

**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA**

*(Coram: Mwilu; DCJ & VP, Wanjala, Njoki, Lenaola & Ouko SCJJ)*

**PETITION NO. 7 (E009) OF 2022**

**BETWEEN**

**TANAD TRANSPORTERS LIMITED..... 1<sup>ST</sup> APPLICANT**

**GEORGE GICHANA MOMANYI .....2<sup>ND</sup> APPLICANT**

**ABDULRAHMAN M SAID.....3<sup>RD</sup> APPLICANT**

**AND**

**LAISER COMMUNICATIONS LIMITED.....1<sup>ST</sup> RESPONDENT**

**CITY COUNCIL OF NAIROBI.....2<sup>ND</sup> RESPONDENT**

**CHIEF LAND REGISTRAR.....3<sup>RD</sup> RESPONDENT**

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*(Being an application for conservatory orders pending the determination of an appeal from the majority judgment and decree of the Court of Appeal at Nairobi (Karanja, Murgor & Kiage JJA) dated 1<sup>st</sup> April 2022 in Civil Appeal No.441 of 2018)*

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**RULING**

**[1] UPON** perusing the Notice of Motion application dated 7<sup>th</sup> April 2022 and filed on 12<sup>th</sup> April 2022 pursuant to Article 163 (4)(a) and (b) of the Constitution, sections 3, 15, 16 and 24 of the Supreme Court Act and Rule 26 of the Supreme Court Rules 2012 seeking the following orders: **THAT**

- i) Spent;*
- ii) spent*
- iii) spent*

- iv) *Pending the hearing and determination of Petition of Appeal No.E009 of 2022, a conservatory order be and is hereby issued staying the execution of the judgment and decree of the Environment and Land Court made on 12<sup>th</sup> November 2008 in ELC No.64 of 2009, Laiser Communications Limited & 2 others v Tanad Transporters Limited and 2 others and the affirmation thereof by the judgment of the Court of Appeal on 1<sup>st</sup> April 2022 in Civil Appeal No. 441 of 2018 Tanad Transporters Limited and 2 others v Laiser Communications Limited & 2 others*
- v) *Leave of the Supreme Court be and is hereby granted to the Applicants to file an appeal against the judgment and decree of the Court of Appeal made on 1<sup>st</sup> April 2022 in Civil Appeal No. 441 of 2018 Tanad Transporters Limited and 2 others v Laiser Communications Limited & 2 others if the same is required.*
- vi) *Petition of Appeal No. E009 of 2022 Laiser Communications & others v Tanad Transporters and 2 others be and is hereby deemed to have been filed pursuant to leave granted herein.*
- vii) *The costs of this Application be provided for*

**[2] UPON** perusing the grounds on the face of the application; the supporting affidavits sworn on 7<sup>th</sup> April 2022 by Nelson Havi Advocate and Musa Said Hassan, a director of the 1<sup>st</sup> applicant, on behalf of the 1<sup>st</sup> applicant and the 3<sup>rd</sup> applicant who is his son; and the submissions dated 13<sup>th</sup> April 2022 and filed on 19<sup>th</sup> April 2022, their main argument being that the decree in ELC No.64 of 2009 directed OCS Pangani Police Station to supervise the eviction of the 1<sup>st</sup> and 3<sup>rd</sup> applicants from their properties and there is imminent danger that the 1<sup>st</sup> respondent will secure the assistance of the OCS to dispossess the 1<sup>st</sup> and 3<sup>rd</sup> applicants of their properties and destroy the valuable developments thereon; that there is an arguable appeal from the decision of the Court of Appeal and the appeal will be rendered nugatory if stay is not granted and it is in the public interest that the order of stay be granted, the facts of the case meeting the

criteria set out in ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*** [2014] eKLR and that the jurisdiction of this Court has been invoked as of right, in terms of Article 163(4)(a) of the Constitution and by leave, if required;

**[3] UPON CONSIDERING** the proceedings before Hon. Deputy Registrar of the Court on 20<sup>th</sup> April 2022 in the presence of counsel for the applicant and respondents whereupon counsel for the 2<sup>nd</sup> respondent indicated that he supports that application, while counsel for the 1<sup>st</sup> respondent stated that he had not put in a replying affidavit and submissions as his client was away and noting that the replying affidavit or submissions in response to the application were yet to be filed at the time of drafting this ruling; and that the 1<sup>st</sup> respondent has since filed a Notice of Preliminary Objection dated 19<sup>th</sup> April 2022 and filed on 18<sup>th</sup> May 2022 challenging the Court's jurisdiction to entertain the appeal for the reasons stated therein;

**[4] TAKING INTO ACCOUNT** the fact that when the petition herein was also mentioned before the Hon. Deputy Registrar on 20<sup>th</sup> April 2022 in which he directed that the petition be mentioned on 8<sup>th</sup> July 2022 in order to allow the Court to dispense with the present application before addressing the preliminary objection;

**[5] COGNISANT** of the Notice of withdrawal dated 27<sup>th</sup> May 2022 filed on behalf of the applicants under section 3 of the Supreme Court Act and Rule 19 of the Supreme Court Rules in which the applicants withdraw prayers 5 and 6 of the Notice of Motion Application dated 7<sup>th</sup> April 2022 together with ground 14 in respect thereof, effectively dispensing with the need for leave by the Court to file the appeal on account of questions involving general public importance being raised in the appeal;

**[6] FROM THE FOREGOING** and based on the directions issued before the Deputy Registrar as alluded to, the Court is not seized of the preliminary objection at this juncture and limits its consideration only to the application before it which application is supported by the 2<sup>nd</sup> respondent, the 1<sup>st</sup>

respondent having filed neither response nor submissions in respect of the application, the only issue for consideration is whether the applicants are entitled to stay of execution as prayed.

[7] In ***Peter Ayodo Omenda & 6 others v Ethics & Anti-Corruption Commission & 2 others*** SC Application No. 31 of 2019 [2020] eKLR, we affirmed that this Court has authority to issue orders for the preservation, in an interim period, of a subject-matter of appeal (see ***Board of Governors, Moi High School, Kabarak & Another v. Malcolm Bell***, Supreme Court Applications Nos. 12 & 13 of 2012). It is not automatic that for any unopposed application, the Court will as a matter of course grant the sought orders. It behooves the Court to be satisfied that *prima facie*, with no objection, the application is meritorious and the prayers may be granted (see ***Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others*** [2018] eKLR Civil Application No.26 of 2018).

[8] The criteria for grant of stay by this Court is now well established following the enunciation in the ***Gatirau Munya Case*** and followed, *inter alia*, in ***George Boniface Mbugua v Mohammed Jawayd Iqbal (Personal representative of the Estate of the late Ghulam Rasool Jammohamed)*** SC Misc. Application No. 7 (E011) of 2021 [2021] eKLR. The applicant needs to demonstrate, first that the appeal is arguable and not frivolous; that if the order of stay is not granted the appeal will be rendered nugatory; and finally, that it is in the public interest to grant an order of stay. It must be remembered that the question whether an appeal is arguable, does not call for the interrogation of the merit of the appeal, and the Court, at this stage must not make any definitive findings of either fact or law. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully by the Court. On the nugatory aspect, the concern is whether 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. See the

decision of the Court of Appeal in ***Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others*** Civil Application No 31 of 2012, [2013] eKLR.

**[9]** Turning to the first criteria, the applicants argue that their appeal hinges on the question of interpretation or application of the Constitution including:

- a) Whether the Court of Appeal can in exercise of its appellate jurisdiction under Article 163(4)(b) of the Constitution disregard the law of property ownership and evidence and derogate one's fundamental right to property lawfully acquired and owned, contrary to Article 40 of the Constitution;
- b) Whether the Court of Appeal can in exercise of its appellate jurisdiction under Article 163(4)(b) of the Constitution disregard the law of property ownership and evidence and derogate one's fundamental right to property lawfully acquired and owned, contrary to Article 64 of the Constitution; and
- c) Whether the Court of Appeal can in exercise of its appellate jurisdiction under Article 163(4)(b) of the Constitution frame and/or reframe issues for trial by the Environment and Land Court in respect to the disputed ownership of properties Land Reference Numbers 36/IV/108, 36/IV/107 and 36/IV/106 and determine the right of ownership in respect thereof as though it were a trial court without violating the appellant's fundamental right to a fair hearing and public hearing entrenched under Article 50(1) of the Constitution of Kenya.

**[10]** This in our view calls into consideration the sanctity of title to property and the indefeasibility of that title which is a fundamental tenet of registration of private property as guaranteed under the Constitution, arguments that can only be carried forth in the appeal for determination including the effect of the consent filed by the parties before the Court of Appeal. In the same breadth and in light of the jurisdiction question as raised in the preliminary objection by the 1<sup>st</sup> respondent, this portends an argument that can only be tested on its

merit at the opportune time. We are therefore satisfied that the applicants have demonstrated that they have an arguable appeal.

**[11]** Would the appeal be rendered nugatory? The applicants argue that this condition is satisfied by two undisputed factors. First, that the properties in issue are developed occupied and in use by the 1<sup>st</sup> and 3<sup>rd</sup> applicants and that there is considerable doubt as to whether the 1<sup>st</sup> respondent is entitled to the properties registered in the name of the 1<sup>st</sup> applicant in view of the consent order made by the Court of Appeal in ***Civil Application No. Nai 297 of 2010 (UR 208/2011) Tanad Transporters Limited & 2 others v Laiser Communications Limited and 2 others*** and the express admission before the Environment and Land Court. Second, that there is imminent danger of their eviction with the assistance of the OCS Pangani as per the decree issued in ***ELC No.64 of 2009*** thereby dispossessing the applicants of their properties and destruction of valuable developments thereon.

**[12]** The applicants' assertion in this regard is undisputed. The applicants remain in occupation and have made substantial development on it. The *status quo* in our view favours the applicants. The threat of eviction of the 1<sup>st</sup> and 3<sup>rd</sup> respondent remains imminent and there are no assurances of the 1<sup>st</sup> respondent's ability or willingness to compensate the applicants in damages and the reasonability of such damages should the applicant succeed in their appeal. Moreover, if the 1<sup>st</sup> respondent was to take possession, it is not clear what other improvements or changes they would make on the property and how reversible that would be. Under the circumstances, the balance of probability favours the applicants on the aspect of the appeal being rendered nugatory in the event of refusal by the court to grant conservatory orders.

**[13]** On public interest, we believe there is sufficient public interest element in the appeal. This is manifested in the question revolving around competing claims to the ownership of property derived from public institutions. There are contradicting assertions by the applicants and the 1<sup>st</sup> respondent over the suit

property each tracing claim from public institutions in the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, respectively, with each giving evidence inconsistent with the other with the backing of the respective institutions.

[14] Considering that this Court has, in the cases of ***Cyrus Shakhhalaga Khwa Jirongo v. Soy Developers Limited & 9 others***, SC Application 22 of 2019; [2019] eKLR and ***Peter Ayodo Omenda & 6 others v Ethics & Anti-Corruption Commission & 2 others***, SC Application 31 of 2019; [2020] eKLR, granted orders to stay the respective decisions of the Court of Appeal and noting that indeed the petition of appeal filed by the applicants on 12<sup>th</sup> April 2022 challenges the majority decision of the Court of Appeal we are satisfied that the applicants are deserving of the prayers sought.

[15] In the end, we make the following orders:

- i. ***The Notice of Motion Application dated 7<sup>th</sup> April 2022 and filed on 12<sup>th</sup> April 2022 be and is hereby allowed to the extent that pending the hearing and determination of Petition of Appeal No.E009 of 2022 Tanad Transporters and 2 others v Laiser Communications & others, a conservatory order be and is hereby issued staying the execution of the judgment and decree of the Environment and Land Court made on 12<sup>th</sup> November 2008 in ELC No.64 of 2009, Laiser Communications Limited & 2 others v Tanad Transporters Limited and 2 others and the affirmation thereof by the judgment of the Court of Appeal on 1<sup>st</sup> April 2022 in Civil Appeal No. 441 of 2018 Tanad Transporters Limited and 2 others v Laiser Communications Limited & 2 others;***
- ii. ***Costs of the application shall abide the outcome of the appeal.***

Orders accordingly.

**DATED and DELIVERED at NAIROBI this 8<sup>th</sup> day of July 2022.**

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**P.M. MWILU**  
**DEPUTY CHIEF JUSTICE & VICE**  
**PRESIDENT OF THE SUPREME COURT**

.....  
**S.C. WANJALA**  
**JUSTICE OF THE SUPREME COURT**

.....  
**NJOKI NDUNGU**  
**JUSTICE OF THE SUPREME COURT**

.....  
**I. LENAOLA**  
**JUSTICE OF THE SUPREME COURT**

**JUDICIARY**  
.....  
**W. OUKO**  
**JUSTICE OF THE SUPREME COURT**

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

**REGISTRAR**  
**SUPREME COURT OF KENYA**