



**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA**

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

**PETITION (APPLICATION) NO. E039 OF 2025**

**— BETWEEN —**

**INTERCOUNTRIES IMPORTERS  
AND EXPORTERS LTD..... APPELLANT/APPLICANT**

**— `AND—**

**TELEPOSTA PENSION SCHEME  
REGISTERED TRUSTEES ..... 1<sup>ST</sup> RESPONDENT  
NATIONAL LAND COMMISSION..... 2<sup>ND</sup> RESPONDENT  
HON. ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT  
JUBILEE INSURANCE COMPANY LTD..... 4<sup>TH</sup> RESPONDENT  
PARK AVENUE INVESTMENTS LTD.....5<sup>TH</sup> RESPONDENT  
TRUST BANK LIMITED (*IN LIQUIDATION*) .....6<sup>TH</sup> RESPONDENT**

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*Being an application for conservatory orders in the form of stay of execution  
and injunction against the Judgment of the Court of Appeal in Nairobi  
(Okwengu, Mativo & Macharia JJ. A), delivered on 12<sup>th</sup> July 2024 in Civil  
Appeal No. 293 of 2016*

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**Representation:**

Mr. Musota and Mr. Melly for the appellant/applicant

*(MMA Advocates LL. P)*

Mr. Bundotich for the 1<sup>st</sup> respondent

*(Kale Maina & Bundotich Advocates LL. P)*

Mr. Ochieng for the 2<sup>nd</sup> respondent

*(National Land Commission)*

Mr. Kamau for the 3<sup>rd</sup> respondent

*(The Hon. Attorney General Chambers)*

Mr. Thuita for the 5<sup>th</sup> respondent

*(Guandaru Thuita & Co. Advocates)*

Mr. Muthee for the 6<sup>th</sup> respondent

*(TripleOK Law LL. P Advocates)*

## **RULING OF THE COURT**

**[1] UPON READING** the Notice of Motion dated 17<sup>th</sup> December 2025 and filed on 22<sup>nd</sup> December 2025, seeking *an interim order for the stay of execution of the Court of Appeal judgment in Nairobi Court of Appeal Civil Appeal No. 293 of 2016 dated 12<sup>th</sup> July, 2024; an order of stay of execution of the said judgment pending the hearing and determination of the appeal; an injunction barring the 1<sup>st</sup> respondent or its agents or assignees from selling, charging or otherwise disposing of the suit property, pending the hearing and determination of the appeal; and costs of the application to abide the appeal; and*

**[2] UPON EXAMINING** the grounds on the face of the application and the supporting affidavit sworn by *Naushad Abid* on 17<sup>th</sup> December 2025, wherein it is contended that the appeal is arguable and raises substantial issues of law affecting the banking and lending sector. Particularly, that the impugned decision

undermines the statutory protection afforded to purchasers under a statutory power of sale pursuant to Section 99(3) of the Land Act; unless injunction and stay orders are granted, the 1<sup>st</sup> respondent may dispose of, charge, or otherwise alienate the suit property, thereby defeating the substratum of the appeal and rendering it nugatory; no prejudice will be occasioned to the respondents if the orders sought are granted; it is in the interest of justice that the application be allowed; and although the Court of Appeal directed the applicant to seek recourse against the 6<sup>th</sup> respondent, the latter is under liquidation and lacks the financial capacity to compensate the applicant; and

**[3] UPON CONSIDERING** the applicant's submissions dated 17<sup>th</sup> December 2025, asserting that the appeal is arguable as it raises substantial questions regarding the applicability of the principles in ***Dina Management Limited Vs County Government of Mombasa*** [2023] KESC 30 (KLR) (***Dina Management Limited Case***) to titles acquired through statutory power of sale under the Indian Transfer of Property Act (*repealed*), Section 77 (3) of the Registered Land Act (*repealed*), and as embodied in Section 99 (3) of the Land Act; unless the orders sought are granted, the instant appeal will be rendered nugatory as the 1<sup>st</sup> respondent may dispose of the suit property before the appeal is heard and determined; the issues to be determined in the appeal transcend the interests of the parties and bear significant implications for the banking sector, particularly on the securitization of land and enforcement of securities under statutory power of sale regimes, and in support thereof relies on ***Munya Vs Kithinji & 2 others*** [2014] KESC 38 (KLR), ***Kenya Hotel Properties Limited Vs Attorney General & 5 others*** [2022] KESC 62 (KLR), ***Non-Governmental Organizations Coordination Board Vs EG & 5 others*** [2023] KESC 78 (KLR), and ***Shah & 7 others Vs Mombasa Bricks & Tiles Ltd & 5 others*** [2022] KESC 25 (KLR); and

**[4] UPON PERUSING** the 1<sup>st</sup> respondent's replying affidavit sworn by Peter K. Rotich on 14<sup>th</sup> April, 2026 and their submissions dated 17<sup>th</sup> April 2026, in

opposition, on grounds that, the application lacks merit and fails to satisfy the threshold for grant of stay and injunctive relief. Specifically, the impugned judgment has already been enforced through the cancellation of the applicant's title and restoration of the suit property to the 1<sup>st</sup> respondent; the appeal is not arguable in light of the decisions in *Dina Management Limited* case and *Sehmi* [infra], which affirm that the doctrine of indefeasibility does not extend to titles obtained unlawfully; the applicant has failed to demonstrate what prejudice it would suffer if the orders sought herein are not granted, since it is cushioned by a Deed of Indemnity executed by the 6<sup>th</sup> respondent in its favour; the suit property was vested to the 1<sup>st</sup> respondent for a public purpose and is therefore incapable of alienation to private entities, citing *Munya Vs Kithinji & 2 others* [supra], *Obado Vs Oyugi & 2 others* (2014) KESC 25 (KLR), *Sehmi & another Vs Tarabana Company Limited & 5 others* (2025) KESC 21 (KLR), to urge that the application is devoid of merit and ought to be dismissed with costs; and

**[5] NOTING** that the 6<sup>th</sup> respondent electronically filed a notice of intention not to oppose the application dated 20<sup>th</sup> April 2026 on the same date; and

**[6] COGNISANT OF THE FACT THAT** the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents did not oppose the application despite having been duly served, as evidenced by the Affidavit of Service sworn by Martin Ajega, a licensed court process server, on 12<sup>th</sup> January 2026 and electronically filed on 15<sup>th</sup> January 2026; and

**[7] BEARING IN MIND** that the dispute emanates from competing claims to ownership of Land Reference No. 209/13238 (originally LR No. 209/2397) (the suit property); the 1<sup>st</sup> respondent (Teleposta) instituted proceedings before the High Court alleging that the suit property had been fraudulently and unlawfully alienated by the 2<sup>nd</sup> respondent (Commissioner of Lands) to the 5<sup>th</sup> respondent (Park Avenue Investments); the 5<sup>th</sup> respondent subsequently charged the property to the 6<sup>th</sup> respondent (Trust Bank); and upon default, the 6<sup>th</sup> respondent purported to exercise its statutory power of sale and transferred the property to the applicant (Intercountries Importers & Exporters Limited); the 1<sup>st</sup> respondent sought, *inter*

*alia*, the cancellation of the grant issued to the 5<sup>th</sup> respondent and the issuance of a fresh grant in its favour, or, in the alternative, compensation from the 2<sup>nd</sup> respondent; and

**[8] NOTING** that in a Judgment dated 27<sup>th</sup> July 2016, the High Court (*Ougo, J.*) found that the suit property was lawfully allocated to the 5<sup>th</sup> respondent; at the time of allotment, no registration of title to the suit property had been made in favour of the 1<sup>st</sup> respondent or its predecessor; and the applicant was a *bona fide* purchaser for value and the lawful proprietor thereof; and

**[9] FURTHER NOTING** that the Court of Appeal in its Judgment dated 12<sup>th</sup> July 2024, overturned the High Court and found that the suit property was not unalienated land available for allotment; the allotment to the 5<sup>th</sup> respondent by the 2<sup>nd</sup> respondent, and subsequent registration was irregular and unprocedural; the 2<sup>nd</sup> respondent could not ignore the unregistered interest of the 1<sup>st</sup> respondent, more so because, it was the 5<sup>th</sup> respondent that had initiated the process of allotment by application to the 2<sup>nd</sup> respondent; the suit property was not vacant at the time of the allotment to the 5<sup>th</sup> respondent; consequently, the 5<sup>th</sup> respondent acquired no valid title capable of being charged to the 6<sup>th</sup> respondent and the subsequent sale of the property by the 6<sup>th</sup> respondent to the applicant, in purported exercise of its statutory power of sale, was a nullity incapable of conferring any lawful title; and ultimately, the applicant was not a *bona fide* purchaser for value without notice; and

**[10] TAKING INTO ACCOUNT** that the applicant herein seeks conservatory orders in the nature of injunction and stay of execution pending the hearing and determination of the appeal by this Court. It is common ground, in that context, that this Court is vested with jurisdiction to issue such orders pursuant to Section 23A of the Supreme Court Act, as read with Rule 3(5) of the Supreme Court Rules. Also, as appreciated in ***Board of Governors, Moi High School, Kabarak & another Vs Bell & 2 Others*** [2013] KESC 12 (KLR), the essence of such

interlocutory orders is to safeguard the character and integrity of the subject-matter of an appeal, pending the resolution of all contested issues; and

[11] NOW GUIDED by the principles enunciated by this Court in *Munya Vs Kithinji & 2 others* [2014] KESC 38 (KLR) (*Munya Case*) that;

***“The principles to be considered before a Court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:***

- i. the appeal or intended appeal is arguable and not frivolous; and that***
- ii. unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.***

***These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of the Constitution of Kenya, 2010, a third condition may be added, namely:***

- iii. that it is in the public interest that the order of stay be granted.”***

[12] APPRECIATING that in *Kenya Hotel Properties Limited Vs Attorney General & 5 others* [2020] KESC 6 (KLR), this Court defined an arguable appeal in the following terms:

***“Arguability of an appeal would entail this Court looking at the record and the Petition of Appeal and determine, without finality but at a prima facie level, whether the appeal has***

***substance and/or is not made of straw. It also entails interrogating its foundation and confirming that it is not built on quick sand.”***

**[13] FURTHER APPRECIATING** that in ***Haki Na Sheria Initiative Vs Inspector General of Police & 2 others; Kenya National Human Rights and Equality Commission (Interested Party)*** [2021] KESC 22 (KLR), this Court addressed the question of when an appeal may be rendered nugatory absent an order of stay, as follows:

***“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.”***

**[14] HAVING CONSIDERED** our prior decisions and those of the superior courts, totality of the pleadings, affidavits, and rival arguments by the parties on both sides, **WE OPINE** as follows:

- i. The appeal is arguable; it raises a *bona fide* point of law regarding the applicability of the *rationes decidendi* in ***Dina Management Limited case*** and ***Sehmi*** [supra] to the transfer or acquisition of title through a public auction conducted pursuant to a chargee’s exercise of its statutory power of sale.
- ii. Absent the orders sought, further dealings with the suit property may occasion irreparable harm that may not be readily reversible or adequately compensated by an award of damages, should the appeal ultimately succeed.
- iii. Balancing the loss and uncertainty which would be occasioned to the applicant as against the respondents and the public, we find that public interest tilts in favour of granting a conservatory order of injunction to preserve the substratum of the appeal, pending its hearing and final

determination. We are further satisfied that no prejudice will be occasioned to the respondents by the grant of such order.

iv. It is not disputed that the impugned judgment has already been executed and the suit property restored to the 1<sup>st</sup> respondent, as evidenced by the Certificate of Lease dated 22<sup>nd</sup> September 2025 annexed to the 1<sup>st</sup> respondent's Replying Affidavit. Consequently, the prayer for stay of execution of the Judgment of the Court of Appeal dated 12<sup>th</sup> July 2024 in Civil Appeal No. 293 of 2016 has been overtaken by events and is hereby declined.

[15] ACCORDINGLY, we make the following orders:

***i) The Notice of Motion dated 17<sup>th</sup> December 2025 and filed on 22<sup>nd</sup> December 2025 is hereby allowed in the following terms:***

***a) A conservatory order of injunction is hereby issued restraining the 1<sup>st</sup> respondent or its agents or assignees from selling, charging or otherwise disposing of the suit property, pending the hearing and determination of the appeal.***

***b) Costs of this application shall abide the outcome of the appeal.***

It is so ordered.

**DATED and DELIVERED at NAIROBI this 3<sup>rd</sup> Day of July, 2026.**

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**P. M. MWILU  
DEPUTY CHIEF JUSTICE & VICE PRESIDENT  
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**

.....  
**M. A. WARSAME**  
**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

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

