IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, VISRAM & KANTAI, JJ.A.)

CIVIL APPLICATION NO. NAI. 36 OF 2016

BETWEEN

COMPAR INVESTMENTS LIMITED ……APPLICANT

VERSUS

NATIONAL LAND COMMISSION ……..…… 1ST RESPONDENT

CHIEF LAND REGISTRAR ……2ND RESPONDENT

KENYA URBAN ROADS BOARD ……..……3RD RESPONDENT

THE HON. ATTORNEY GENERAL ……..…4TH RESPONDENT

(An application seeking an injunction, stay of proceedings of the 1st, 2nd and 3rdRespondents in implementing 1st Respondent's determination to revoke, the Applicant's title and conservatory orders against the 1st, 2nd and 3rd Respondents from revoking the Applicant's title and or demolishing or in any way interfering with the Applicant's property, LR No. 209/12686 Nairobi following the orders made at the High Court of Kenya at Nairobi (Lenaola, J.) dated 5th February, 2016 **in ELC Petition No. 311 of 2014)**

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RULING OF THE COURT

The Notice of Motion dated 12th February, 2016 is said to be brought under various rules of this Court including **Rule 5(2) (b)** and various provisions of the **Appellate Jurisdiction Act** and other enabling provisions of law and it is prayed in the main that we grant a conservatory order restraining the respondents, their respective officers, agents, employees and servants from:

a. *revoking and or cancelling the applicant's title over L.R. No. 209/12686 Nairobi; and*

b. *encroaching, entering, demolishing, destroying or in any way interfering with the registration, possession and use of the applicant's title over L.R. No. 209/12686 Nairobi.*

It is also prayed that a stay of any further proceedings by the respondents' be granted pending hearing of the intended appeal and further that we issue an injunction restraining the 1st and 2nd respondents from

registering the revocation of the applicant's title over the said parcel of land and further that the 3rd respondent be restrained from interfering with that title. In the grounds in support of the Motion it is stated, inter alia, that the 1st respondent's determination was not arrived at fairly as it lacked due process and violated rules of natural justice; that no reasons were given by the 1st respondent to the applicant on how it reached its decision; that if the applicant's title to the land is revoked the title would have been taken away permanently from the applicant; that there was a possibility of the respondents entering the property and destroying developments thereon valued in September, 2011 at Kshs.600,000,000/=; that the applicant had contractual obligations with financial institutions and had also leased the premises to tenants; and that the intended appeal was arguable and would be rendered nugatory if stay orders were not granted.

All those grounds are recapitulated in an affidavit of a Director of the applicant, one **MINAXI KARIA** sworn on 12th February, 2016 where it is further deponed that the applicant was not given any or any fair hearing before title to the property was ordered revoked; that the 1st respondent did not reach a decision as required in law before issuing the revocation order; that the learned judge against whose judgment an appeal is intended erred in not noticing that there was no decision issued in writing by the 1st respondent before it published its determination; that the learned judge erred in not noticing that no reasons were proffered for the 1st respondent's decision to revoke the applicant's title; that:

> ***"i) That the Learned Judge also erred in deciding on one hand that he had no Jurisdiction to decide the case and at the same time, failing to transfer the matter to the Environmental and Land Court; where the applicant had headed to file the Petition;***
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> j. ***That the Learned Judge also erred in law in remarking that he had no Jurisdiction to hear the case and also proceeding to decide matters such as whether the Applicant was a bona fide purchaser of the property, LR No. 209/12686 Nairobi;***
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> k. ***That the Learned Judge also erred in finding that the 1st Respondent had found out that the Applicant's property had been set aside for public purposes when no such finding or decision or written decision had been disclosed by the 1st Respondent.***
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> • ***That the Learned Judge also erred in dismissing the***
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> ***Applicant's contention that failure by the 1st Respondent to promulgate Regulations governing the manner in which it carries out the Review of Grants undermined the mandate granted to the 1st Respondent and caused the events of unfairness recorded on 28th April 2014 when the Applicant's grant was reviewed.***
>
> m.**……."**

The applicant's director further deponed that the intended appeal raised an important point of public importance on the limits of the mandate given to the 1st respondent and the process of undertaking such a process in the absence of specific regulations on how it should be done. Also that the applicant had purchased the property for valuable consideration and that if the developments on the property were demolished by the respondents the applicant's business and existence as a going concern would be seriously threatened.

In view of the detailed grounds set out in the Motion and in the affidavit which we have set out in summary in this Ruling we do not find it necessary to give any further background for purposes of the determination we shall make in this matter.

In arguments before us when the Motion came for hearing on 26th April, 2016 **Mr. George Oraro**, Senior Counsel who led **Mr. Elijah Mwangi**, for the applicant submitted that the applicant had purchased the premises and had invested heavily on the same by erecting buildings that were occupied by

tenants. Learned counsel informed us that the 3rd respondent had in the year 2013 given a demolition notice to the applicant stating that the land did not belong to the applicant but was reserved for a power line. Further that the applicant had appeared before the 1st respondent to make representations but was either shut out of proceedings or not given a fair opportunity to be heard. What followed was a notice published in newspapers where the applicant's title was ordered revoked thus an intended appeal.

On whether the intended appeal was arguable learned counsel submitted that it was arguable whether the learned judge was right to hold that there was sufficient compliance with the requirement on fair hearing and if an opportunity to be heard was accorded.

On whether the intended appeal would be rendered nugatory if the stay applied for was not granted learned counsel for the applicant submitted that there were developments worth about 1 billion shillings on the property which could be destroyed which to learned counsel would render the intended appeal nugatory if the appeal, when heard, succeeded.

Miss Omuko, learned counsel for the 1st respondent submitted that the intended appeal could not be rendered nugatory as compensation could be made for demolished buildings damage to which quantification could be made. Learned counsel conceded that the intended appeal was arguable.

Mr. Onyiso Kepha, learned counsel for the 2nd, 3rd and 4th respondents, in opposing the Motion, submitted that the intended appeal was not arguable because the High Court had found that the land claimed by the applicant was public land reserved for a power line. Learned counsel was of the further view, like Miss Omuko, that the applicant could be compensated in damages which could not render the intended appeal nugatory.

Mr. Oraro, in a brief reply, reminded us that the 3rd respondent which claimed the land was not ordinarily concerned with laying or maintenance of power lines, a preserve of an entity not a party to the suit in the High Court.

The principles upon which we exercise our jurisdiction in applications such as this one are now well settled. An applicant, to be entitled to orders of stay, must demonstrate that the appeal, or intended appeal, is arguable which is the same as saying that it is not frivolous. Such an applicant, if he satisfied that principle, must, in addition, demonstrate that the appeal, or intended appeal, would be rendered nugatory if orders of stay were not granted. See, for instance, an enunciation of these principles in the case of **Republic v Kenya Anti-Corruption Commission and 2 Others [2009] KLR 31** where the following passage appears:

> ***"The law as regards the principles that guide the court in such an application brought pursuant to Rule 5(2) (b) of the Rules are now well settled. The court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the court, first, that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds, the result or the success would be rendered nugatory. In order that the applicant may succeed, he must demonstrate both limbs and demonstrating only one limb would not avail him the order sought if he failed to demonstrate the other limb. [See also this Court's decisions in the case of RELIANCE BANK LTD v NORLAKE INVESTMENTS LTD (2002) 1 EA 227 & GITHUNGURI v JIMBA CREDIT CORPORATION LTD & OTHERS (NO. 2) 1988; KLR 828; WARDPA HOLDINGS LTD & OTHERS v EMMANUEL WAWERU MATHAI & HFCK (CIVIL APPEAL NO. 72 OF 2011 [unreported]."***

In the lead Ruling in **Chris Munga Bichange v Richard Nyagaka Tongi & 2 Others [2013] eKLR** Onyango Otieno, JA stated on arguability of an appeal or intended appeal:

> ***"I do not think, in law it is necessary that there be more than a certain number of arguable issues for the court to find that the appeal filed or the intended appeal is arguable. In fact, in law***

one arguable point suffices for that finding."

So an applicant who establishes that there is a single arguable point and who also satisfies the nugatory aspect of the application before the Court is entitled to the protection accorded by **Rule 5(2) (b)** of this **Court's Rules**.

We have considered the application, the rival submissions, authorities cited and the relevant law and have taken the following view of the matter.

It is common ground that the subject property was granted to a company through a Grant Number 66946 for a term of 99 years from 1st August, 1985. A transfer of that grant was duly registered by the Registrar of Titles on 26th June, 2001 in favour of the applicant. It is also common ground that the applicant proceeded to erect various buildings on the premises which were let to tenants and the developments were worth a colossal sum of money by the time the petition was heard in the High Court.

We have perused the draft Memorandum of Appeal attached to the application. The appellant takes as some of the grounds of the intended appeal, *inter alia:*

"1. THAT the Learned Judge erred in law and in fact in deciding on one hand that he had no Jurisdiction to decide the case and at the same time, failing to transfer the matters to the Environmental and Land Court, where the Appellant had lodged the Petition only for the ELC registry to direct it to the Constitutional and Human Rights Division;

2. ***THAT the Learned Judge erred in law in remarking that he had no Jurisdiction to hear the case and also proceeding to decide matters such as whether the Appellant was bona fide purchaser of the property, LR No. 209/12686 Nairobi;***

3. ***THAT the Learned Judge grossly erred in law and infact in failing to notice and find that there was no decision issued in writing by the 1st Respondent, National Land Commission, "NLC" before or when it published its determination in the Newspapers on 4th July 2014 and later in the Kenya Gazette recommending the revocation of the Appellant's title;***

4. ***THAT in addition, the Learned Judge erred in law in failing to notice and find that there were no written reasons, specific to the Appellant's property or at all the properties, issued by the 1st Respondent, and therefore, other than to guess and speculate, the Appellant could not and might never know the 1st Respondent's reasons for the recommendation made to revoke the Appellant's title, LR No. 209/12686 Nairobi."***

Whether or not the 1st respondent's action has breached the applicant's fundamental right to a fair hearing by reaching a decision without according the applicant an opportunity to be heard and whether issuing the "revoke the title" order without according any reasons for that decision is obviously an arguable point in the intended appeal. We do not have to go any further on this aspect as the respondents concede that there are arguable points in the intended appeal.

On the nugatory aspect learned counsel for the applicant submits that buildings and developments have been erected on the land worth about Kshs.1,000,000,000/= and that such a colossal sum qualifies for the intended appeal being rendered nugatory if a stay is not granted. Both counsel for the respondents concede that there are developments but they counter by stating that the developments are quantifiable and the applicant can be compensated in damages.

We recognize in general, that circumstances that may render an appeal or intended appeal nugatory, if successful, will vary from case to case. In money decrees, for instance, this Court has in various decisions recognized that requiring an applicant to pay a huge sum of money before an appeal is heard may render an appeal nugatory. See, for that general principle, **The Reliance Bank Limited case** (supra).

Githinji, JA in **Mbaraki Bulk Terminal Limited v East African Bulking Services Limited & 2 Others [2007] eKLR** while dealing with the nugatory aspect of an application like the one before us considered a situation where a large sum of money had been awarded in the decree by the High Court in **Kenya Breweries Limited v Kiambu General Transport Agency Limited Civil Application No. 100 of 2000** (unreported) where it was held:

> ***"The sum involved amounting to Kshs.241,586,711/58 is certainly very large and there is an uneasiness pervading a refusal to grant a stay of execution where such large amount of money is involved owing to the damage such a refusal may occasion to the applicant.***
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> ***Indeed the futility of success of the applicant's appeal to this Court may result from such a refusal for the damage to the applicant may be irremediable even if the decretal sum was subsequently repaid to it if its appeal to this Court was to be successful."***

In **Butt v Rent Restriction Tribunal [1982] KLR 417** this Court stated that the court may grant a stay of execution where special circumstances of the case require.

This Court has also held in many decisions that in considering the second limb of an application for stay pending appeal the court must weigh the claims of both sides. In **Oraro & Rachier Advocates v Cooperative Bank of Kenya Limited [2002] eKLR** the decree was a money decree and although the Court stated that the respondent in that case was a bank capable of refunding the decretal sum if the appeal succeeded the Court considered the inconvenience that would befall the applicant, a law firm, if it was asked to settle the decretal sum pending appeal. The Court found that the second limb of the principle on which we grant stay of execution pending appeal had been satisfied and granted stay. The same issue arose in **Simba Colt Motors Limited v James Gitahi Mwangi [2012] eKLR** which quoted **Reliance Bank Limited** (supra) thus:

> ***"In determining the second limb of the test, the court in Oraro and Rachier Advocates v Co-operative Bank of Kenya (supra) had not been enunciating a third principle but merely stating that, in making its decision, it was bound to consider the conflicting claims of both sides. Where a decree for the payment of money was issued, the inability of the other side to refund the decretal sum was not the only thing that would render the success of the appeal nugatory. The factors that could render the success of an appeal nugatory thus had to be considered within the circumstances of each particular case (Oraro and Rachier Advocates –vs- Co-operative Bank of Kenya (supra) explained and followed). Rule 5 (2) (b) conferred on the court original jurisdiction based on the exercise of discretion by the judges of the court. In the exercise of that discretion, certain principles had been developed to guide the court, the scope of which took account of evolving circumstances as they arose in various cases. In this instance, the circumstances showed that it would be onerous to require the liquidator of the Applicant to deposit the money in court. A refusal to grant a stay would cause the Applicant such hardship as would be out of proportion to any suffering the Respondent might undergo while awaiting the hearing and determination of the Applicant's appeal."***

In the instant application, both sides agree that there are substantial developments on the land. The applicants contention that those developments were worth Kshs.600,000,000/= at the hearing of the petition in the High Court and that they may well be worth one billion shillings now is not contested by the respondents. The respondents answer is that those developments are quantifiable and so should be demolished and if the intended appeal succeeds then the applicant can be compensated accordingly.

So where does the balance of convenience lie?

Although the 1st respondent, a constitutional commission charged with management of land in Kenya is within its mandate to order revocation of titles we do not think that such a body should risk public funds in the way counsel for the respondents urge in this matter. The developments are worth a colossal sum of

money and those developments should be preserved pending the hearing of this appeal. We therefore have come to the conclusion that the applicant has satisfied the second limb of the principles which we consider in an application such as this one.

But we cannot stop there. It is urged by the respondents that the land subject of the revocation order is public land which the 3rd respondent intend to be used for a public purpose. So the matter must move with haste as the applicant's private rights should not stand in the way of the public interest. For these reasons we order that the applicant file the intended appeal within 30 days of today in default this application would stand dismissed with costs to the respondents. The appeal, when filed, be given a hearing date on the basis of priority so that the issues in contention be determined speedily without delay. Costs of this Motion shall abide the intended appeal.

Dated and Delivered at Nairobi this 17th day of June, 2016.

E.M. GITHINJI

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JUDGE OF APPEAL

ALNASHIR VISRAM

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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.

DEPUTY REGISTRAR