



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: ASIKE-MAKHANDIA, J. MOHAMMED & KANTAL, J.J.A.)**

**CIVIL APPLICATION NO. 124 OF 2020**

**BETWEEN**

**TINEK LIMITED..... 1ST APPLICANT**

**ABDINOOR SHERIFF AHMED.....2ND APPLICANT**

**AND**

**NATIONAL LAND COMMISSION ..... 1ST RESPONDENT**

**CHIEF LAND REGISTRAR.....2ND RESPONDENT**

**THE REGISTRAR OF TITLES.....3RD RESPONDENT**

**THE ATTORNEY GENERAL..... 4TH RESPONDENT**

**KENYA NATIONAL HIGHWAYS AUTHORITY.....5TH RESPONDENT**

**KHALIF KURIE HERIS..... 6TH RESPONDENT**

**ENGEN KENYA LIMITED ..... 7TH RESPONDENT**

**PETER NZUKI..... 8TH RESPONDENT**

(An application for stay of execution pending appeal from the Judgment of the Environment and Land Court of Kenya at Machakos (O.A. Angote, J.) dated 8th May, 2020 in **ELC Petition No. 60 of 2018**)

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**RULING OF THE COURT**

In a Judgment delivered on 8th May, 2020, **Angote, J.**, made an order of certiorari to remove to the court and quash the decision made by the 1st respondent (**National Land Commission**) and **Gazette Notice No. 11714** published on 9th November, 2018 by the said respondent was quashed. The Judge further declared that title to **Land Reference No. 337/1645** and subsequent titles **L.R. Nos. 337/3821-3838** were null and void and were cancelled. A prayer that the 1st and 5th respondent's (National Land Commission and Kenya National Highways Authority) be directed to enforce an award of **Kshs.197,985,519** in respect of the said property **L.R. No. 337/3838** was declined as was a prayer that the 1st applicant (**Tinek Limited**) be compensated for loss of the suit property.

In the Motion brought under **rule 5(2) (b)** of the **Rules of this Court** amongst other provisions of law it is prayed in the main that pending hearing and determination of the applicants' intended appeal there be a stay of execution of the decision of the Environment and Land Court declaring that title to L.R. Nos. 337/3821-3838 (inclusive) were null and void. In grounds in support of the Motion and in a supporting affidavit of **Abdinoor Shariff Ahmed**, a shareholder of the 1st applicant, it is said amongst other things that the applicant was not heard before its title was revoked; that the trial court gave orders that were not prayed for; that grounds for cancelling the title were not specifically pleaded nor proved; that the trial Judge erred in law and fact in imputing fraud and illegality on the mode of acquisition of the suit property; that the Judge should have found that the applicants were bona fide purchasers; that the Judge erred in failing to find that there was a violation of their rights under the Fair Administrative Actions Act; and at paragraphs p, q and r of the application: the applicant specifically averred that:

**“p. The Learned Judge having appreciated that the 1st Respondent did not accord the Applicants’ right to be heard before revoking the title of the suit property, the Judge misdirected himself by accepting 1st Respondent’s averments that the Applicants did not exhibit any documents of allocation of the suit land including letter of allotment and an approved part development plan since the Applicants would have easily proved their case if they were accorded right to be heard.**

**q. The Learned Judge erred in law by failing to satisfy himself that the grounds upon which a title can be impeached were not specifically pleaded and proved to the required standard before cancelling the title of the suit land and that the Applicants were not alleged or proved to be party to fraud, corrupt scheme or any wrong doing that could deprive them their title.**

**r. The Learned Judge erred in law and denied the Applicants a right to fair hearing by failing to address the issue of estoppel raised by the Applicants in the pleadings by the fact that an award had been given to the 1st Applicants to compensate it for compulsorily acquisition of a portion of its land.”**

It is also stated that by cancelling the title the suit property shall be placed beyond the reach of the applicants and that there is danger of re-allocation of the suit property to third parties and that would render the intended appeal nugatory. The applicants state that the suit property is worth over Kshs.400,000,000 with developments erected thereon 15 years ago.

The principles that apply in an application of this nature are well settled. For an applicant to succeed he must, firstly, show that the appeal, or intended appeal, as the case may be, is arguable, which is the same as saying that it is not frivolous. The applicant must, in addition, demonstrate that the appeal would be rendered nugatory absent stay - *Stanley Kangethe Kinyanjui v Tony Ketter & Others [2013] eKLR*.

The applicants state that they were not heard and that there was violation of their rights to be heard. This is a constitutional issue as a party is entitled to be heard where an adverse order may be made against them. It is also alleged that there was violation of their rights under the Fair Administrative Actions Act. These, we find, to be arguable points in the intended appeal.

The trial Judge ordered cancellation of title to the suit property. The applicants argue that this may lead to the suit property being transferred to third parties and the title would then be beyond their reach. We find that this, if it happened, would render the intended appeal nugatory.

The applicants having satisfied both limbs of the principles on which we operate in applications for stay of execution pending appeal we allow the Motion dated 18th May, 2020. Costs of the Motion will be in the appeal.

**Dated and delivered at Nairobi this 18th Day of December, 2020.**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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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.

*Signed*

**DEPUTY REGISTRAR**