REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Appli 106 of 2007

BENJA PROPERTIES LIMITED…………....…………………. APPLICANT

AND

H.H. DR. SYEDNA MOHAMED

BURHANNUDDIN SAHEB ……………………...….….1ST RESPONDENT

MOHAMED FIDAALI HEBATULLAH ……..........……2ND RESPONDENT

HUSSEINBHAI AHMEDALI HEBATULLAH..............…3RD RESPONDENT

THE ATTORNEY GENERAL …….............THIRD PARTY RESPONDENT

THE COMMISSIONER OF LANDS ....THIRD PARTY RESPONDENT

(An application for stay of execution against the whole of theJudgment of the High Court of Kenya

Nairobi (Mr. Justice Visram) dated 27th February, 2007
in

H.C.C.C. NO. 73 OF 2000)

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RULING OF THE COURT

This is a Notice of Motion dated 15th May 2007 seeking a stay of execution of the Judgment and Decree of the superior court at Nairobi (Visram J.) delivered on the 27th February, 2007, pending the hearing and determination of the appeal against that judgment. The record of appeal was filed on 27th April, 2007, in Civil Appeal No. 79 of 2007.

The dispute between the parties relates to a parcel of land situate in Kirinyaga Road Nairobi otherwise known as LR. No. 209/136/239 measuring about 68 acres. After lawful purchase from the original registered owner in 1960, the land was subdivided and several sub-plots were assigned to various new

owners including the first three respondents here, in 1992. The three were assigned LR. Nos. 209/136/269 and LR. No. 209/136/322. Three years later in 1995, the Commissioner of Lands, who is the fourth respondent, issued letters of allotment to some three individuals for plot No. 209/12999 which did not physically exist but which on the evidence was "*part of*" or "*overlapped*" the plots owned by the respondents 1, 2 and 3. The allottees then sold and transferred the plot to the applicant here who was subsequently issued with a title deed in 1997. When the applicant attempted to take possession of the land and to evict the tenants therein, the respondents 1, 2 and 3 sued them and sought an injunction to stop them from interfering with the property and the tenants. They also sought an order for cancellation of the Grant of Title issued to the applicant in respect of the disputed land. Upon being sued, the applicant issued third party notices against the Attorney General and the Commissioner of Lands seeking indemnity and damages.

After hearing the suit, the superior court dismissed the applicant's claim against the third parties (i.e. the Attorney General and the Commissioner of Lands) on the ground that the applicant had not served the mandatory statutory notice on them thus rendering the claim invalid in law. He also found that the letter of allotment upon which the applicant laid lawful claim to the disputed land was worthless because it purported to allot land under the Government Lands Act that was not available for allotment. The superior court also found that the respondents 1, 2 and 3 had clear, clean and legitimate Titles which could not be alienated or interfered with. He gave judgment in favour of the respondents and made the following orders:-

"***1. Cancellation of Grant No. I.R. 72150 and title to LR. No. 209/12999.***

2. An injunction barring the defendant from interfering with LR. Nos. 209/136/269 and LR. No. 209/136/322.

3. Dismissal of the defendant's claim against the Third Parties, with costs;

And

4. That the defendant pay the costs of this suit to the plaintiffs."

It is against those orders that the appeal was filed, as stated earlier, on 27th April, 2007.

This being a motion asking the Court for an order of stay of execution, under ***rule 5(2) (b)*** of the rules of this Court, the applicant is required to satisfy the Court that its appeal is an arguable one and that unless we grant the order sought, the appeal, were it to succeed in the end, the success of the appeal would have been rendered nugatory. In the recent case of ***Retreat Villas Ltd v. Equatorial Commercial Bank Ltd & Others Civil Application No. NAI. 140 of 2006(ur)***, this Court stated the settled principle thus:-

"***The applicant is not required to show in an application of this nature that the appeal would definitely succeed or that the appeal has very high chances of succeeding. It is sufficient if the applicant shows that he has serious questions of law for the submission to the court on the hearing of the appeal. (See Githunguri vs. Jimba Credit Corporation Ltd (No 2) [1988] KLR 838 at page 844 paragraph 35) or put in another way, that reasonable argument can be put forward in support of the appeal (see J.K. Industries vs. Kenya Commercial Bank Ltd. & Another [1987] KLR 506 at page 510 paragraph 35)."***

At the hearing of the motion, learned counsel for the respondents, 1, 2 and 3 Mr. Gitonga Murugara and Mr. Bitta for the respondents 4 and 5 conceded that the appeal, on the face of it, raised arguable points and was not therefore frivolous. We need not therefore go into details of the submissions made in that regard by learned counsel for the applicant Mr. Owang. Accordingly we will only deal with the second aspect of the two requirements stated above, namely, that if we refused to grant the order for stay now, the success of the appellants' appeal, were it to succeed, would be rendered nugatory.

In the affidavit in support and in submissions of counsel, the applicant fears that the disputed land

would be disposed of particularly because, in the applicant's belief, the respondents 1, 2 and 3 are not residents of this country and may relocate to a foreign country after alienating the property. In such event the disputed land would be placed beyond the reach of the applicant in the event of success of the appeal. They placed the value of the property at Kshs.22 million and submitted that if the order for cancellation of the grant issued to the applicant is cancelled as ordered by the superior court, the applicant will suffer irreparable loss. At the very least, Mr. Owang submitted, the *status quo* existing before the judgment of the superior court ought to be maintained until the appeal is decided. The *status quo,* as understood by him, was that there were *Jua Kali* artisans in occupation of the property who had been paying rent to the applicant and should continue to do so. In the alternative, Mr. Owang called for the deposit of the Title Deed with the court pending determination of the appeal.

For their part, the first three respondents swore in their replying affidavit that they were Kenyans and were resident here. The 1st respondent was indeed their religious leader. They had no intention of alienating the disputed land and therefore such fears were unfounded. Mr. Murugara further submitted that there was nothing special about the disputed land whose value was known and indeed the applicant had claimed damages. It was a commercial property currently occupied by *Jua Kali* artisans who were paying rent to the applicant before institution of the suit and such rent is ascertainable. There was no averment that the respondents, including the Government which is represented by the Attorney General, were not able to compensate the applicant in the event of success of the appeal. The appeal cannot therefore be rendered nugatory.

Mr. Bitta supported the submissions of Mr. Murugara and added that the property was subject to the doctrine of *Lis pendens* which is reserved in ***section 52*** of the Transfer of Property Act and therefore there can be no fear about alienation before the litigation is terminated. The section provides in relevant part as follows:-

"52. During the active prosecution in any Court……………………………………………of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose."

In view of those provisions therefore, he submitted, there was no likelihood that the appeal would be rendered nugatory.

We have carefully considered the submissions of counsel but we are not persuaded that the success of the appeal filed in this matter would be rendered nugatory if we do not grant the order sought before us. We find no basis for the assertion that the disputed land will be alienated before the appeal is disposed of. We are not persuaded either, that the applicant will suffer loss which is incapable of recompense in damages in the unlikely event that the property is alienated.

In the result, we order that the application be and is hereby dismissed with costs to the respondents.

Dated and delivered at Nairobi this 20th day of July, 2007.

E. O. O'KUBASU

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

W. S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR