IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OUKO, (P), NAMBUYE & KIAGE, JJ.A)

CIVIL APPLICATION NO. 68 OF 2020

BETWEEN

TAVETA TEACHERS INVESTMENT LIMITED (Suing on their own behalf and on behalf of the 430 Squatters/

Residents of Junda Kasarani Ndogo Self Help Group Residing upon Property Title No. 771/li/Mn)**.....APPLICANT**

AND

MBARO JOHNSON & 9 OTHERS.....RESPONDENTS

(Being an application for stay of execution pending an appeal from a Ruling in Mombasa, (Yano, J.) delivered on 29th July, 2019 in ELC Case No. 318 of 2015)

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RULING OF THE COURT

On 29th March, 2019 Matheka, J. determined the respondents' originating summons for adverse possession of the suit property known as No. 771/Ii/MN CR. 8594 and measuring 47.62 acres or thereabouts, and concluded that;

> **"1. That the plaintiffs have acquired title to the disputed land by adverse possession having lived on the suit land for over twelve (12) years openly and without any interference by anyone.**
>
> **2. That the defendant, by self, agents, servants, family members and other authorized person and independent contractors be restrained by a permanent injunction from entering the suit property or demolishing the houses, structures or damaging or harvesting the plaintiffs crops therein and or evicting or interfering with the plaintiff's user and occupation of the suit property with their families".**

Apparently, this decision was reached after Matheka, J. rejected the applicant's application on 7th December, 2018, to be allowed to defend the suit. After that rejection, the learned Judge proceeded to pronounce the above judgment on the basis of the respondents' evidence.

Unbowed, the applicants returned with an application for a raft of reliefs; an order of stay of execution of the judgment and all the consequential orders, an order to set aside the judgment, an order to recall the respondents for the purpose of being cross-examined and an order to re-open the case for purpose of adducing evidence.

By a ruling of 29th day of July, 2020, Yano, J. applying **section 7** of the Civil Procedure Act and **section 28** of the Environment and Land Court Act found that a similar application had been heard and determined by a court of co-ordinate jurisdiction, as a result of which the application before him was *res judicata* and amounted to ;

> **"…an abuse of the court process as it raises issues which has been substantially litigated upon by a court of competent jurisdiction. In the result, the application is dismissed with costs to the plaintiffs".**

Intending to challenge this conclusion on appeal to this Court, the applicant has taken out a motion on notice under **Rule 5(2)(b)** of the Court of Appeal Rules, praying that the effect of the ruling of Yano, J. of 29th July, 2019 be stayed and the *ex perte* judgment of Matheka, J. of 29th March, 2019 also be stayed pending the lodgment of the intended appeal. The manner these prayers are framed is untenable as the notice of appeal before us is in respect only of the decision of Yano, J. made on 29th July 2019.

The Court in **Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others** [2013] eKLR has laid a broad-based consideration of what must be satisfied before any relief under the rule can be granted. First, the Court will become seized of the application only after the notice of appeal has been filed under **Rule 75.** The notice of appeal envisaged must relate to the decision being challenged or to be challenged in the appeal or intended appeal. The judgment rendered by Matheka, J is not the subject of the intended appeal.

The applicant must also satisfy the Court that the intended appeal is not only arguable but also, if successful, will be rendered nugatory if an order of stay is not granted. Both limbs too must be satisfied.

A consideration of an application under **Rule 5 (2) (b)** does not require the Court to make any definitive or final findings on matters of either fact or law as doing so may embarrass the ultimate hearing of the main appeal.

What Yano, J. did was to consider whether to grant an order of stay of execution of the judgment of 29th March, 2019, set it aside and allow the applicant to defend the claim, order the respondents to be recalled for the purpose of being cross-examined, and whether to permit the case for the applicant to be re-opened for purpose of adducing evidence.

Essentially, the Judge was being asked to exercise judicial discretion, which he did by dismissing the application on the ground of being *res judicata.*

Without expressing any firm position on that decision, we do not think, *ex facie,* that any arguable point will arise.

On the nugatory aspect, we do not see any part of that decision that is capable of being enforced. It was a dismissal.

For these reasons, we reject this application by dismissing it with costs, the applicant having failed on the two limbs.

Dated and delivered at Nairobi this 29th day of January, 2021.

W. OUKO, (P)

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JUDGE OF APPEAL

R.N. NAMBUYE

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR