we are satisfied that the applicant has met the threshold, the twin principles for the grant of a stay of execution of the judgment and decree pending the hearing and determination of the intended appeal.

Accordingly, the application dated 12th March, 2020 is allowed in terms that there shall be stay of execution of the judgment and decree of the ELC No. 348 of 2008 consolidated with ELC No. 1018 of 2014 dated 8th January, 2020 until the hearing and determination of the intended appeal. Costs shall abide the outcome of the intended appeal.

Dated and delivered at Nairobi this 7th day of August, 2020.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb.

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR