IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: M'INOTI, MURGOR & ODEK JJ.A.)

CIVIL APPLICATION NO. 64 OF 2018 (UR 56/2018)

CONSOLIDATED WITH

CIVIL APPLICATION NO. 65 OF 2018 (UR 57/2018)

BETWEEN

MEGVEL CARTONS LIMITED.......................................APPLICANT

AND

DIESEL CARE LIMITED.......................................1ST RESPONDENT

REGISTRAR OF TITLES......................................2ND RESPONDENT

COMMISSIONER OF LANDS...............................3RD RESPONDENT

(Application for stay of execution pending the hearing and determination of an appeal from the judgment and decree of the Environment and Land Court at Machakos (Angote, J.) dated 26th January 2018

In

ELCC NO. 166 OF 2011)

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RULING OF THE COURT

On 26th January 2018, the Environment and Land Court at Machakos, ***(Angote, J.)*** delivered judgment in ***Environment & Land Court Case No. 166 of 2011*** and declared null and void a grant held by ***the applicant, Megvel Cartons Ltd,*** over the parcel of Land Known as ***LR. No. 25064 (I.R. 85088)***. The learned judge further issued a permanent injunction restraining the applicant, ***the Registrar of Titles (2nd respondent)*** and the ***Commissioner of Lands (3rd respondent)*** from remaining upon, selling, allocating, or interfering with the ***1st respondent's (Diesel Care Ltd)*** quiet and peaceful possession or ownership of the parcel of land known as ***1504/11 (I.R. 85400).*** Lastly he ordered the applicant to pay costs of the suit to the 1st respondent. It is common ground that LR No 1504/11 and LR No. 25064 refer to one and the same parcel, the point of departure being which of the two titles is valid and which one is not.

The applicant was aggrieved by the judgment and on 29th January 2018 lodged a notice of appeal. On the same day it applied before the trial court for stay of execution of the decree pending the filing, hearing and determination of the intended appeal to this Court. By a ruling dated 23rd February 2018, the learned judge granted stay of execution of the judgment and decree on condition that the applicant deposits the sum of ***Kshs. 100 million*** in a joint interest earning bank account in the names of the applicant's and the 1st respondent's advocates, within 21 days from the date of the ruling. The applicant was once again aggrieved by the conditions imposed by the learned judge, which it contends are onerous and a clog on its right of appeal, and on 26th February 2018 lodged a second notice of appeal against the ruling and order. At the time of hearing the application for stay of execution to which this ruling relates, the applicant had already filed ***Civil Appeal No. 70 of 2018,*** against the judgment and decree of the trial court and ***Civil Appeal No. 71 of 2018*** against the ruling and order granting conditional stay of execution.

On 9th March 2018, the applicant filed in this Court two applications, one for stay of execution of the judgment and decree dated 26th January 2018 and the other for stay of execution of the ruling and order of 23rd February 2018. Because the dispute involves the same parties, the same property, and a related judgment and ruling, we directed, with the consent of the parties, that the two applications should be consolidated and determined together in this ruling.

Before we delve into the merits of the applications it is necessary to sketch the background to the dispute. On 11th July 2011 the 1st respondent, claiming to be the registered owner of LR No. 1504/11, filed suit against the applicant and the 2nd and 3rd respondents seeking a permanent injunction to restrain them from entering or remaining on the land and damages for trespass. The 1st respondent contended that LR No. 1504/11 was allotted to a ***Mr. & Mrs. Mwikali Mulei*** on 1st September 1999 who subsequently sold and transferred it to the 1st respondent on 30th May 2001 for a consideration of Kshs 6 million.

The applicant filed a defence and counterclaim contending that the registration of the 1st respondent as owner of LR No. 1504/11 was fraudulent, null and void because the grant for that property was surrendered to the Government for purposes of change of user from agricultural land to industrial use. It was its contention that LR No. 1504/11 was registered in the name of ***Margaret Wamaitha Humphrey*** in 1985 before she sold it to Joseph Odero, who in 1998 applied for change of user as a result of which he surrendered the grant for LR No. 1504/11 and was issued with a new one, to wit, LR No. 25064. In 2008 the applicant purchased LR No. 25064 from Odero, took possession and developed thereon a factory worth ***Kshs 1.2 billion*** today. Accordingly, the applicant prayed for an order nullifying title LR No. 1504/11 and an order prohibiting the 1st respondent from entering or trespassing into LR No. 25064.

After hearing the dispute, learned judge framed only one issue for determination, namely, which of the two titles was valid. He concluded that the 1st respondent had proved, on a balance of probabilities, the validity of title LR No 1504/11 while the applicant had failed to establish that of title LR No. 25064, and accordingly issued the orders that we have already referred to, in favour of the 1st respondent.

Mr. Oduol, learned counsel who appeared for the applicant with ***Ms. Kidunduhu,*** learned counsel, urged us to find that the applicant has an arguable appeal which shall be rendered nugatory if we do not grant an order staying execution of the decree and order of the High Court. Counsel submitted that the proceedings and judgment before the trial court had given a seal of legality to glaring fraud because, contrary to the conclusion by the learned judge, it was the 1st respondent who had fraudulently obtained LR No. 1504/11. He added that the 1st respondent's claim was founded on the alleged allotment of LR No. 1504/11 to the Muleis on 1st September 1999, yet at the time of the alleged allocation it was registered private land, which was not available for allotment by the Commissioner of Lands. Unlike the 1st respondent, the applicant contended that it had adduced cogent evidence on the root of its title from 1931, until the surrender of the grant for purposes of change of user and a new one, LR No. 25064, issued. In the applicant's view, the learned judge had completely ignored that evidence in favour of the alleged and illegal allotment of the land to the Muleis.

It was the applicant's further contention that in arriving at his decision that its title was invalid, the learned judge abdicated his responsibility to evaluate the evidence and instead merely adopted the conclusions of the ***National Land Commission*** and the police. The applicant submitted that the learned

judge had erred in nullifying its title No.LR No 25064 whilst none of the respondents had sought or prayed for nullification of that title.

Lastly, the applicant urged that its appeal was arguable because even the learned judge was persuaded to grant stay of execution to enable the applicant pursue its appeal, only that he erred by imposing onerous and unjustified conditions which the applicant could not meet without being forced out of business. The applicant was also aggrieved that the learned judge had insisted on deposit of cash rather than a bank guarantee,

On whether the appeal would be rendered nugatory if it succeeded absent an order of stay of execution, the applicant urged that it had invested approximately Kshs 1.2 billion shillings in developing a running factory and that after the judgment, the 1st respondent had made concerted efforts to dispossess the applicant. If it was evicted before the appeal was heard and determined, the applicant argued, it would suffer colossal and irreparable loss because the financial status of the 1st respondent was unknown. The applicant accordingly urged us to find that even the balance of convenience was in its favour because it was in possession of the property and was running the factory thereon. In support of its plea, the applicant relied, among others on the decision of the Supreme Court in ***Deynes Muriithi & 4 Others v. Law Society of Kenya & Another [2016] eKLR*** and the decisions of this Court in ***Oraro & Rachier Advocates v Co-operative Bank of Kenya Ltd [2000] eKLR; E Muriu Kamau & Another v. National Bank of Kenya Ltd [2009] eKLR;*** and ***Kenya Methodist University v. Mary Kaungania & Another [2017]***.

Mr. Muite, learned Senior Counsel, leading ***Mr. Maina***, learned counsel, for the 1st respondent opposed the application for stay of execution contending that discretion in an application under rule 5(2)(b) of the rules of this Court must be exercised taking into account the interests of both parties and the peculiar facts and circumstances of each case. In this case, the peculiar circumstances that counsel urged us to take into account were the confirmation by the National Land Commission, the police, and the Director of Survey, all competent authorities, that the applicant's title was a forgery and the fact that the applicant should not have built the factory before confirmation that it held genuine title to the property in dispute. Learned counsel further submitted that the applicant was made aware of the 1st respondent's claim to the land in 2010 and did not take any action to establish its own claim to the land. In counsel's view the 1st respondent did not adduce any evidence to show that it had paid any purchase price, which negated its claim to the land as a purchaser.

On whether the appeals, if successful, would be rendered nugatory, the 1st respondent argued that it would not because the applicant would simply be put back into possession of the land. We were therefore urged to find that the applicant had failed to establish the twin principles upon which an order for stay of execution is granted. In support of its submissions, the 1st respondent relied on the decisions of this Court in ***Stanley Kangethe Kinyanjui v. Tony Ketter & 5 Others [2013] eKLR; Julius Wahinya Kangethe & Another v. Muhia Muchiri Ng'ang'a [2017] eKLR*** and ***Housing Finance Company of Kenya v. Sharok Kher Mohamed Ali Hirji & Another [2015] eKLR***

As regards the order for deposit of Kshs 100 million, the 1st respondent submitted that the court had power to make the order taking into account the fact that the 1st respondent had been kept out of the property for a long time. It was the 1st respondent's further contention that even if we were inclined to order stay of execution of the judgment, we should not disturb the order on deposit of the money because none of the parties was to access the money but instead, it was to be held in a joint account to be released to whichever party succeeded in the appeal. In a submission that calls to mind the two women in the Old Testament that were fighting over a child before King Solomon, the 1st respondent invited us to direct the applicant to occupy one half of the property whilst the 1st respondent occupied the other, pending the hearing and determination of the appeal.

Mr. Eredi, learned counsel for the 2nd and 3rd respondents joined in opposing the application, contending that the learned judge had properly analyzed and considered all the evidence on record. He was of the view that there was no arguable appeal that could be rendered nugatory and urged us to dismiss the application.

We have carefully considered the applications, the affidavits in support, the replying affidavits, the memorandum of appeal, the submissions of learned counsel and the authorities that were cited by the parties. The parties all agree, and rightly so, that to entitle the applicant to an order of stay of execution, it must satisfy us that its appeal is arguable and that unless we grant stay, it will be rendered nugatory if it were ultimately to succeed. (See ***Jaribu Holdings Ltd v. Kenya Commercial Bank Ltd [2008] eKLR).*** An arguable appeal has been described as one that raises even a single *bona fide* issue that deserves to be fully considered by this Court. (See ***Kenya Railways Corporation v. Edermann Properties Ltd Civil Application No. Nai. 176 of 2012).*** In that regard an arguable appeal need not be one that will necessarily succeed upon hearing of the appeal. It also need not raise a multiplicity of issues, one *bona fide* issue alone will suffice.

We have carefully examined the memorandum of appeal. The applicant intends to persuade this Court, at the hearing of the appeal, that the Commissioner of Lands could not have validly allotted the land to the Muleis, from whom the 1st respondent claims to have purchased it, while it was private land from the 1930s. It also contends that whilst there is evidence that the root of its title is traceable back to the 1930s, there is no such evidence as regards the 1st respondent's title, which was upheld by the trial court. The applicant further contends that the learned judge erred by treating its documents, including deed plans, as forgeries and yet upheld the 1st respondent's title, which was based on the same deed plans. In our view, these are not frivolous issues. They are matters that deserve consideration and determination by the Court. We shall not say more in that regard because whether or not the applicant's contentions have merit is a matter for the bench that will hear the appeal, which we cannot preempt. (See ***Central Bank of Kenya Deposit Protection Fund Board v. Uhuru Highway Development Ltd & Others, CA No. 95 of 1999).***

Regarding whether the intended appeal will be rendered nugatory if it succeeds in the absence of an order of stay of execution, we have no doubt that indeed it will. There is no dispute that the applicant is in possession of the disputed property and has on it a running factory. There is uncontroverted averments that after the judgment the 1st respondent moved posthaste and attempted to evict the applicant from the land and to inhibit the running of the factory. In ***Kenya Airports Authority v. Mitu-Bell Welfare Society & Another, CA No. 114 of 2013 (UR 77/2013)*** this Court explained that the rationale of determining whether an appeal will be rendered nugatory or not is to obviate the spectacle of a meritorious appeal being rendered academic or a mere pyrrhic victory, once it has succeeded.

We do not, at this stage, deem it necessary to venture into a determination of whether or not the learned judge should have ordered the applicant to deposit the Kshs 100 million simply because that is the subject of Civil Appeal No. 71 of 2018. A finding that the learned judge should or should not have imposed the conditions will embarrass the bench, which ultimately hears the appeal. All that we can say at this stage is that the applicant has persuaded us that in both its complaints, it has an arguable appeal, which will be rendered nugatory if we do not issue an order of stay of execution.

Accordingly this application succeeds, with the effect that execution of the judgment and decree dated 26th January 2018 and the ruling and order dated 23rd February 2018, are hereby stayed until the hearing and determination of Civil Appeals Nos. 70 and 71 of 2018. We direct that the said appeals be listed for hearing on priority basis, taking into account the demands of current election petition appeals before the Court, which have statutory prescribed timelines for completion. The costs of this consolidated application shall abide the outcome of the said appeals. It is so ordered.

Dated and delivered at Nairobi this 20th day of April 2018

K . M'INOTI

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JUDGE OF APPEAL

A . K. MURGOR

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JUDGE OF APPEAL

J . OTIENO-ODEK (Prof)

....

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR