IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: KOOME, ASIKE-MAKHANDIA & SICHALE, JJ.A]

CIVIL APPLICATION NO. 333 OF 2019

RAPHAEL KAKENE MULOKI.....1ST APPLICANT

PETER MAINGI KAVITA.....2ND APPLICANT

AND

THE CABINET SECRETARY OF LANDS.....1ST RESPONDENT

ELIJAH MUEMA KITAVI.....2ND RESPONDENT

KASENGA MWANIA.....3RD RESPONDENT

(Being an application for stay of execution of the judgment and decree of the High Court of Kenya Odunga J delivered on 26th June 2019.)

IN

(Machakos Judicial Review Misc Appl. No. 231 of 2018)

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RULING OF THE COURT

Before us is a motion dated **8th October 2019,** filed by **Raphael Kakene Muloki and Peter Maingi Kavita *(The applicants),*** brought under the provisions of **Rule 5 (2) (b), 41, 42 and 47 (1) and (2) of the Court of Appeal Rules** in which the applicants seek the following orders:

> ***"1. Spent.***
>
> ***2. This honourable court of appeal be and is hereby pleased to stay execution of the judgment of the honourable Justice G.V Odunga in Judicial Review Misc Application No. 231 of 2018, delivered on 26th June 2019 and the decree thereof issued on 31st July 2019 pending the hearing and determination of this application.***
>
> ***3. This honourable court of appeal be and is hereby pleased to stay execution of the judgment of the honourable Justice G.V Odunga in Judicial Review Misc Application No. 231 delivered on 26th June 2019 and the decree thereof issued on 31st July 2019 pending the hearing and determination of the appeal herein.***
>
> ***4. That costs of this application be provided for".***

The motion is supported by the grounds appearing on the face of the motion and an affidavit sworn by **Raphael Kakene Muloki (**the 1st applicant herein), who deposed *inter alia* that on **25th June 2018,** they had brought judicial review proceedings against the 1st respondent who is the Cabinet Secretary Lands and citing the 2nd and 3rd respondents herein as interested parties. That, the reason for bringing the aforesaid judicial review proceedings was that there were two judgments made by the Minister regarding the same land wherein in one judgment, the Minister gave the land in dispute to the applicants; whereas in the other, he gave the same land to the 2nd and 3rd respondents

and that the 1st respondent chose to implement the judgment that was in favour of the 2nd and 3rd respondents and ignored the one that favoured the applicants. It was further deposed that in the aforesaid judicial review proceedings, the applicants had sought among others an order of certiorari to quash the decision of the said Cabinet Secretary to implement one judgment and ignore the other which proceedings were dismissed by **Odunga J** on **26th June 2019**.

It was submitted for the respondents that the orders sought by the applicants cannot be issued since the application had been overtaken by events due to the fact that the 2nd and 3rd respondents had already subdivided the land and all the parcels had title deeds and that further the applicants had not stated what loss they were likely to suffer if the orders sought were not granted since they had never been in occupation of the suit land and neither did they have title deeds to the land. Finally, it was submitted that there is no appeal to be rendered nugatory as the subject land had been sub-divided and title deeds in the names of the 2nd and 3rd respondents issued.

We have carefully considered the motion, the grounds thereof, the supporting affidavit, the respondent's submissions, the authorities cited and the law.

The applicant's motion is brought *inter alia,* under **Rule (5) (2) (b)** of this Court's Rules. **Rule 5 (2) (b)** of the Rules which guides the court in applications of these nature provides:

> ***"(2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may:***
>
> ***(a)…***
>
> ***(b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just."***

The principles upon which this Court exercises its unfettered jurisdiction under ***Rule 5 (2) (b)*** are firmly settled. The applicant is required to show that the intended appeal or appeal is arguable and that unless the court grants the order or orders sought (a stay of execution or an order of injunction or a stay of proceedings) the intended appeal or appeal would be rendered nugatory

These principles were summarized by this Court (differently constituted), in the case of ***Stanley Kangethe Kinyanjui vs. Tony Ketter & Others [2103[eKLR.***

A cursory perusal of the pleadings herein do not show that the applicants have an arguable appeal or that the appeal will be rendered nugatory if the orders sought are not granted. The High Court merely dismissed the applicants' motion dated **1st July, 2018** with no orders as to costs. The parties were not ordered to do anything or to refrain from doing anything. What was therefore issued by the superior court is in the nature of a negative order in capable of execution and as such there is nothing to stay. See **Western College of Arts and Applied Sciences v. EP Oranga & 3 others [1976] eKLR** where the Learned Judges stated thus;

> ***"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. Any execution can only be in respect of costs. In Wilson v Church the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, 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 a stay, it is so ordered."***

Similarly**, in Raymond M. Omboga v Austine Pyan Maranga Kisii HCCA No 15 of 2010, Makhandia** J (as he then was) stated thus:

> ***"The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order...The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory do not arise..."***

From the circumstances of this case and the applicants' motion having been dismissed by the High court, it is our considered opinion that there is nothing to stay and the intended appeal will not be rendered nugatory if the stay orders are not granted. Indeed, it has been submitted for the respondents that the orders sought by the applicants have been overtaken by events as the 2nd and 3rd respondents have already subdivided the land and title deeds issued in their names, a fact which has not been controverted by the applicants and if this court were to grant the orders being sought, the same would be tantamount to issuing orders in vain, the futility of which is obvious.

In view of the above, we have concluded that there is nothing to stay and further the applicants have not established the twin principles for consideration in an application under Rule **5(2) (b)** of this Court to grant an order of stay of execution.

The upshot of the foregoing is that the motion dated **8th October 2019** is without merit and the same is hereby dismissed with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF MAY, 2021.

M. K. KOOME

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JUDGE OF APPEAL

ASIKE- MAKHANDIA

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR