



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Mwilu; DCJ & VP, Ibrahim, Wanjala, Lenaola, & Ouko SCJJ)

PETITION (APPLICATION) NO. E014 OF 2023

-BETWEEN-

ASHMI INVESTMENT LIMITED APPELLANT/APPLICANT

-AND-

RIAKINA LIMITED 1ST RESPONDENT

NATIONAL LAND COMMISSION 2ND RESPONDENT

Being an application for Conservatory Orders

Representation:

Ms Misiati for the Appellant/Applicant
(Prof. Tom Ojienda & Associates)

Mr. Onyango for the 1st Respondent
(A.I Onyango & Company Advocates)

No appearance for the 2nd Respondent

RULING OF THE COURT

[1] UPON perusing the Applicant's Notice of Motion dated 4th May, 2023 and filed on 19th May, 2023 pursuant to Article 163(4)(a) of the Constitution

2010; sections 21 (1) (a), 24 (1) of the Supreme Court Act No. 7 of 2011; Rules 3 (5), 31 & 32 of the Supreme Court Rules, 2020 seeking the following orders:

1. *Spent;*
2. *Spent;*
3. *THAT the Honourable Court be pleased to issue conservatory orders staying the execution of the Ruling dated 14th April 2023 in Civil Appeal No. 384 of 2019, Ashmi Investment Limited versus Riakina Limited and National Land Commission pending the hearing and determination of this Petition of Appeal;*
4. *Spent;*
5. *THAT the Honourable Court be pleased to issue conservatory orders staying the execution of the Judgment dated 19th November 2021 in **Civil Appeal No. 384 of 2019**, Ashmi Investment Limited versus Riakina Limited and National Land Commission, pending the hearing and determination of this Petition of Appeal;*
6. *Spent;*
7. *THAT this Honourable Court be pleased to issue a temporary injunction restraining the 1st Respondent, its members, its agents, servants, employees and/or representatives from entering, taking possession of and in any other manner interfering with the suit property pending the hearing and determination of this Petition of Appeal;*
8. *THAT this Honourable Court be pleased to grant such other appropriate relief as it may deem fit, to give effect to the Orders sought herein; and*
9. *THAT the costs of this Application be provided for; and*

[2] UPON perusing the grounds on the face of the application; the supporting affidavit sworn on 4th May, 2023 by Abdirahman Mohamed Elmi, and written submissions dated 4th May, 2023 and filed on 19th May, 2023 wherein the applicant contends that it is the registered owner of LR Nos. 29957 and 29955 (hereinafter **the suit properties**) as allocated to it having paid the

allotment fees; that the Court of Appeal in its ruling dated 14th April, 2023 affirmed its judgment dated 19th November 2021 where it upheld the High Court decision cancelling the applicant's survey, deed plan and the resultant titles to the suit properties; that this decision was reached without any cogent proof of illegality or fraud tendered by the 1st respondent; and that it did not violate the doctrine of *lis pendens* as the titles issued during the pendency of the trial was a culmination of the registration process; and

[3] UPON considering the applicant's further argument that it has met the test laid down by this Court in ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*** SC Application No.5 of 2014 [2014] eKLR by demonstrating that it has an *arguable appeal* based on the aforementioned grounds; that the *appeal would be rendered nugatory* if the subject matter is not preserved since the 1st respondent during the pendency of the Court of Appeal proceedings invaded the suit properties, erected a perimeter wall and installed a security person who has made it impossible for the applicant to go anywhere near the suit properties; and that *public interest* rests in favour of allowing the application as pertinent questions have been raised including the place of the court to infer fraud where it is not specifically pleaded and no evidence has been led to prove the same to the required standard; as well as dispossession of a legitimate allottee of property in the absence of proof of fraud and illegality; and

[4] UPON perusing the 1st respondent's notice of preliminary objection dated 30th May 2023 and filed on 13th June 2023, opposing the application and petition of appeal on the grounds that the appeal is frivolous for this Court lacks jurisdiction as moved by the appellant; and that the notice of appeal was filed/lodged out of time contrary to rule 36 (1) of the Supreme Court Rules; and

[5] UPON considering the applicant's written submissions dated 9th May, 2023 in opposition to the preliminary objection wherein the applicant asserts that this Court has jurisdiction because, from the onset, its claim was anchored on its right to own the Suit Properties as the *bona fide* allottee; and thus, the

question before the court was whether the applicant or 1st respondent had acquired a right to the Suit Properties under Article 40 of the Constitution. Hence, the appeal has attributes of constitutional interpretation and/or application that arise from the main suit and require it to be heard and determined by the superior courts below which this Court has discretion to assess as was held by the Court in ***Paul Mungai Kimani & 20 others (on behalf of themselves and all members of Korogocho Owners Welfare Association) vs Attorney General & 2 others*** Sup Ct Petition No. 45 of 2018 [2020] eKLR. Furthermore, the applicant contends that section 26 of the Land Registration Act, legislation derived from Article 68 of the Constitution, calls upon the superior court to question whether the applicant has a legitimate title of the Suit Properties under Article 40, and whether the 1st respondent violated the same in anyway; and

[6] ADDITIONALLY, the applicant argues that the notice of appeal was lodged within the prescribed timeline considering that 21st April, 2023 was a holiday and is excluded under Rule 36 (1) of the Supreme Court Rules, section 57 of the Interpretation and General Provisions Act and as determined by this Court in ***Bookpoint Limited v Guardian Bank Limited & another***; SC Application No. 4 (E006) of 2021, [2021] eKLR; and

[7] HAVING taken into account the entirety of the application, the preliminary objection, responses and submissions put forth, **WE OPINE** as hereunder:

[8] A preliminary objection challenging our jurisdiction having been raised in response to the application and appeal, the same has to be addressed *in limine*. The crux of the preliminary objection is two pronged. First, that the notice of appeal was filed out of time contrary to Rule 36 (1) of the Supreme Court Rules 2020 and secondly, that the appeal does not meet the threshold of Article 163(4)(a) of the Constitution.

[9] On the first objection we note that under Rule 36 (1) of the Supreme Court Rules, a notice of appeal ought to be filed within fourteen (14) days from the

date of judgment or ruling which is the subject of appeal. Rule 36(2)(b) thereof stipulates that the filing of the notice of appeal is, at the first instance, with the Registrar of the court from which the appeal originates. The ruling subject of appeal in this instance was delivered on 14th April, 2023. It is uncontroverted that the applicant lodged the Notice of Appeal to the Court of Appeal, through its online virtual platform on 28th April, 2023. As indicated under section 57(b) of the Interpretation and General Provisions Act, public holidays are excluded in computing time. Since 21st April 2023 was gazetted as a public holiday vide *Gazette Notice No. 5045* dated 19th April 2023, we find that the applicant filed the Notice of Appeal within the fourteen-day window, expiring on 29th April, 2023.

[10] We appreciate that in line with the Covid-19 Practice Directions on Electronic Case Management issued by the Court of Appeal and in particular Direction 8(3) thereof, filings before the Court of Appeal are entirely virtual. Thus, the date of filing effectively coincides with the date of lodging through the virtual platform. The Court has previously exercised its discretion to excuse the confusion arising out of the transition between the Court of Appeal filing process and the filing before the Supreme Court in relation to the Notice of Appeal. In *Dina Management Limited v County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2022] KESC] 24 (KLR) (Civ) (19 May 2022) (Ruling)*, we held as follows:

“{We are} Satisfied therefore that the electronic Notice of Appeal was timeously lodged in the Court of Appeal strictly in accordance with Direction 8(3) aforesaid and subsequently filed in this Court within the time set, we find that it is properly on record and reject the objection by the 1st respondent, being satisfied that it was electronically served on 17th June, 2021 which was the same day that the Notice of Appeal was filed.”

[11] This was in response to a similar objection regarding the electronic lodging of the Notice of Appeal before the Court of Appeal and the transmission of the

hard copy to this Court in line with Rule 12 of this Court's Rules as explained in the case of **Kenya Hotel Properties Limited v. Attorney General & 5 others**; SC Application No. 2 of 2021 (E004 of 2021); [2021] eKLR; We are therefore satisfied that just like in the cited cases, the objections concerning non-compliance with Rule 36(1) of this Court's Rule cannot stand.

[12] On the second limb of the objection, both parties appreciate the parameters of our jurisdiction. We need not re-emphasize that jurisdiction of a court flows from either the Constitution or legislation or both. And, jurisdiction is everything. (See **Samuel Kamau Macharia & another v. Kenya Commercial Bank & 2 others**, SC Application No. 2 of 2011; [2012] eKLR). Only those appeals arising from cases involving interpretation or application of the Constitution can be entertained by the Supreme Court. The appeal must originate from the Court of Appeal case where issues of contestation revolved around interpretation or application of the Constitution. That the interpretation or application has formed the basis for determinations at the superior courts below and the same issue progressed through the normal appellate mechanism to reach this Court.

[13] The gist of the applicant's case from the onset before the superior courts focused on determining the ownership of the suit properties between the applicant and the 1st respondent. This is readily discerned from paragraph 13 of the Plaint filed before the High Court and the prayer seeking a declaration as a *bona fide* owner of the suit properties. In doing so, the applicant invoked the doctrine of *bona fide* owner in the wake of double allotment of the suit properties. In the appeal before us, which stems from that before the Court of Appeal, the applicant raised grievances on the court's application of the doctrine of *lis pendens* and the findings of fraud as against the evidence adduced at the trial including the affidavit introduced at the Court of Appeal sworn by one Zacharia Ndege.

[14] We caution, as we did in **Daniel Kimani Njihia v Francis Mwangi Kimani & another** Sup Ct Civil Application No. 3 of 2014 [2015] eKLR, that

the Supreme Court is not just another layer of appeal. Our circumscribed jurisdiction under Article 163(4)(a) of the Constitution does not permit the Court to adjudicate factual contestations unless they can fit the narrow prism of constitutional interpretation and application. From our careful perusal of the record, we are satisfied that the dispute as to the ownership of land as a *bona fide* allottee under the circumstances and the court's application of the doctrine of *lis pendens* bearing in mind the appellant's argument surrounding this court's advisory opinion concerning the dispute between the National Land Commission and the Ministry of Lands are issues that involve the interpretation and application of Article 40 of the Constitution. The issues surrounding the inference of fraud and the attendant evidence do not fall for our determination as they were fully ventilated before the superior courts below. The objection therefore partially succeeds and is to that extent only allowed.

[15] In saying so, we think it is necessary to allow the appellant to ventilate its appeal under the strict confines of Article 163(4)(a) of the Constitution. The court recently entertained a similar dispute involving contested ownership of land in ***Dina Management Limited v County Government of Mombasa & 5 others (Petition 8 (E010) of 2021)*** [2022] KESC] 30 (KLR) (21 April 2023) (Judgment) as of right.

[16] With our finding on the preliminary objection, we now turn to consider the prayers for conservatory relief. We note that the application is uncontroverted as the respondent fully relied upon the objection in response to the same. Nevertheless, it is not lost to us that the applicant still has to satisfy the Court that it is deserving of the said orders. The Court's jurisdiction to grant interim relief is hinged on sections 21 and 24 of the Supreme Court Act. The objective of the interim relief is to protect the substratum of the appeal.

[17] As set out in ***Gatirau Peter Munya case***, it is evident to us that the appeal satisfies the three tests of arguability, in view of the self-evident arguments raised in the appeal, the appeal would be rendered nugatory if the court does not intervene and public interest in the sense that it is important for

the constitutional right to own property, the exercise of authority by public bodies resulting to double allocations of titles to land and the misapplication of the doctrine of *lis pendens* which is a legal argument that goes to jurisdiction.

[18] On costs, award of the same is discretionary and follows the principle set out by this Court in ***Jasbir Singh Rai & 3 other v Tarlochan Singh Rai & 4 others*** SC Petition No. 4 of 2012; [2014] eKLR that costs follow the event. However, as the appeal is yet to be determined, it is only prudent that the costs abide the outcome of the appeal.

[19] CONSEQUENTLY, we make the following orders:

- (a) ***The Preliminary Objection partly succeeds to the extent that the applicant will restrict its appeal to the following issues:***
 - (i) ***Whether the applicant was a bona fide owner of the suit properties within the provisions of Article 40 of the Constitution;***
 - (ii) ***Whether the Court of Appeal misapplied the doctrine of *lis pendens* and thereby denying the applicant a right to property.***
- (b) ***Notice of Motion dated 4th May, 2023 and filed on 19th May, 2023 be and is hereby allowed.***
- (c) ***Conservatory orders be and are hereby issued staying the execution of the Ruling dated 14th April 2023 in Civil Appeal No. 384 of 2019, Ashmi Investment Limited versus Riakina Limited and National Land Commission pending the hearing and determination of the Appeal;***
- (d) ***Conservatory orders staying the execution of the Judgment dated 19th November 2021 in Civil Appeal No. 384 of 2019, Ashmi Investment Limited versus Riakina Limited and National Land Commission, pending the hearing and determination of this Appeal.***

- (e) *A temporary injunction be and is hereby issued restraining the 1st Respondent, its members, its agents, servants, employees and/or representatives from entering, taking possession of and in any other manner interfering with the suit property pending the hearing and determination of this Appeal.*
- (f) *The costs of the application to abide the outcome of the appeal.*

It is so ordered.

DATED and DELIVERED at NAIROBI this 4th day of August, 2023.

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

.....
M. K. IBRAHIM
JUSTICE OF THE SUPREME COURT

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

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

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

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

REGISTRAR
SUPREME COURT OF KENYA