IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MAKHANDIA, KIAGE & ODEK, JJ.A)

CIVIL APPLICATION NO. 77 OF 2018 (UR. 51/2018)

BETWEEN

CHARLES MUNYENDO OLINGO .....APPLICANT

AND

SALIM CHETECHI MAKOKHA .....1ST RESPONDENT

GREGORY MACHANJA WAMERE .....2ND RESPONDENT

(An application for stay of execution of the Judgment and Decree of the High Court of Kenya

*at Kakamega (**N. A. Matheka, J.**) dated 12th July, 2018*

in

E.L.C. Cause No. 630 of 2014)

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RULING OF THE COURT

Charles Munyendo Olingo, the applicant herein intends to appeal to this Court against the judgment and decree ensuing from the Environment and Land Court at Kakamega *"ELC"* **(N. A. Matheka, J)**, dated 12th July, 2018. The applicant moved the ELC as the administrator of the estate of his late father, **John Mashemo Olingo**, hereinafter **"the deceased Purchaser"**, through an Originating Summons seeking confirmation of his claim over the parcel of land known as E/WANGA/ELUCHE/97 hereinafter, **"the suit land".** It was his claim that the suit land was bought by the deceased purchaser in 1966 from the late **Aura Matete**, hereinafter **"the deceased Vendor"** and that they had been in occupation since then. The deceased vendor died in 2000 before transferring the suit land to the deceased Purchaser. The 1st respondent misrepresented himself to be the deceased vendor and changed the details of the ownership of the suit land at the lands office in his favor and thereafter unlawfully transferred and registered the suit land in the name of the 2nd respondent who was nonetheless aware of the applicant's interest in the suit land. It was the applicant's contention that given the circumstances, the 1st respondent did not have a valid title that he could transfer to the 2nd respondent.

The respondents' case in turn was that the deceased vendor lived on the suit land from 1962 and the same was registered in his name. He, however, moved out in 1997 and left the 1st respondent on the suit land. The 1st respondent later on also moved out of the suit land but continued tilling it until he sold it to the 2nd respondent. The suit land was and is still in the possession of the 2nd respondent and the applicant has never utilized it.

The learned Judge in dismissing the applicant's case with costs observed that the applicant was lying that he was in possession of the suit land when his land was only adjacent to the suit land. It was not established that the applicant had been in possession of the suit land openly, continuously and uninterrupted for a period of 12 years nor had the applicant proved on a balance of probabilities that the respondents had been dispossessed of the suit land for a continuous period of twelve years so as to entitle the applicant to the land by way of adverse possession.

Aggrieved by the decision, the applicant lodged a notice of appeal signifying his intention to appeal. Subsequently, the applicant filed the present application dated 9th August, 2018 predicated upon rules 5(2) (b) and 20 of the Court of Appeal Rules, the Judicature Act and Order 40 (1) (a) & (b) of the Civil Procedure Rules in which he *inter alia* seeks stay of execution of the judgment and decree aforesaid pending the

hearing and determination of the intended appeal.

The grounds in support of the application are that the impugned judgment was based on adverse possession which had not been pleaded; that the court failed to consider evidence in favour of the applicant and in particular two letters from the Local Chief and Assistant Chief; that he was placed at a disadvantage when his advocate failed to file written submissions; that the respondents were planning to sell the suit land and if they were to succeed, irreparable harm will be occasioned to him and even compensation thereafter will not restore him to his original position given the complex litigation and other complications that may arise. The affidavit in support of the application merely reiterated and expounded on the above grounds.

In reply to the application, the 2nd respondent deposed on his own behalf and on behalf of the 1st respondent that the application was fatally and incurably defective and incompetent. The supporting affidavit did not disclose any facts in support of the orders sought. The applicant had failed to demonstrate that he would suffer irreparable harm should the orders sought not be granted. In any event, the applicant would not suffer any loss since it was the 2nd respondent who was in possession of the suit land. The appeal does not deter a successful litigant from enjoying the fruits of the judgment. The applicant had failed to demonstrate to Court that the intended appeal was arguable. On the whole the respondents maintained that the application did not satisfy the conditions required for grant of stay orders pending appeal.

At the hearing of the application, **Mr. Omondi,** learned counsel holding brief for Mr. Malala, learned counsel appeared for the applicant while **Mr. Getanda**, learned counsel was present for the respondents. Mr. Omondi relied on Mr. Malala's written submissions and opted not to highlight whereas Mr. Getanda relied on the replying affidavit and briefly highlighted.

On arguability, counsel for the applicant submitted that the adverse possession principle relied on in the judgment was not pleaded by the applicant and that the learned Judge failed to consider relevant factors which favoured the applicant. With regard to the nugatory aspect, counsel submitted that the applicant is and has been in possession of the suit land since 1966 through his late father and if the respondents were to execute the decree and evict him while the appeal was pending hearing, then the appeal would be rendered academic.

In opposing the application, **Mr. Getanda** stated that the submissions by the applicant merely dealt with the merits of the intended appeal and they were irrelevant for the purposes of the present application. No draft memorandum of appeal had been annexed. The claim before the trial court was anchored on adverse possession, which claim was dismissed and therefore there is nothing to stay. Since the order sought to be stayed was negative in nature it was incapable of being stayed.

We have carefully perused the record and submissions by counsel and the issue for our determination is whether the applicant has satisfied the laid down principles for grant of stay of execution pending appeal. However, before we venture into those principles, we must first address the issue as to whether a negative court order is capable of being stayed. The applicant moved the ELC court seeking a declaration that he was the proprietor of the suit land. His claim was dismissed. The court did not order either party to do anything. It simply dismissed the appellant's case with costs. In the case of **George Ole Sangui v Kedong Ranch Limited CA NAI 55 OF 2015,** this Court while determining an application under **Rule 5(2) (b)** of this Court's rules which sought to stay an order of dismissal framed the issues for determination as follows:

> "**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 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." (**Emphasis ours).

Subsequently, the Court concluded that:

> **"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. (**Emphasis ours).

This Court again whilst considering whether dismissal of a suit gives rise to an order capable of stay can be granted under rule 5 (2) (b) in respect of a negative order in the case of **Western College Arts & Applied Sciences v Oranga & Others [1976] KLR 63** 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 restrain by injunction.**" (Emphasis ours).

A similar approach was also adopted by this Court in **Republic v Kenya Wildlife Service & 2 Others CA NO. NAI 12 OF 2007)** as follows:

> **"It would appear to us that we have no jurisdiction to grant any order for injunction or stay on the terms sought or at all, for the reason that Aluoch J. neither granted or refused the application for stay. The Superior Court has not therefore ordered any of the parties to do anything or refrain from doing anything. There is therefore no positive and enforceable order made by the superior court which can be the subject matter of the application for injunction or stay"**

Going by the aforesaid authorities, we are satisfied that the order issued by the trial court was negative in nature which by parity of a long line of decisions of this Court as demonstrated above, is incapable of being stayed.

Having found as we have, we would have been minded to stop here. However, for what it is worth and completeness' sake, we venture into the merits of the application. For an applicant to be successful in an application of this nature, he must first show that he has an arguable appeal which is the same as saying that the appeal is not frivolous. Such an applicant, upon satisfying that principle, has the additional duty to demonstrate that the appeal, if successful would be rendered nugatory in the absence of an order of stay. In the case of **Trust Bank Limited and Another v. Investech Bank Limited and 3 Others, Civil Application Nai. 258 of 1999** (unreported) this Court stated:

> **"The jurisdiction of the Court under Rule 5(2) (b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case ..."** (Emphasis ours).

The applicant did not annexe a draft memorandum of appeal in the application. Barring that we cannot really tell whether the grounds intended to be raised in the appeal are arguable or not. In the case of **Dennis Mogambi Mang'are v Attorney General & 3 Others, Civil Application No. NAI 265 of 2011 (UR 175/2011**) this Court stated that

> **"An arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court's consideration."**

In the grounds in support of the application, the applicant made reference to the judgment being based on adverse possession that was not pleaded. That may well be a good ground of appeal. However, the record does not seem to align with the submissions of the applicant. Anyhow, the lesser we say on this aspect the better. In a nutshell therefore, the appellant has not demonstrated the arguability of his intended appeal.

With regard to the nugatory aspect, the applicant has not disputed the fact that the 2nd respondent is in possession of the suit land nor has he claimed that he is about to be evicted by the respondent from where he is currently residing. The factors which can render an appeal nugatory are to be considered within the circumstances of each particular case and in doing so, the Court is bound to consider the conflicting claims of both sides. In the case of **Reliance Bank Ltd v. Norlake Investments Ltd [2002] E.A. 227**, when dealing with competing interests this Court stated *inter alia:*

> **"To refuse to grant an order of stay to the applicant would cause to it such hardships as would be out of proportion to any suffering the respondent might undergo while waiting for the applicants appeal to be heard and determined."** (Emphasis ours).

In the circumstances of the present case, the applicant has not demonstrated the hardship he is likely to suffer should stay of execution not be granted and it is safe to say therefore that no prejudice will be occasioned to the applicant as well.

From the foregoing, we are not inclined to exercise our discretion in favour of the applicant. Consequently, the application dated 9th August, 2018 lacks merit and is accordingly dismissed with costs to the respondents.

Dated and delivered at Kisumu this 3rd day of July, 2019.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.