IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPLICATION NO. 93 OF 2016

BETWEEN

CATHERINE KORIKO.....1ST APPLICANT

BENJA KORIKO.....2ND APPLICANT

DANIEL KORIKO.....3RD APPLICANT

FELIX KORIKO.....4TH APPLICANT

AND

EVALINE ROSA..... RESPONDENT

(Application for stay of further proceedings pending the lodging, hearing and determination of an intended appeal from the ruling of the Environment & Land Court at Kisii ***(Mutungi J)*** *dated* ***28th October, 2016***

in

ELC CASE NO. 171 OF 2011)

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RULING OF THE COURT

By a rather poorly crafted motion dated 23rd November, 2016, the applicants herein seek an order that *"there be a stay of proceedings in Environment & Land Case No. 171 of 2011 at Kisii pending filing, hearing and/or determination of the intended appeal."* It has on its face the grounds on which it is premised, namely;

> ***"1. Unless there is stay of further proceedings the intended appeal if successful would be rendered nugatory which will occasion prejudice to the applicants;***
>
> ***2. The intended appeal is arguable based on the proposed grounds of appeal filed herewith;***
>
> ***3. It is in the best interest of justice to stay further proceedings before the Environment and Land Court to give applicants opportunity seek leave to amend their pleadings through the***

intended appeal."

A supporting affidavit by **Catherine Koriko** sworn on 23rd November, 2016 states that the applicants are aggrieved by a ruling of that court dated *"25th November, 2016"* denying the applicants leave to amend their pleadings. From the record, no ruling was delivered on such date, nor indeed could it have been delivered on a date after the date of the motion. It was careless of the drafters of the affidavit to have stated that date when the impugned ruling was in fact delivered on 28th October, 2016. She swore that the intended appeal *"is arguable and raises pertinent issues of law"* as evidenced by the proposed grounds of appeal exhibited. Unless the proceedings are stayed, the appeal would be rendered nugatory as the applicants would not get opportunity to file their claim in court, she averred.

The application is opposed by a replying affidavit sworn by **Evaline Rosa** on 31st March, 2017 which gave a detailed history of the dispute between the parties and how in the court below she, as plaintiff, had testified, called witnesses and closed her case when the applicants herein applied for leave to amend their statement of defence and counterclaim. That application was disallowed in exercise of the learned Judge's discretion. The applicants' intended appeal is therefore unarguable. Moreover, a denial of stay of proceedings would not render the appeal nugatory. The application for stay was described as a ploy to further delay the disposal of the dispute and characterized as frivolous and vexatious by applicants who have displayed lethargy and want of diligence. She prayed that the motion be dismissed with costs.

At the hearing of the application, **Mr. Nyasimi** and **Ms Ochwal,** respective learned counsel for the parties relied on those affidavits to canvas the rival positions. The former had also filed submissions and authorities. In his address to us, he explained that the amendment sought in the court below was to introduce a claim of adverse possession, which was prompted by a judgment of the High Court in a related matter. He conceded, however, that the facts sought to be relied on had all along been in existence.

On her part, Ms Ochwal characterized the application as devoid of merits. It is not arguable. The applicants' complaint that they were denied a fair trial was false as they were given time to file an application for leave to amend and it was denied properly for attempting to introduce a wholly new case too late in the day.

An application such as is before us seeks the exercise of the Court's discretion in favour of an applicant in the form of temporary relief pending the hearing and determination of the appeal or intended appeal. The principles upon which we exercise such discretion are well-settled. First, the applicant must persuade the Court that he has an arguable appeal, meaning one that raises a *bona fide* point worthy of judicial consideration, though it need not be one that must necessarily succeed. The applicant must also show that if the stay sought is not granted, the appeal will be rendered nugatory or trifling and of no effect, serving no purpose by reason of the apprehended harm or loss having been suffered in the interim. It behoves an applicant to satisfy the court on both limbs. See ***RELIANCE BANK LIMITED -vs- NORLAKE INVESTMENTS LIMITED [2002] 1 EA 232.***

Regarding the first test, the arguability of the appeal, we have considered that what the applicants intend to appeal against is the learned Judge's refusal to allow an amendment to their pleadings. In his ruling, the learned Judge noted that the amendments, sought long after the respondent herein had closed her case, were an attempt to introduce a totally new cause of action. The applicants were attempting to abandon their initial claim to the suit laid on the basis of being beneficiaries to the estate of a deceased person and make a claim for adverse possession instead. He reasoned that to allow the amendments would *"inevitably mean reopening the pleadings where the plaintiff would of necessity require to answer to the fresh suit … be required to testify afresh and consider whether or not to call any witness."* Taking the view that the applicants were out on a fishing expedition, and while noting the law on amendments of pleadings he concluded that to allow the amendment at that stage would occasion prejudice and injustice to the plaintiff.

With respect to the applicants, and while cognizant that it is not our merit to decide the intended appeal, and indeed whatever view we take cannot bind the bench that will hear the intended appeal, we are not persuaded that the applicants have demonstrated that their appeal is arguable. There is nothing to suggest

that the learned Judge exercised his discretion otherwise than judicially and judiciously. He appreciated the law on the subject and applied it to the facts. He did not consider any extraneous matter nor fail to consider anything relevant to the applicants. He cannot be said to have been plainly wrong.

As the applicants have failed to persuade us on the arguability of the intended appeal, we need not trouble ourselves on whether it would be rendered nugatory, as that would be an exercise in futility.

The motion is devoid of merit and accordingly fails. It is dismissed with costs to the respondent.

DATED and delivered at Kisumu this 20th day of November, 2019

ASIKE MAKHANDIA

…….

JUDGE OF APPEAL

P. O. KIAGE

……..

JUDGE OF APPEAL

OTIENO ODEK

……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR