



**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA**

*(Coram: Koome (CJ & P), Ibrahim, Wanjala, Njoki Ndungu, Lenaola SCJJ)*

**APPLICATION NO. E020 OF 2024**

**-BETWEEN-**

**JUDITH WANJIRU NJENGA.....APPLICANT**

**-AND-**

**MASTO HOLDINGS LIMITED.....1<sup>ST</sup> RESPONDENT**

**P.M. NG'ANG'A.....2<sup>ND</sup> RESPONDENT**

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

**THE ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**NATIONAL LANDS COMMISSION.....5<sup>TH</sup> RESPONDENT**

**THE CO-OPERATIVE BANK OF KENYA.....INTERESTED PARTY**

---

*(Being application for conservatory orders in the form of stay of execution and injunction against the Judgment of the Court of Appeal in Nairobi delivered on 26<sup>th</sup> April, 2024 in Civil Appeal No. 632 of 2019 (Tuiyott, Achode & Gachoka JJ.A) pending the determination of an application for grant of leave and certification to appeal)*

---

**Representation:**

Mr. Mbichire for the Applicant  
*(Mbichire & Company Advocates)*

Dr. Muthomi Thiankolu for the 1<sup>st</sup> Respondent  
*(Muthomi & Karanja Advocates)*

Mr. William Muthee for the Interested Party  
(TripleOK Law LLP Advocates)

## **RULING OF THE COURT**

**[1] UPON READING** the Motion dated 19<sup>th</sup> June, 2024 and filed on 25<sup>th</sup> June, 2024 by the applicant, pursuant to Articles 47, 48, 50, 163(4)(b) of the Constitution, Section 3, 3A and 23A of the Supreme Court Act, Rule 32 of the Supreme Court Rules, 2020 seeking the following orders:

1. **THAT** this Honourable Court be pleased to grant a stay of execution of the Judgment of the Court of Appeal at Nairobi delivered on the 26<sup>th</sup> April, 2024 by Honourable Justices F. Tuiyott, L. Achode and M. Gachoka JJA in Civil Appeal No. 632 of 2019 Mastro Holdings Ltd. Vs. Judith Njenga & 4 Others pending the determination of the Certification Application filed in Civil Application SUP. No. E010 of 2024 before the Court of Appeal;
2. **THAT** this Honourable Court be pleased to issue a temporary injunction restraining the 1<sup>st</sup> 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 namely L.R. No. 209/522/2 pending the determination of the Certification Application filed in Civil Application SUP. No. E010 of 2024 before the Court of Appeal;
3. **THAT** this Honourable Court be pleased to grant such other appropriate relief as it deems fit to give effect to the orders sought herein; and
4. **THAT** costs of this application be provided for; and

**[2] UPON PERUSING** the grounds on the face of the application, the supporting affidavit by Judith Wanjiru Njenga sworn on 19<sup>th</sup> June, 2024 and written

submissions of even date wherein the applicant contends that she has been the registered proprietor of L.R. 209/522/2 (hereinafter the “*suit property*”) which has been the subject matter of several suits between herself, the 1<sup>st</sup> respondent and the interested party herein on allegations that the suit property was charged to the interested party and sold to the 1<sup>st</sup> respondent; she contends that the suit property comprises her matrimonial home to which she holds an original title; that the 1<sup>st</sup> respondent produced a fraudulent copy of title and which has never been verified by lands office or supported by any search nor was the original copy produced in court. After a protracted court battle before the Environment and Land Court, the Court (*Bor. J.*) found in favour of the applicant issuing a permanent injunction against the 1<sup>st</sup> respondent stopping him from harassing, evicting, trespassing upon or in any manner interfering with the suit property; upon appeal by the 1<sup>st</sup> respondent, the Court of Appeal overruled the trial court and revoked the applicant’s title, ordered for rectification of the register in favour of the 1<sup>st</sup> respondent, issued a permanent injunction against the applicant and ordered for the applicant’s eviction to be enforced by the OCS Central Police Station; the Court of Appeal granted the applicant reprieve of sixty (60) days from the date of the judgment to vacate the land, failing which she would be evicted.

**[3] FURTHER,** aggrieved by the decision of the Court of Appeal, the applicant lodged an application on 17<sup>th</sup> May, 2024 seeking leave to appeal and certification to appeal under Article 163(4)(b) of the Constitution, which application was heard on 11<sup>th</sup> June, 2024 and ruling reserved for 8<sup>th</sup> November, 2024; that her application seeking stay of execution and/or status quo was rejected by the Court of Appeal on account of lack of jurisdiction; that should her application for certification and eventual decision by this Court be successful, it would amount to an act in futility as the 1<sup>st</sup> respondent would have proceeded with her eviction from the suit property; that her application before this Court is merited as her intended appeal

is arguable urging that the Court of Appeal disregarded any attempt to interrogate the issues of validity of the instrument of charge that gave rise to the statutory power of sale and ended up validating a charge that was not registered against the title; the Court of Appeal further failed to rule as regards the operational parts of the transfer of a proprietary right or interest in property under the provisions of Section 23(1) of the Registration of Titles Act and whether the provisions of Section 69 (B) (2) of the Indian Transfer of Property Act are absolute and afford protection to a 'purchaser' even where there was a flawed process followed in the exercise of a statutory power of sale.

**[4] MOREOVER**, the applicant adds that the decision by the Court of Appeal was in conflict with the *dicta* in the decision by this Court in ***Dina Management Limited vs County Government of Mombasa & 5 Others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR)***; that due to the date given for the ruling on certification, she is left exposed to eviction pursuant to the orders in the Judgment of the Court of Appeal as the sixty(60) days granted in the judgment expired on 25<sup>th</sup> June, 2024; she adds that she is aged 80 years old and has been in occupation of the suit property for over 50 years (since 1974) and without the stay of execution she will be forcefully evicted which will cause her irreparable harm that cannot be compensated by any form of damages.

**[5] ADDITIONALLY**, the applicant acknowledges that the rules of this Court, in particular, Rule 31(2) of the Supreme Court Rules, 2020, do not permit applications to be brought before a petition is lodged; she, however, urges that this Court is her saving grace to help her maintain her home and preserve the suit property; she implores the Court to exercise its jurisdiction to grant conservatory status quo orders under its inherent powers to prevent a miscarriage of justice and preserve the subject matter of the intended appeal; she cites the cases of ***Deynes Muriithi & 4 Others vs Law Society of Kenya & Another [2016] e KLR***

and **Board of Governors, Moi High School, Kabarak & Another vs Bell & 2 Others** (Petition 6 & 7 of 2013 & Civil Application 12 & 13 of 2012 (Consolidated)) [2013] KESC 12 (KLR) to bolster her plea; and

[6] **UPON PERUSING** the response by the 1<sup>st</sup> respondent by way of preliminary objection dated 3<sup>rd</sup> July, 2024 anchored on Sections 15B and 23A of the Supreme Court Act and Rules 31(2) and 32 of the Supreme Court Rules, 2020 and submissions dated 5<sup>th</sup> July, 2024; citing the decisions in **National Land Commission vs. Tom Ojienda & Associates & 2 Others** [2024] KESC 16 (KLR) and **Mbugua alia George Boniface Nyanja vs. Iqbal (Personal representative of the Estate of the Late Ghulan Rasool Janmohamed** [2024] KESC 41 (KLR) the 1<sup>st</sup> respondent argues that the Court has no jurisdiction on account of the applicant's Motion being premature or unripe to the extent that the applicant's right to appeal to this Court has yet to crystallize as her application for certification or leave to appeal is still pending before the Court of Appeal; interlocutory applications in appeals to the Supreme Court can only be filed within an existing appeal; therefore the question of whether the applicant has met the legal threshold for grant of stay of execution or any other relief is equally premature or unripe; it is also argued that the two decisions the applicant relies on being **Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others** [2014] e KLR and **Deynes Muriithi & 4 Others vs Law Society of Kenya & another** [2016] e KLR are irrelevant and distinguishable as they relate to cases involving appeals as of right under Article 163(4)(a) of the Constitution; while the case of **Board of Governors, Moi High School, Kabaraka & Another vs. Malcolm Bell** [2013] eKLR is equally irrelevant and distinguishable as the applicant therein had already secured certification and timeously filed their Petition and Record of Appeal; this Court is urged to dismiss or strike out the application, with costs; and

[7] **UPON PERUSING** the preliminary objection dated 2<sup>nd</sup> July, 2024 and written submissions dated 4<sup>th</sup> July, 2024 by the interested party in opposition to the application and on similar grounds as those advanced by the 1<sup>st</sup> respondent;

[8] **HAVING** considered the totality of the applications, responses and rival arguments by the parties, **WE NOW OPINE** as follows:

- (i) **GUIDED** by the provisions of Section 23A of the Supreme Court Act, this Court has jurisdiction to issue an order for stay of execution, an injunction, stay of further proceedings or any other conservatory or interim orders, on such terms as the Court may deem fit. It is well established following our decision in the case of ***Gatirau Peter Munya vs. Dickson Mwenda & 2 others***, SC Application No. 5 of 2014, [2017] eKLR that an applicant must satisfy the Court that the appeal is arguable and is not frivolous; that unless the orders of stay are granted, the appeal will be rendered nugatory; and thirdly, it is in the public interest that the order of stay be granted.
- (ii) However, appreciating what we stated in ***Aviation & Allied Workers Union Kenya v. Kenya Airways & Others***; SC Application No. 50 of 2014, [2015] eKLR that where a court's jurisdiction, is objected to by any party to the proceedings, such an objection must be dealt with as a preliminary issue, before the meritorious determination of any cause. We must therefore evaluate whether the instant application has met the set jurisdictional threshold.
- (iii) Noting that in the cases of ***James Mbatia Thuo & Ephantus Mwangi v Kenya Railways Corporation & Attorney General of Kenya***, SC Civil Application No. 10 of 2017 [2018] eKLR and ***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 this Court held that interlocutory applications have no legal basis in the absence of an appeal accompanied by a memorandum of appeal. We further note that this judicial pronouncement is now enacted in the Supreme Court Rules, 2020 in which Rule 31(2) provides that: “*an interlocutory application shall not be originated before a petition of appeal or a reference is filed with the Court.*”

- (iv) For the above reason, no interlocutory application can be brought before a petition of appeal or reference is lodged. Put another way, an interlocutory application must be based on an existing petition or Reference. We are thus inclined to agree with the 1<sup>st</sup> respondent and interested party that without a substantive appeal to anchor the applicant’s motion, this Court is bereft of jurisdiction to grant the orders sought.
- (v) Further, the applicant states that she had sought conservatory orders of stay of execution before the Court of Appeal but the same was denied due to a lack of jurisdiction. However, having perused the record, we note that the applicant, though represented by counsel, rather than file a proper application under the relevant rules before the Court of Appeal, erroneously sought stay of execution before the Deputy Registrar of the Court of Appeal when the parties appeared for settlement of terms. We say no more on the issue.
- (vi) Consequently, while we appreciate and understand the applicant’s circumstances, the Court lacks the requisite jurisdiction to grant the orders sought.

**[9] ACCORDINGLY**, and for the reasons aforestated we make the following orders:

- i. The applicant’s Notice of Motion dated 19<sup>th</sup> June, 2024 and filed on 25<sup>th</sup> June, 2024 be and is hereby dismissed;*
- ii. Each Party shall bear their costs of the Application.*

It is so ordered.

**DATED and DELIVERED at NAIROBI this 18<sup>th</sup> day of October 2024.**

.....  
**M.K. KOOME**  
**CHIEF JUSTICE &**  
**PRESIDENT OF THE SUPREME COURT**

.....  
**M. K. IBRAHIM**  
**JUSTICE 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**

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

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