IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A.)

CIVIL APPLICATION NO.59 OF 2016 (UR.42/16)

BETWEEN

THE COUNTY GOVERNMENT OF BOMET.....……..……. APPLICANT

AND

MOI UNIVERSITY……...…….....1ST RESPONDENT

THE ATTORNEY GENERAL……..…….....2ND RESPONDENT

THE CHIEF LAND REGISTRAR…….....……3RD RESPONDENT

(An application for injunction pending the hearing and determination of an intended appeal from the judgment and order of the High Court of Kenya at Bomet (Muya, J.), dated 8th June, 2016

in

Petition No.3 of 2016)

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RULING OF THE COURT

As framed, the motion by the County Government of Bomet dated 27th August 2016 seeks the following orders;

> ***"(2) That pending the hearing and determination of this Application inter partes,there be an order of injunction restraining the 1st Defendant/1st Respondent either by itself, its agents, servants or otherwise howsoever from occupying, interfering, trespassing, demolishing, dealing or in any way alienating or disposing of the land identified in the Bomet Town Part Development Plan 2000 dated 7th January, 2000, Ref. No. R336/2000 being parcels Nos.418 and 419 and the Public Stadium therein.***
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> ***(3) That pending the hearing and determination of the intended Appeal, there be an order of injunction restraining the 1st Defendant/1st Respondent either by itself, its agents, servants or***

otherwise howsoever from occupying, interfering, trespassing, demolishing, dealing or in any way alienating or disposing of the land identified in the Bomet Town Part Development Plan 2000 dated 7th January 2000, Ref. No. R336/2000 being parcels Nos.418 and 419 and the Public Stadium therein."

Those orders are sought against Moi University, The Attorney Generaland the Chief Land Registrar who are the 1st, 2nd and 3rd Respondent respectively.

The application is founded on grounds appearing on the face of the motion namely;

"On 8th June, 2016, the Honouarable Justice Martin Muya delivered a Judgment at the High Court in Bomet in Petition No.3 of 2016, being County Government of Bomet vs. Moi University and Others and which effect was to grant a multi-million public stadium which is still under construction to the 1st Respondent.

The Applicant has satisfied all the principles as laid down in Giella v Cassman Brown & Company (1973) EA 358, the Applicant has an arguable appeal, the appeal will be rendered nugatory and the applicant will suffer greater hardship if the application is not allowed as there is an on-going construction of a public stadium on the suit property in respect of which the applicant has invested hundreds of millions and which will, in the absence of the injunction, be brought down by the 1st respondent.

The 1st Respondent has already moved into the land in question together with the necessary equipment to begin its own development.

In the absence of the injunction to protect the subject matter of the appeal, the stadium, the appeal will be merely academic and will be rendered nugatory as damages cannot compensate for the demolition of the stadium.

On 8th June 2016, the applicant's oral application for limited stay was rejected by the Superior Court.

On 22nd June 2016, the applicant's formal Application for limited stay was rejected by the Superior Court prompting the present application herein to preserve the subject matter of the appeal pending the hearing and determination of this Application and Appeal.

A further premise cited is that the applicant has an arguable appeal with high chances of success which may be rendered nugatory unless the stay is not granted.Some ten proposed grounds are listed.

Those same proposed grounds of appeal are replicated in paragraph 12 of the affidavit of Kilelson Mutai sworn in support of the application. He swears that he is the Chief Officer of the County Secretary of the applicant and that the applicant has developed to near completion a multi-million public stadium on part of the suit land which the learned Muya J, awarded to the 1st respondent by the impugned judgment. The 1st respondent has in consequence moved into the said land intent on carrying its own developments and the applicant is apprehensive that the stadium, built with millions of shillings of taxpayers' money is in imminent danger of being brought down. Such an eventuality would render the appeal merely academic as damages cannot compensate for the demolitions of the stadium. It is for that reason that the injunction is sought to restrain the 1st applicant from occupying, interfering with, trespassing, demolishing, alienating or disposing of the land in dispute and the public stadium therein pending appeal, it is averred.

Those grounds and averments were the gravamen of the arguments made before us by **Mr. Osur** learned counsel for the applicant.

The application stands opposed by the 1st Respondent and by the 4th Respondent who comprise a group

of elected leaders from Bomet County who had participated in the proceedings before The High Court as Interested Parties. Eric Liyale, the 1st Respondent's Legal Officer in his affidavit sworn on 11th November 2016 was dismissive of the application terming it lacking in merit and pointed to the dismissal by the learned Judge of similar applications, one oral and the other formal. He then swore at paragraphs 12 and 13 as follows;

> ***" 12. That the 1st Respondent is the registered owner of land parcel number Bomet Town/307 and Bomet Town/308 and the certificates of lease issued to the 1st Respondent are prima facie evidence of proprietorship and the 1st Respondent's title to the said land parcels is absolute and indefeasible. The Appellant failed to impeach the legality of the said titles. See annextures marked ELI(a) & (b) being copies of the certificates of lease.***
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> ***13. That in the petition dated 11th April 2016 the Appellant did not challenge the process of alienation and allocation of public land but only challenged the process of registration of title by the 3rd Respondent in favour of the 1st Respondent. As a matter of fact the Appellant failed to enjoin the National Lands Commission as a party to the suit".***

He went on to aver that the applicant's motion targets the wrong parcel numbers namely 418 and 419 yet the suit land is land parcel number Bomet 307 and 308 which the 1st Respondent is in occupation of. He added that not having challenged as unconstitutional the process of issuance of certificates of title in the 1st Respondents favour, and not having proved fraud or illegality in that process, and not having enjoined The National Land Commission, the appellant's appeal is on ***"quicksand [with] remote chances of success."***The Deponent further swore that the allocation of the suit land to the 1st Respondent was properly done by the National Land Commission under **section 12** of the **Land Act,2012** following a public request and public participation for purpose of a public university pursuant to which the 1st Respondent has "***already set up Bomet University College on it and enrolled over 200 students for undergraduate studies".*** It has also engaged a contractor to undertake construction on the land so that "***an injunction will occasion us damages for breach of contract"*** and will also mean a stoppage of the academic programmes and relocation from the suit land to the prejudice of the students and staff of the university. He concluded that the university had no intention of disposing of the land so that the applicant's apprehension has no basis and the application has no merit.

For the 4th Respondent, Hon. Dr. Joyce Cherono Laboso swore an affidavit on 14th November 2016. She averred that the applicant has absolutely no arguable appeal and that it shall suffer no loss as "***there is no intention whatsoever in the offing for demolition and destruction of the stadium"*** and or the fixtures in it as it belongs to the people of the County of Bomet and the public at large. She went on to provide a blow by blow response to the applicant's averments, the gist of which was that the impugned orders of the High Court were correct and that they are not amenable to be stayed having been negative in effect and that no injunction should lie as the respondents have not contemplated any action to be stayed. The deponent explained that "***the contractors' machinery and equipment are for construction of amenities on its property not touching on the stadium***" and "***in any case should any such action of that nature be contemplated"*** a proper audit of the construction will be done with a bill of quantities to compensate the applicant for the costs of construction of the stadium, though no such action is contemplated.

Further on the nugatory aspect, the Deponent swore as follows at paragraph 4(vi);

> ***"That the lease is registered in the name of a government ministry known as Cabinet Secretary, National Treasury and the applicant ought to demonstrate that the respondent is so impecunious that it will not be able to pay or compensate the applicant if the applicant was to succeed in the appeal. That has not been demonstrated and neither will it ever be demonstrated as the finances of the whole country are approved from the Ministry of Finance".***

The deponent went on to repeat that the orders given by the learned Judge were negative in character and

so incapable of being stayed. She stated further that the allocation of the land to the 1st respondent was with the involvement of "***principally all parties***" with the applicant "***ably represented by the Deputy Governor"*** and that therefore the 1st respondent's registration vested it with an indefensible title there having been no fraud.

Learned counsel for the 1st Respondent **Mr.Yego** and **Mr. Mutai** learned counsel for the 4th Respondent based their submissions before us on the said replying affidavits and urged us to dismiss the motion for failing to satisfy the principles for the grant of a Rule 5(2) (b) relief and therefore unmeritorious.

An application for a stay of execution or an injunction pending appeal is a plea to this Court's discretion, one that is exercised on well-settled principles, namely that the applicant must establish that he has an arguable appeal and that the said appeal may be rendered nugatory in the absence of the interim relief sought. As to what those twin principles entailin practical terms, this Court in **STANLEY KANGETHE KINYANJUI -VS- TONY KETTER & 5 OTHERS [2013] eKLR**, after noting that the principles themselves are 'notorious' 'old hat' and applied as 'everyday fare' in this Court, nonetheless proceeded to distill some dozen-odd pointers to their application as follows, and we respectfully agree;

> ***(i) "In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this Court. See Reuben & 9 Others v Nderitu & Another (1989) KLR 459.***
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> ***(ii) The discretion of this Court under rule 5(2) (b) to grant a stay of injunction is wide and unfettered provided it is just to do so.***
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> ***(iii) The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. Halai & Another v Thornton & Turpin (1963) Ltd. KLR 365.***
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> ***(iv) In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. David Morton Silverstein v Atsango Chesoni Civil Application No. Nai 1989 of 2001.***
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> ***(v) An appeal must satisfy the court on both of the twin principles.***
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> ***(vi) On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. Damji Pragiji Mandavia v Sara Lee Houssehold & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004.***
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> ***(vii) An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. Joseph Gitahi Gachau & Another v Pioneer Holdings (A) Ltd. & 2 Others, Civil Application No. 124 of 2008.***
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> ***(viii) In considering an application brought under Rule 5 (2) (b) the Court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal. Damji Pragji (Supra).***
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> ***(ix) The term "nugatory" has to be given its full meaning. It does not mean worthless, futile or invalid. It also means trifling. Reliance Bank Ltd v Norlake Investments Ltd [2002]1 EA 227 at page 232.***
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> ***(x) Whether or not an appeal will be rendered nugatory depends of whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.***
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> ***(xi) Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecuniosity, the onus shifts to the latter to rebut by evidence the claim. International Laboratory for Research on Animal Deceases v Kinyua[1990] KLR 403".***

See also; **WANANCHI GROUP LTD -VS- COMMISSIONER FOR**

INVESTIGATION & ENFORCEMENT [**2014] eKLR** for the 4th Respondent's List of Authorities curiously attached to Hon. Laboso's Affidavit.

The twin principles have been held to hold sway in all courts with appellate jurisdiction when addressing pleas for interim relief including the Supreme Court which, in **GATIRAU PETER MUNYA -VS- DICKSON MWENDA KITHINJI & 2 OTHERS** [**2014] eKLR**, added to them, a third condition namely,***"that it is in the public interest that the order of stay be granted".*** The Court considered that ground to be justified by the context and nature of the Constitution of Kenya, 2010 in these terms;

> ***"89. This third condition is dictated by the expanded scope of the Bill of Rights, and the public spiritedness that run through the Constitution".***

We have given due and anxious consideration to the application before us, the oral affidavits and submissions made by counsel on opposing sides. On the first consideration, namely the arguability of the intended appeal, **Mr. Biko** contended that the draft Memorandum of Appeal attached reveals a manifestly arguable appeal. To demonstrate, he addressed us on proposed grounds (d) to (h) which are expressed thus;

> ***"(d) That the Honourable Learned Judge erred in law by failing to consider the role of the National Land Commission and the County Government in allocation of public land.***
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> ***(e) That the Honourable Learned Judge erred in law by finding that the burden of proof on acquisition of public land is on the Petitioner contrary to Section 112 of the Evidence Act and Court of Appeal decision in Henry Muthee Kathurima v Commissioner of Lands & Another eKLR [2015].***
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> ***(f) That the Honourable Learned Judge erred in law by failing to consider Section 12(2) of the Land Act, 2012 to the effect that the suit land was not available for allocation as the same was already set aside for public purposes in this case a stadium which construction was on going.***
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> ***(g) That the Honouarble Learned Judge erred in law by failing to find that the County Government holds all land that formally vested in the former local authorities in trust for the local residents and must consent/be involved in its allocation.***
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> ***(h) That the Honourable Learned Judge erred in law by failing to find that failure to follow the procedure of allocating public land enumerated under the Land Act, 2012 renders an allocation unlawful acquisition under Article 40(6) of the Constitution".***

From a purely cursory consideration of those five grounds (and an applicant need not demonstrate a plurality of grounds as a solitary one if raising a bona fide point worthy of consideration and calling for an answer from the opposite party is enough), we are unable to say that the proposed appeal is devoid of substance or that it is raising idle or trifling issues unworthy of judicial consideration. We say so mindful that an arguable appeal by definition need not be one that must necessarily succeed. Indeed, the threshold for interim relief under this limb is a relatively low one since what one needs show is arguability of the proposed appeal and not great or preponderate chances of its success.

The respondents' only answer to the applicant's assertion that its intended appeal is arguable seems to be the rather technical plea that the applicant's petition before the High Court was bound to fail for the failure to enjoin the National Land Commission. The applicant's rejoinder to this is that it is enough that it sued the Hon. Attorney General. Considering the proposed grounds of attack on the judgment of the High Court, it seems to us that the respondents have not provided sufficient answers to dislodge the applicant's claim of arguability of its intended appeal and we are thus satisfied that the first limb has been established.

Turning now to the nugatory aspect, for the applicant must satisfy it as well to obtain relief, again the contentions are diametrically opposed. To the applicant, should a stay or injunction be denied, the 1st respondent will proceed to demolish the stadium already put up at great expense and will deprive the people of Bomet of an important public facility. What is more, the residents will be denied the use of the dumpsite on the suit land and require a forced relocation of the same to an alternative site at great public expense.

On their part, the respondents deny the existence of a dumpsite on the disputed land and insist that there is no plan or intention to demolish the stadium but the applicant counters that with the 1st respondent's contractors on site there is nothing to stop or restrain them from demolishing the stadium.

The contending arguments before us seem to pit two projects both laying claim to the public interest. There is no dispute that there is a stadium nearing completion on the suit land. The exact amount of money spent on building it to the stage it is at is not disclosed but the applicant's contention, which is uncontroverted, is that it is in hundreds of millions of shillings of public money. We note that even though the 4th respondent's replying affidavit avers that there is no intention of demolishing the stadium, it goes ahead to allude to the possibility of audits of the construction and bills of quantities for purposes of compensation which is a tacit admission that such an eventuality is not ruled out. More important is the fact that the 4th respondent is not the new owner, by right or wrong, of the said property and is therefore in no position to give any assurance that the stadium will not be demolished as apprehended by the applicant.

We find it quite telling that in its replying affidavit, the 1st respondent is conspicuously silent on the question of whether or not it will demolish the stadium as feared. All that is sworn to is that the university has no intention of disposing of the land and that the applicant's apprehension has no basis. We much doubt that the silence on the vexed question of demolition was an oversight. What is clear is that the applicant's assertion that the 1strespondent intends to demolish the stadium has not been denied or otherwise answered on oath. The averment is therefore uncontroverted.

Whereas we do not doubt the ability of the 1st respondent or of the Cabinet Secretary to the National Treasury of Kenya (in whose name the lease of the disputed land is issued as trustee of Bomet University College) to compensate the applicant for any damage arising from the destruction by demolition of the stadium, two issues give us pause. First, we have not been told that the stadium is not a facility of utility to the residents of Bomet so that its demolition means nothing to them. We take judicial notice that public stadia and sports facilities have great public utility and the people of Kenya need more, and not less of them. The possibility of demolition of one nearing completion is not a matter lightly to be taken as it would deprive the people of a facility of value and benefit.

Second and crucially, we must express our unease at the not so muted and hardly concealed confidence of the respondents that even were the stadium to be demolished, the National Treasury is not without funds to make compensation. The attitude seems to be "***Tutabomoa na tulipe" ("We shall demolish and pay")***. With respect, it is a bad attitude. It is untenable, too, because the compensation money does not belong to the respondents or the National Treasury. The National Treasury is the custodian of public funds belonging to the people of Kenya. It is not open to public officials and public bodies including the respondents herein to be wasteful. Rather, there is an obligation, indeed a constitutional command, that public money shall be used in a prudent and responsible way. See **Article 201(d)** of the Constitution.

We think therefore that on the nugatory aspect as well, the applicant has demonstrated that this application is for grant. Our holding on the need for prudence in dealing with public funds and resources accords with the Supreme Court's third condition that it is in the public interest that the order sought be granted. We echo the sentiments of the apex court in the **PETER MUNYA** case (supra) on this aspect thus;

> "(***97) Bearing in mind the nature of the competing claims, against the background of the public cause, we have focused our perception on the public interest, and the concept of good***

governance, that runs in tandem with the conscientious deployment of the scarce resources drawn from the public. Proper husbandry over public monetary and other resources, we take judicial notice, is a major challenge to all active institutions and processes of governance; and the courts, by their established attribute of line-drawing, must ever have an interest in contributing to the safeguarding of such resources".

That consideration provides the answer to the 1st Respondent's plea that it has engaged a contractor to undertake construction on the said land and an injunction would occasion its damages for breach of contract. We say no more than that the agreement with the contractor exhibited by the 1st respondent is said to have been entered into on 8th November 2016 which is long after the said respondent knew that the applicant had not only filed a notice of appeal, but had also filed the instant application seeking interim relief. We are not sure it served the public interest for public bodies to rush headlong into contracts for the doing of the very things that are subject to injunctive pleas in court and then turn around and complain that the grant of those pleas might occasion them loss. Prudence dictates caution and circumspection no matter the confidence entertained about the prospects of juridical triumph.

We have said enough to show that this application is for granting. We grant it in terms of prayer 3 thereof which for the avoidance of doubt, refers to parcels Number 307 and 308 in Bomet Town on which the stadium under construction stands.

The costs shall be in the intended appeal the record whereof shall be lodged within 30 days hereof (if not already lodged) and shall thereafter be listed for hearing on priority basis.

Dated and delivered at Nakuru this 8th day of December, 2016.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR