IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, MWERA & G.B.M. KARIUKI, JJ. A.)

CIVIL APPLICATION NO. NAI 55 OF 2015

BETWEEN

1. GEORGE OLE SANGUI

2. SHOKORET OLE SETABU

3. FRANCIS PTU SIMPANONI

4. OLEKU OLE PUNYWA

5. SIPAIE OLE KOMEYAN

6. NTIKA OLE ROKA

7. DOPOI OLE NCHONSHOI

8. ATETI OLE MALOI

9. TERERE OLE MALOI

10. KUDATE OLE AMBONI

11. LENGUTUTI OLE LESIRI

12.KOOLI OLE KARATINA MUTUTUA...................... APPLICANTS

(Suing on their own behalf and on behalf of the person and families residing on what is commonly known as Kedong Ranch situated on LR. No. 8396 (LR. No. 11977)

AND

KEDONG RANCH LIMITED …... RESPONDENT

*(Being an application for stay of execution of Judgment & Order pending the hearing and determination of an intended appeal arising from the Judgment of the High Court of Kenya Nakuru (**L. Waithaka, J.)** delivered on 30th January, 2015*

in

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RULING OF THE COURT

1. In their notice of motion to this court dated 4th March, 2015 the 12 applicants averred that they brought the motion as they did suit No. 21 of 2010 (O.S) in the High Court at Nakuru in which the impugned judgment was delivered "***on their own behalf and on behalf of the persons residing on what is commonly known as Kedong Ranch situate on L.R. No. 8396 (L.R. No. 11977).***"

2. In their said notice of motion lodged in this court on 5th March, 2015 the applicants seek the following orders: -

1. ***(Spent)***

2. That this Honourable Court be pleased to stay the orders of Hon. Lady Justice Lucy Waithaka granted on the 30th January 2015 in High Court Civil Suit No. 21 of 2010 (O.S) – Nakuru pending the hearing and determination of this application inter-partes.

3. THAT this Honourable Court be pleased to stay the orders of Hon. Lady Justice Lucy Waithaka granted on the 30th January, 2015 in High Court Civil Case No. 21 of 2010 (OS) – Nakuru pending the hearing and final determination of the appellant's intended appeal

4. THAT the costs of this application be provided for.

3. The said application is based on the grounds inter alia –

i. ***THAT on the 30th January, 2015 the Hon. Lady Justice Lucy Waithaka delivered judgment in High Court Civil Case No. 21 of 2010 (O.S) – Nakuru against the appellants holding that the appellants had not proved an adverse title to that of the Respondent on the suit property.***

ii. ***THAT the Honourable Court in making the said judgment made conclusive holdings on the applicants' occupation of the suit land without the Honourable Court or any of its officers ever setting foot on the suit property.***

iii. ***THAT the applicants have only known one home since time immemorial and have lived on the suit property which was handed over to them from generations to generations by their forefathers.***

iv. ***THAT if the stay requested for herein is not granted the respondents may move to interfere with the suit property thereby defeating the appellants appeal rendering it nugatory.***

v. ***THAT the respondents may move to evict and or remove the applicants from the suit property before the intended appeal is heard and determined.***

vi. ***THAT unless restrained by an order of stay the respondents will effect dealings in the suit property to third parties thereby rendering the appeal nugatory.***

vii. ***THAT the applicant is ready and willing to comply with such terms as might be imposed by this Honourable Court in granting the orders sought herein.***

4. The application is premised on sections 3A & 3B of the Appellate Jurisdiction Act (Cap 9 of the Laws of Kenya), and rules 5(2) (b), 41 & 42 of the Court of Appeal Rules 2010.

5. The application was triggered by the decision of the High Court made in the judgment of **Hon. L. Waithaka, J**. delivered on 30th July 2015 in Nakuru in H.C.C.C. No. 21 of 2010 (O.S) in which the learned judge dismissed the applicants' claim for adverse possession of the land comprised in the title No. L.R. 8396 (I.R. No. 11977) situate south of Lake Naivasha within the Republic of Kenya (hereinafter referred to as "**the suit land**"). The learned judge found that the applicants ***"have not been in possession or occupation of the suit land as they alleged***."

6. The application came up for hearing before us on 18th July 2015. Learned counsel **Mr. W. Otieno** appeared for the applicants while learned counsel **Mr. F. Kaima** appeared for the respondent.

7. Relying on the affidavit sworn by **Ntika ole Roka** in support of the application, Mr. Otieno urged us that unless the said High Court judgment is stayed as prayed in prayers 2 and 3 of their application, the appeal they intend to file will be rendered nugatory. He pointed out that there was a risk of the suit land being alienated and the applicants being evicted if stay was not granted.

8. Mr. Otieno in submitting that the appeal is arguable, referred us to the judgment of the High Court contending that the respondent admitted in the High Court that the applicants were in possession of 12,000 acres of the suit land although the finding of the court was against this admission. The learned judge, contended counsel, did not have regard to the report of the Deputy Registrar regarding the state of occupation of the suit land, nor did the learned Judge analyze the principles applicable to adverse possession.

9. **Mr. Kadima** opposed the application. Relying on the respondent's replyingaffidavit, he contended that the application is misconceived as there is no order in place that can be stayed. He pointed out that the applicants' suit was dismissed with costs. In his view, as the court merely dismissed the suit, the order of dismissal cannot be stayed as dismissal of the suit has already taken place. He contended that if the court had ordered eviction, then an order for stay could be properly sought to stop such eviction. He alluded to the evidence on record and submitted that the applicants had gone against their claim for adverse possession by urging their entitlement to the suit land on the basis that it was ancestral land.

In his view, as the applicants challenged the respondent's title, the recourse open to them was a constitutional petition. It was his case that as the applicants pursued what they called ancestral rights instead of adverse possession, their appeal was not arguable.

10. On the issue of whether the appeal, if successful, would be rendered nugatory, counsel for the respondent submitted that there was no evidence that the applicants were in possession and that in any case, there was no order that was capable of stay. In his view, the only order that the applicants could seek to be stayed, was that of costs.

11. In his reply to the respondent's submissions Mr. Otieno pointed out to us that the respondent recognised the applicants as owners and that the suit was a representative suit.

12. . We have perused the application and duly considered the rival submissions of the parties. The issues for our consideration upon which the application turns are these; whether the principles that govern the exercise of this Court's discretionary power in granting the reliefs stipulated in rule 5(2)(b) of the Rules of this Court on which the application is predicted have been met. The twin principles require an applicant to show that he has an arguable appeal and further, that the appeal, if successful, shall be rendered nugatory unless stay is granted.

As stated by this Court in **Peter Gathecha Gachiri v AG and 4 Others** **(Civil Appl. NAI 24 of 2014 (unreported))** with regard to the principles that govern grant of orders under rule 5(2)(b) of the Rules of the Court **–**

"Rule 5(2)(b) of the Rules of this Court on which the application is premised confers on us independent discretionary jurisdiction exercisable in accordance with the twin principles, namely, that the appeal must be shown to be arguable and, in addition, that the appeal, if successful, shall be

rendered nugatory if stay is not granted. These principles have been developed by the court as a guide in the exercise of its discretionary power in determining an application premised on Rule 5(2)(b). The rationale in these principles is intended to balance two parallel propositions; first, that a successful litigant should not be deprived of the fruits of a judgment in his favour without just cause and; secondly that a litigant who is aggrieved by a decision must not be deprived of the right to challenge it in the next higher court (see ***<u>Butt v Rent Restriction Tribunal</u>*** ***[1982] KLR 417. See also*** ***<u>Kenya Shell Ltd v. Kibiru & Another</u>*** ***[1986] KLR 410.***

"It is imperative for an applicant seeking an order under Rule 5(2)(b) to satisfy the Court on both principles. An applicant must show that the appeal is not frivolous, that it is arguable. It is now settled that an applicant need not demonstrate a plethora of arguable points. It is sufficient even if there be a solitary arguable point. An applicant must further show that the appeal, if successful, will be rendered futile if stay is not granted."

13. What is sought to be stayed? As we shall show below in paragraphs 18, 19 and 20, the order is not capable of being stayed. The applicants had sought an order for a declaration that they were entitled to the suit land by virtue of adverse possession. They also sought an order to be registered as the sole proprietors of the suit land and for the costs of the suit. The court dismissed the entire suit with costs to the respondent. Effectively, the order of dismissal is what the applicants seek to stay.

14. In their draft memorandum of appeal, they have proffered 9 grounds of appeal. Among the grounds, they claim that the High Court misapprehended and misapplied the law on adverse possession in determining the suit, and further that the learned judge failed to consider "***the historical and legitimate claim and occupation of the suit land by the Maasai community to which they belong thereby violating their constitutional rights to property, socio-economic rights, and their right to practice their culture."*** A look at the originating summons and the affidavit in support shows that the applicants' claim to the suit land was pegged on the doctrine of adverse possession and not on the basis that it was ancestral land to which they later reverted. The claim that the land was ancestral was used to reinforce the alleged possession.

15. Has the applicant shown that (1) the appeal is arguable; (2) that the appeal, if it succeeds, will be rendered nugatory if stay is not granted; (3) that an order for the dismissal of the suit can be stayed.

In considering these issues, we propose to deal with the last issue because the success or otherwise of the application reposes on it. Can an order dismissing a suit be stayed under rule 5(2) (b)? If the answer is in the negative, that will dispose of the application. If it is in the affirmative, a consideration shall ensue of the twin principles regarding the arguability of the appeal and the nugatory effect of the appeal if it succeeds and stay is not granted.

16. . First, the suit as framed in the originating summons dated 18th December 2009 sought in prayer (a) a declaration that the applicants had become entitled to the suit land by virtue of adverse possession. The court dismissed the claim. In prayer (b) of the originating summons, the relief sought was an order that the applicants be registered as "***the sole proprietor of the piece or parcel of land."***

And finally, they sought costs which they were denied as the court awarded the same to the respondent in whose favour the suit was determined.

17. The issue whether dismissal of a suit gives rise to an order that is capable of being stayed by an order under rule 5(2)(b) was considered by this Court in the case of **<u>Western College & Arts and Applied Sciences v Oranga & Others</u> [1976] KLR 63**. In that case, there was a dispute between the parties about money lying in a bank account contributed by members of the public for construction of a college of technology called WECO. The appellant filed suit in the High Court in pursuit of the money seeking a declaration that the money belonged to WECO and that WECO was entitled to operate the bank account. The High Court dismissed the suit with costs whereupon WECO gave notice of appeal and applied for temporary injunction to restrain the respondent from operating the bank account and for stay of execution until the appeal was determined. At the time, this Court did not have jurisdiction to grant an injunction

under the equivalent of rule 5(2)(b) but it had jurisdiction to grant stay. The Court, therefore, held that it had no jurisdiction to grant an order for injunction. But with regard to the prayer for stay in respect of which it then, as now, had jurisdiction, the Court held that there was nothing in the order of dismissal of the suit (other than the order for costs) that could be enforced, and accordingly dismissed the application for stay. In a unanimous decision, the Court stated: -

"But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit with costs. An execution can only be in respect of costs….

The High Court has not ordered any of the parties to do anything, or to refrain from doing anything or to pay any sum. There is nothing arising out of the High Court judgment for this Court in an application for stay to enforce or to restrain by injunction."

18. In the case of **Devani and 4 Others v Joseph Ngindari (Civil Application No. NAI 136 of 2004 (unreported)** an application was made under rule 5(2)(b) of the Rules for interim stay of execution of a High Court order/decree which had dismissed judicial review proceedings under Order 53 of the Civil Procedure Rules. This Court stated in its decision:

"By dismissing the judicial review application, the superior court did not thereby grant any positive order in favour of the respondents which is capable of execution. If the order sought is granted, it will have the indirect effect of reviving the dismissed application. This Court cannot undo at this stage what the superior court has done.

It can only do so after hearing the appeal. It seems to us that the application for stay of execution of the dismissal order was not brought in error. It was designed to achieve that result which regrettably is impracticable."

19. Again in the case of **William W. Wahome and the Registrar of Trade Unions & Others (Civil Appl. No. NAI 308 of 2005 (unreported)** the High Court had set aside *ex parte* leave to institute judicial review proceedings. An application was made to this Court under Rule 5(2)(b) for stay of execution of the ruling of the High Court that set aside the grant of leave to apply for judicial review. The Court stated: -

"The order of 19.9.2005 did not grant the respondents any relief other than costs which can be enforced through execution. On the contrary, the order in fact denied the applicant a relief in the sense that it struck out the application for leave and for an order of stay and set aside the leave and stay granted earlier. There is no judgment in favour of the respondents which is capable of enforcement by execution save for costs". (*Emphasis added****)***

20. In the instant case, the High Court dismissed the suit in which the applicants were seeking a declaration and an order to be registered as the proprietors of the suit land on the basis of the doctrine of adverse possession. The dismissal order cannot be enforced and is not capable of execution. It is not a positive order requiring any party to do or to refrain from doing anything. It does not confer any relief. It simply determined the suit by making a finding that the claimant was not entitled to the reliefs or orders sought and dismissed the suit against the respondent. That was not a positive order that required any party to do or refrain from doing anything. It was not capable of execution or enforcement. The act of dismissal of the suit could not be stayed. It is our finding that to the extent to which the application seeks stay of the order of the dismissal of the suit it cannot be granted.

21. We observe that the applicants did not seek an order of injunction to be allowed to remain on the land pending the determination of the appeal. The intended grounds of appeal in the draft memorandum of appeal show that the appeal is arguable. But an arguable appeal is not necessarily one that is bound to succeed.

22. The principles that govern the exercise of the Court's discretionary power under rule 5(2)(b) have not been met as there is no order in the impugned decision in respect of which the Court can exercise its discretionary power to put on hold pending the hearing and determination of the appeal.

23. In the circumstances, we find no merit in the notice of motion dated 4th March, 2015 which we hereby dismiss. We make no order as to costs.

DATED and delivered at Nairobi this 31st day of July, 2015.

H. M. OKWENGU

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JUDGE OF APPEAL

J. W. MWERA

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JUDGE OF APPEAL

G. B .M. KARIUKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR