



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A.)

CIVIL APPLICATION NO. 36 OF 2019

BETWEEN

MOHAMED SALIM HUSSEIN & 61 OTHERS.....APPLICANTS

AND

EGERTON UNIVERSITY.....RESPONDENT

*(An application for stay of execution pending lodging, hearing and determination of
an intended appeal from the Ruling of the Environment and Land Court*

at Malindi (Olola, J.) delivered on the 24th January, 2019

in

Malindi ELC Suit No. 97 of 2014.)

RULING OF THE COURT

This Notice of Motion dated 10th May 2019 is made under **sections 3A and 3B** of the **Appellate Jurisdictions Act** and **rules 5 (2) (b) and 47 (1) and (2)** of the **Court of Appeal Rules**, and has been brought pursuant to a decision of the Environment and Land Court (Olola, J.) delivered on 24th January 2019 and seeks orders that this Court be pleased to issue conservatory orders by way of stay of execution of the eviction orders and Notices issued against the applicants herein pending the hearing and determination of the motion, and the intended appeal, and that the Court make such further orders as it would deem necessary. The background to the application in brief is, after the applicants encroached; the respondent's land known as *209163/D Lamu West District (the suit land)* the respondent sought to have them evicted. In response, the applicants filed *Malindi ELC Case No. 67 of 2013* which was struck out on 19th December 2013 for the reason that it disclosed no cause of action. Displeased, the applicants' filed an appeal against that ruling, but to date have not applied for the proceedings in order to file the appeal.

The continued refusal of the applicants to vacate the suit land necessitated the institution of proceedings by the respondent in *Malindi ELC No. 97 of 2014* which suit in principal sought orders of eviction. On 5th

June 2015, the court, (Angote, J.) entered judgment in favour of the respondent and granted the eviction orders sought against the applicants, as well as an order of permanent injunction to restrain the applicants from trespassing on the suit land. The applicants then filed the Notice of Motion dated 5th September 2018, the subject of this application seeking to set aside the trial court's ruling, which the court (Olola, J.) dismissed on 24th January 2019.

Aggrieved, the applicants seek to file an appeal in this Court and have in the meantime filed this motion seeking to stay execution of the orders of the trial court. The motion was brought on grounds that the applicants' appeal is arguable with a high chance of success, because the judgment of the trial court, would amount to an unlawful amendment or supersession of the provisions of the Land Act, and was tantamount to condemning the applicants' unheard and furthermore, that a litigant should not be punished for the mistakes of their counsel. It was supported by the affidavit of **Charles Muli Kaindi** sworn on 10th May 2019, wherein it was deponed that following the dismissal motion, the applicants and their families' quiet enjoyment of the suit land had been disrupted, as they were being harassed by the respondent's agents; that third parties had entered upon the suit land and were cutting down trees and clearing the bushes; and that the applicants were being prevented from cultivating the portions of land they have been occupying. It was averred that on this basis they are apprehensive that eviction from the suit land is imminent.

In a replying affidavit sworn on 2nd July 2019 by **Janet Bii**, the respondent's Legal Officer deponed, *inter alia*, that the stay of execution orders sought were against the ruling of Olola, J. of 24th January 2019 in respect of the application to set aside Angote, J's judgment of 5th June 2015, and that to date, no appeal had been preferred against that judgment and therefore no proper reason was advanced to deny the respondent the peaceful enjoyment of the suit land.

When the application came up for hearing, **Mr. Otieno**, learned counsel for the applicants submitted that the intended appeal was arguable because the eviction notices that were served on the applicants were defective, and that under **sections 152 (C), (D) (E) and (F)** of the **Land Laws Amendment Act, 2016** a clear regime is outlined for undertaking of evictions; that the learned judge misdirected himself on the form the notices should take, in that they lacked specific particulars and failed to specify the implementing authority; that as a consequence the notices were a nullity; it was further asserted that the respondent's contention that the suit is *res judicata* is wrong as the suit was not at any time argued to finality.

Opposing the application was **Ms. Sambu**, learned counsel for the respondent. Counsel reiterated to a large extent the contents of the respondent's replying and supplementary affidavits, but went on to argue that the Environment and Land Court had issued negative orders on 24th January 2019, effectively dismissing the application; that the appeal is not arguable as the applicants had participated in the suit; that the question of proprietorship had already been determined by the court which found that the respondent was the registered proprietor. It was argued that there was nothing to show that the appeal would be rendered nugatory if the orders sought were not granted, and in any event the orders sought are not capable of being issued against a negative order.

We have considered the pleadings and the submissions of the parties. In the case of **Stanley Kang'ethe Kinyanjui vs Tony Keter & 5 Others**, **Civil Application No. NAI. 31/2012**, this Court stated, *inter alia*:

"That in dealing with Rule 5 (2) (b), the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the judge's discretion to this Court." The first issue for our consideration is whether the intended appeal is arguable. This Court has often stated that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous; a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable."

It is therefore well established that, two principles guide the court. Firstly, an applicant is required to demonstrate that the appeal or intended appeal is arguable, or in other words, that it is not frivolous.

Secondly, that unless he is granted a stay of execution or injunction as the case may be, the appeal or intended appeal, if successful, will be rendered nugatory.

We would also add that in dealing with applications under **rule 5 (2) (b)**, the Court exercises original jurisdiction which exercise does not constitute an appeal from the trial judge's discretion to this Court. See **Ruben & Others vs Nderitu & Another (1989) KLR 459**.

The pleadings and submissions that we have sought to set out above have outlined the particular facts of this case. In view of the orders that were issued by the trial court on 24th January 2019, we do not consider it necessary to go into whether the appeal is arguable, because the orders sought can simply not be granted. Suffice to say that we were unable to discern which grounds of appeal the applicants intended to rely on in the intended appeal, as on the one hand they seemed to advance grounds in respect of Angote, J's judgment of 5th June 2015, and later in their submissions argued grounds that were in respect of Olola, J's ruling of 24th January 2019.

Turning to the orders of the trial judge, we agree with the respondent that the court issued a negative order. In the concluding paragraph of the ruling, the learned judge of the lower court stated thus;

“Accordingly and in the circumstances of the case there is absolutely no merit in the application before me. The same is dismissed with costs to the Plaintiff/Respondent”.

In the case of **Kanwal Sarjit Singh Dhiman vs Keshavji Jivraj Shah [2008] eKLR**, whilst considering whether an order of stay of execution can be granted in respect of a negative order this Court held as follows:

“The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only.”

And addressing the same issue in the case of **Western College of Arts and Applied Sciences vs Oranga & Others [1976] KLR 63** this 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 restrain by injunction

In view of the above, the lower court having declined to grant the orders sought which were to set aside and or vary the judgment and decree of Olola, J., we find that there is nothing for us to stay.

In sum, we find that the Notice of Motion dated 10th May 2019 is not merited and is dismissed with costs to the respondent.

It is so ordered

Dated and delivered at Malindi this 28th day of November, 2019.

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU (FCIArb)

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR