IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI (PCA), KOOME & SICHALE, JJ.A) CIVIL APPLICATION NO. NAI. 90 OF 2016 (UR 70/2016)

BETWEEN

SHADRACK K. KIMOSE & 147 OTHERS……..…….……APPLICANTS

AND

LOMOLO (1962) LIMITED ……....RESPONDENT

(An application for orders of stay of execution of the Ruling and Orders of the Environmental and Land Court of Kenya at Nakuru (Munyao, J.) dated the 29th March 2016

in

E. L. C. No. 36 of 2015)

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RULING OF THE COURT

1. By way of a plaint filed in the High Court of Kenya at Nakuru, Lomolo (1962) Limited, the respondent herein, filed suit against the applicants, Shadrack Kimose and 147 others, seeking an order of eviction requiring all the applicants to vacate the piece or parcel of land known as L.R. No 10939 (the suit premises). The applicants instructed their advocates M/s. Ikua, Mwangi & Company Advocates, to enter appearance for them. However, the applicants did not file a defence to the suit. The respondent therefore filed an application for summary judgment. That application was allowed, with the trial court ordering that the applicants vacate the suit premises within fourteen days of service of the order, failure to which an order to evict them would issue.

2. When this order was served upon the applicants, they filed an application under certificate of urgency to set aside the order of summary judgment. They argued that their advocates on record had failed to follow instructions to defend the suit. They submitted that they were not aware of the application for summary judgment until the time they were served with the order of eviction, and asked the court to stay the order pending the hearing and determination of the application to set aside the order of eviction.

3. The trial court declined to certify the application as urgent; it also rejected the prayer to grant an order of stay pending the hearing and determination of the application and directed that the application be listed for hearing in the normal manner.

4. The applicants, being aggrieved with that order, have now filed the present application by way of a

motion on notice dated the 4th April 2016, in which they seek an order for stay of execution of the aforesaid order requiring them to vacate the suit premises. The grounds upon which they seek this order are: briefly stated, that that the applicants have a good appeal whose urgency the trial judge failed to appreciate; that the intended execution of the ruling will render the intended appeal nugatory because the applicants as well as their families will be rendered destitute; and that the respondent will suffer no prejudice should the order of stay of execution be granted pending the hearing of the application to set aside the order of summary judgment.

5. The application is opposed by way of a replying affidavit sworn on the 29th June 2016 by Githui John, the advocate who has conduct of the matter on behalf of the respondent. In his affidavit, learned counsel avers that there is no nexus between the appeal filed and the subject matter of the application for an order of stay of execution. In particular, counsel depones that the applicants do not have a good appeal because they never filed a statement of defence to challenge the suit in the first place, and thereafter, they did not file any reply in opposition to the application for summary judgment.

6. The applicants seek the exercise of the discretionary jurisdiction of this Court as provided under **rule 5(2)(b)** of this Court's rules. In the words of this Court in ***Stanley Mbiuki v Director of Land Adjudication & Another*** ***[2016] eKLR (Civil Application No. Nai. 180 of 2015 (Ur 145/2015):***

> ***"Rule 5(2)(b) of this Court's Rules on which the application is predicated confers on this court independent discretionary jurisdiction where a notice of appeal has been filed in accordance with the rules of this Court or where an appeal is pending. Such discretionary jurisdiction is 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, will 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 designed to balance two parallel propositions; first, that a successful litigant who has a decree or order in his favour which has been appealed against should not be deprived of the fruits of a judgment in his favour without cause and; secondly, that a litigant who is aggrieved by a decision must not be deprived of the right to challenge it on appeal…."***

7. These are the principles we must now bear in mind as we determine this application. Mr. Mandela Chege, learned counsel for the applicants, contended before us that the intended appeal is arguable; he submitted that the trial judge failed to appreciate that the application before him was urgent due to the fact that the applicants faced imminent eviction from their homes.

8. In reply, Mr. Githui contended that the application is incompetent because the intended appeal has no nexus to the order of stay of execution sought. In addition, he submitted that the intended appeal is not arguable because the applicants had unsuccessfully sought to be declared owners of the suit property by adverse possession, and also because the applicants had thereafter made an unsuccessful claim to the suit premises through the National Land Commission.

9. The purpose of an order under **rule 5(2)(b)** of this Court's rules is to safeguard the subject matter of the appeal, or to safeguard the *status quo* pending the intended appeal. See ***Lake Tanners Limited & 2 Others v Oriental Commercial Bank Limited*** ***[2010] eKLR (Civil Application No. 64 of 2010)*** where the Court stated that this consideration will apply to an application for an order of injunction or, as the case may be, an order of stay of execution pending appeal because the purpose of that order would be to preserve the *status quo* pending appeal.

10. The record before us shows there were multiple suits before the High Court at Nakuru by the same parties over the same subject matter over ownership and occupation of the suit premises. The applicants had first filed High Court Civil Case No. 36 of 2007 in which they claimed ownership of the suit premises against the respondents. That suit was heard and determined in favour of the respondent by Ouko, J (as he then was). Thereafter, the applicants filed Civil Suit No. 98 of 2013, by way of an originating summons against the respondent in which they sought to be declared the lawful owners of the suit premises. Waithaka, J in a judgment dated 10th December 2014 dismissed the suit and established that the suit was

res judicata in the following terms:

> ***"… [T]here is no doubt that the matter directly and substantially in issue in the current suit has been directly and substantially in issue in a former suit. The parties were basically the same. The title under which they litigated was also basically the same…."***

The learned judge went further to hold that:

> ***"…[t]he status of the plaintiffs in the current suit and any other person claiming to be entitled to the suit property … was determined in the former suits when the trial judge held:-***
>
> *'From the totality of the evidence presented … I have no doubt in my mind that the company and Lomolo (1962) Ltd, it predecessor in title were never dispossessed by the group. Lomolo (1962) Ltd, it is admitted, had all along planted sisal on the entire piece of land. Their title was acknowledged throughout as the group would seek permission to graze their cattle on the suit property. There were no acts by the group on the suit property that were inconsistent with the company's or its predecessor in title's enjoyment of the soil. The groups intermittent use of the land with the owners permission does not given them the right to claim of adverse possession.'"*

11. As matters stand, there were two suits by the applicants that were dismissed with the result being that the respondent's title over the suit premises was upheld. We are not told whether appeals were filed against these judgments of the High Court. The instant application seeks an order of stay of execution against the orders of summary judgment in a case where the applicants never filed a defence to the respondent's suit for vacant possession; neither did they file a replying affidavit in opposition to the application for summary judgment. Although Mr. Chege argued that there is an arguable appeal as the applicants are likely to be evicted from the suit premises, the facts before us do not support those arguments. We are not satisfied the applicants have demonstrated there is an arguable appeal, in a matter which was declared *res-judicata* and no appeal has been filed.

12. We now turn to consider whether the intended appeal, if successful, will be rendered nugatory if we do not grant the order sought. For the proposition that this would be the case, Mr. Chege submitted that the intended appeal would be rendered nugatory inasmuch as the applicants would have been evicted from their homes and businesses and effectively be rendered destitute. We have considered the history of the litigation between the parties herein; we have noted that the High Court has made orders in favour of the respondent in relation to the suit premises in two different suits where there has been no appeal. After weighing the competing claims of each party, the balance of convenience tilts in favour of the respondent. We are not persuaded, therefore, that if we do not grant the order sought, then the intended appeal, if successful, will be rendered nugatory.

13. The end result is that this application fails and we order that it be and is hereby dismissed with costs to the respondent.

Dated and delivered at Nairobi this 29th day of July, 2016.

P. KIHARA KARIUKI, (PCA)

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JUDGE OF APPEAL

M. K. KOOME

…….……..

JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR