



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: OKWENGU, WARSAME & J. MOHAMMED, JJ.A)**

**CIVIL APPLICATION NO. 61 OF 2020**

**MUTHITHI INVESTMENTS COMPANY LIMITED.....APPELLANT/APPLICANT**

**VERSUS**

**THE COMMISSIONER OF PRISONS.....1<sup>ST</sup> RESPONDENT**

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

**COUNTY GOVERNMENT OF MURANGA.....3<sup>RD</sup> RESPONDENT**

(An application under Rule 5(2)(b) of the Court of Appeal Rules for the stay of execution pending the lodgment, hearing and determination of the appeal from the judgment and orders of the Environment and Land Court at Murang'a, Hon. J.G. Kimei Dated 27th January, 2020 in *E.L.C Petition No. 1B of 2017*)

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**RULING OF THE COURT**

**Background**

1. By way of a notice of motion dated 28th March, 2020, **Muthithi Investments Company Limited** (the applicant) urges this Court to exercise its discretion under **Rule 5(2)(b) of the Court of Appeal Rules** (this Court's Rules) and grant it orders in the main:

- a. That execution of the orders of Kemei, J. made on 27th January, 2020 ordering the revocation and cancellation of **Title Number Muranga Municipality Block 2/525** (the suit property) be and is hereby stayed pending the hearing and determination of this application;
- b. That the execution of the orders of the learned Judge made on 27th January, 2020 ordering the revocation and cancellation of the suit property be and is hereby stayed pending the hearing and determination of the intended appeal;
- c. That the execution of the orders of the learned Judge permanently restraining the applicant from interfering with the suit property be and is hereby stayed pending the hearing and determination of this application;
- d. That the execution of the orders of the learned judge permanently restraining the applicant from interfering with the suit property be and is hereby stayed pending the hearing and determination of the intended appeal; and
- e. That the costs of this application be provided for.

2. **The Commissioner of Prisons** is the 1st respondent, the **Hon. Attorney General** is the 2nd respondent while the **County Government of Muranga** is the 3rd respondent herein. The application is supported by the affidavit of **Mike Maina Kamau**, a Director of the applicant and is based on the grounds *inter alia* that in 1997 the applicant purchased the suit property and was duly registered and issued with a Certificate of Lease and has been in exclusive possession of the suit property for over 16 years; that the applicant has continued to pay all the requisite dues to the 3rd respondent who continued to demand rates from the applicant to-date; that during the proceedings at the trial court the applicant adduced evidence that it followed all the laid out procedures in purchasing the suit property and is a bona fide purchaser for value; that the trial court ordered that the applicant's title be revoked and declared that the suit property belonged to a Juvenile Remand Home; that the Juvenile Remand Home was not a party in the suit nor has it ever laid claim to the suit property; that the applicant stands to

lose its title to a non-party in the suit who has never laid any claim as to ownership of the suit property; that due to the imminent cancellation of the applicant's title and imminent eviction from the suit property this application is urgent; that the instant application has demonstrated arguable grounds that merit the grant of an order of stay of execution of the trial court's orders, absent which, the appeal will be rendered nugatory; that the applicant has an arguable appeal which will be rendered nugatory if the orders sought are not granted.

### **Submissions**

3. The application was heard by way of written submissions. Counsel for the applicant submitted that the instant application is arguable on the grounds *inter alia* that the learned Judge held that the suit property belongs to **Muranga Juvenile Remand Home** who was not a party to the suit and who had never laid any ownership claims to the suit property; and whether a title of a *bona fide* purchaser can be revoked and or cancelled where there is no proof of fraud or mistake in which the proprietor had knowledge of or was a party or substantially contributed to.

4. Counsel for the applicant submitted that the appeal will be rendered nugatory if the orders of stay are not granted as a transfer/cancellation of title shall be effected to an entity that has never laid claim to ownership of the suit property; that the character of the land will change and the Juvenile Remand Home may deal with the suit property in a manner that the applicant will completely lose title to the suit property; that granting the stay orders will cause no prejudice to the respondents as they have never been in possession of the suit property.

5. In the draft Memorandum of Appeal, the applicant assails the impugned judgment on the grounds that the learned Judge erred: in failing to hold that the applicant was a bona fide purchaser for value without notice; in failing to take into consideration that the applicant is a registered owner of the suit property; that the outcome of the trial was against the weight of the evidence adduced and in failing to take into consideration the majority decision of this Court in **Civil Appeal in No. 156 & 160 of 2013(Consolidated) Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 Others [2019] eKLR** which held that:

***“If a Certificate of Lease has been duly issued by the Registrar and if the owner is proved to have exercised due diligence at the point of acquisition, it is enough for the appellants to show that they acquired interests from the Vendors and did so in good faith without notice and did not participate in any fraud, and it is not one’s duty to ensure the accuracy of the information contained in the register.”***

***“...it would be contrary to the intent of the law and wholly unnecessary for a party seeking to acquire interest in and to go beyond the register to establish ownership and the history of the past transactions involving that land. It must be reiterated further that the only reason why the law requires keeping of land records is to afford a notice to the whole world of the status of the property.”***

6. Counsel for the 1st and 2nd respondents opposed the application and submitted that the impugned judgment was well reasoned and unambiguous and the draft memorandum filed by the applicant does not raise any legitimate question for resolution by this Court; and that the applicant has not demonstrated that it has an arguable appeal as no evidence has been adduced to support the claims raised in the memorandum of appeal. Counsel submitted that the intended appeal will not be rendered nugatory if the orders sought are denied and the appeal succeeds as the 1st respondent has been in occupation of the suit property since the lapse of the stay of execution granted by the Environment and Land Court.

7. Counsel for the 3rd respondent opposed the appeal and submitted that the orders sought in the instant application cannot be sustained as the suit property cannot be conveyed, damaged or alienated; and that even if execution proceeds, it has not been demonstrated that any loss or damage will be occasioned to the applicant, save for the amount claimed to have been paid by the applicant as land rent which is quantifiable and can be refunded.

### **Determination**

8. We have considered the application, the affidavits, the rival submissions, the authorities cited and the law. It is trite that in an application under **Rule 5(2)(b)** of this Court's Rules, the applicant must establish that there is an arguable appeal and secondly, that the appeal or intended appeal would be rendered nugatory if stay of execution is not granted –In **Ishmael Kagunyi Thande v Housing Finance Company Limited Civil Application No 156 of 2006 (UR)** these principles were restated thus:-

***“The jurisdiction of the court under rule 5(2) (b) is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. The principles are well settled. For an applicant 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.”***

9. On the limb of arguability, the applicant has availed a draft memorandum of appeal in which it has set out several grounds of appeal. The grounds are *inter alia* whether the learned judge erred in failing to hold that the applicant was a bona fide purchaser for value without notice; whether the learned Judge erred by finding that the suit property belongs to an entity who was not a party to the suit and who have never laid claim to the suit land; and in failing to take into consideration that the applicant is the registered owner of the suit property. It is clear that these grounds raise arguable issues and the applicant has therefore satisfied the first limb of arguability.

10. On the nugatory aspect, it is evident that the applicant is the registered owner of the suit property and stands at risk of losing the suit property to the Muranga Juvenile Remand Home, an entity that is not a party to the suit and which has not laid claim to the suit property. In the circumstances therefore, we find that there is merit in the applicant's contention that the intended appeal will be rendered nugatory if stay is not granted and the intended appeal succeeds.

11. In the circumstances, we are satisfied that the applicant has satisfied both limbs of the principle for granting an order of stay of execution. Accordingly, we allow the application and issue orders staying the execution of the judgment and decree of the Environment and Land Court dated 27th January, 2020 pending the hearing and determination of the intended appeal.

12. The costs of the application shall abide the outcome of the intended appeal.

**Dated and delivered at Nairobi this 20<sup>th</sup> day of November, 2020.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**M. WARSAME**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**