IN THE COURT OF APPEAL

AT MALINDI

(CORAM: KOOME, OUKO & M'INOTI, JJ.A)

CIVIL APPLICATION NO.68 OF 2015

BETWEEN

MOHAMMED SALIM HUSSEIN & 61 OTHERS …….. APPLICANT

AND

EGERTON UNIVERSITY …… RESPONDENT

(Being an application for injunction pending the hearing and determination of this intended appeal against the order of the High Court of Kenya at Malindi, (Angote, J.) dated 9th November, 2015

in

E.L.C. CIVIL CASE NO. 97 OF 2014)

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RULING OF THE COURT

This application arises from a practice devised and adopted in Malindi by the Environment and Land Court in consultation with and concurrence of the local Bar, where an application brought under a certificate of urgency is placed before the judge in chambers,and in the absence of the applicant or counsel he determines whether the application is urgent and whether there is a basis to issue *ex parte* orders pending the hearing of the application *inter partes*.

Regarding the matter before us,62 of the applicants were sued by the respondent in MLD.ELC NO.97 of 2014 for vacant possession and permanent injunction in respect of a parcel of land No.209163/D LAMUWEST.The court (Angote,J) heard the case which was undefended and granted the prayers, holding that the suit property being Government land, the applicants could not claim ownership by adverse possession and as such,the applicants were trespassers.

Subsequently the applicants approached the learned Judge withan application for an order of temporary stay of the "*judgment*" (instead of execution) and its setting aside until the application was heard *inter partes.* The application was presented to the learned Judge in chambers pursuant to the practice alluded to earlier. Upon considering the application the learned Judge was of the mind that since the impugned judgment was rendered on 5th June,2015, the application did not deserve to be certified urgent; and that none of the temporary orders prayed for could issue. He directed that the application be listed for *inter partes* in the normal manner.

The instant application brought pursuant to rule **5 (2) (b)** of the Court of Appeal Rules seeks in the main an order of injunction to restrain the respondent from selling,leasing, or demolishing the applicants' houses and evicting them from the suit property, pending the hearing and determination of the intended appeal. The application is premised on the grounds that the applicants having filed the Notice to Appeal to this Court, such intended appeal, which raises serious issues of law, will be rendered nugatory if the stay sought is not granted.

The respondent has opposed the application on several grounds contained in both the replying affidavit and written submissions comprised in eleven pages instead of the four pages directed by the Court. Those grounds include the contention that since there was no Notice of Appeal in respect of the intended appeal, the instant application is incompetent and the Court, for that reason,lacks jurisdiction to entertain it; that the impugned orders are negative in natureandincapable of being stayed; that this Court ought not to interfere with the learned Judge's proper exercise of discretion; that the applicants ought to have sought leave to appeal to this court; and that the twin principles for the grant of the orders under **rule 5(2)(b)** aforesaid have not been satisfied.

Before we embark upon consideration of the merit of the application, we think there is substance in the argument that the applicants ought to have sought leave to appeal against the refusal by the court below to certify the application urgent and to grant *ex parte* temporary orders. Such orders are not enumerated in order **43 rule 1(w)** of the Civil Procedure Rules as appealable as of right.

The second matter relates to the nature of the impugned orders. It has been contended by the respondent that the orders being negative are not capable of being stayed. Under **rule 5(2)(b)**,the Court can grant an order of stay of execution, stayof further proceedings or an injunction. It is equally settled that the consideration of each is guided by the twin principles, that the intended appeal is arguable and that it will be rendered negatory if the order sought is not granted. Whereas it is settled by a series of decisions of this Court that where an application or a suit has been dismissed there cannot be an order to stay the order or decree, as the case may be, arising from such dismissal save only in so far as to the orders of costs,it is however acceptable for the aggrieved party to apply for an injunction under the same order. See**Umoja Service Station Ltd & 5 Others vs. Hezy John Ltd & 4 others** Civil Application No. 39 of 2006. The application before us is for an order of injunction and not for stay of execution.

Thetwo questions for our determination are whether the intended appeal is arguable and whether it will be rendered nugatory if the injunction is not granted. We bear in mind that the intended appeal will be challenging the exercise of judicial discretion by the learned Judge for declining to certify the application as urgent and to issue temporary orders to stay execution of the decree pending *inter partes*. The draft memorandum of appeal annexed to the application contains five grounds to the effect the learned Judge failed to appreciate the urgency of the application; that he failed to find that the applicants, being illiterate people did not participate in the proceedings giving rise to the judgment they intended to stay and set aside because they were misled by their erstwhile advocate; that the learned Judge did not exercise his discretion judicially; that he ignored the fact that the dispute involved land where the applicants had lived for many years; and that he was not sensitive to the plight of the applicants.

This Court will not interfere with exercise of discretion unless the exercise is clearly wrong because the judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration matters which he should have taken into consideration and in so doing arrived at a wrong conclusion. See **Mbogo & another V Shah**(1968)EA 93.

Bearing in mind thatthe learned Judge in declining to certify the application urgent took into account the fact that it was being brought six months after the delivery of the judgment and for that reason he declined to grant any orders *ex parte*, we are satisfied he did not misdirect himself.That was in November 2015, one whole year ago. One wonders the logic in pursuing this applicationin the Court of Appeal instead of listing the application before the learned Judge for *inter partes* hearing.

For us,we think this is one of those rare cases where we can say categorically that the intended appeal is not arguable but frivolous and that this application amounts to improper use of judicial time and an abuse

of its process. Secondly, the appeal will not be rendered nugatory if we reject this application, because the application will still be heard *inter partes* on merit.

The fate of this application should be obvious. It is dismissed with costs to the respondent.

Dated and delivered at Mombasa this 17th day of February, 2017

M. K. KOOME

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR