



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: G.B.M KARIUKI, SICHALE & KANTAI, JJ.A.)**

**CIVIL APPLICATION NO. .9 OF 2017(UR 7/17)**

**BETWEEN**

**DANIEL LOMAGUL KANDEI .....1<sup>ST</sup> APPLICANT**

**RAPHAEL LEKILWAI .....2<sup>ND</sup> APPLICANT**

**LEIMBIAN LASANGURUKURI.....3<sup>RD</sup> APPLICANT**

**AND**

**KAMANGA HOLDINGS LIMITED AND 40 OTHERS.....RESPONDENTS**

*(An application for stay of execution of the orders pending the hearing and determination of the intended appeal from the ruling of the High court of Kenya at Nyeri (Waithaka, J.), dated 18<sup>th</sup> January, 2017*

*in*

*ELC No.74 of 2016(OS)*

\*\*\*\*\*

**RULING OF THE COURT**

On 27<sup>th</sup> January, 2017 the applicants **DANIEL LOMAGUL KANDEI, RAPHAEL LEKILWAI** and **LEIMBIAN LASANGURUKURI** filed a Notice of Motion dated 26<sup>th</sup> January, 2017. The Motion was made pursuant to **Rule 5(2) (b)** of this Courts Rules. The applicants sought the following orders, inter alia,

***(b) THAT this honourable court be pleased to grant stay of execution of orders of the honourable Judge L. Waithaka delivered on 18<sup>th</sup> January, 2017 pending the hearing and determination of the appeal herein.***

***(c) THAT this honourable court be pleased to grant to the appellants, conservatory orders of injunction directed against the respondents in this appeal in the following terms:-***

***i. THAT this court do issue prohibitory orders to be registered against all the titles in Waso East***

*adjudication sections, to wit all the 43 title resulting from the sub-division of Losesia Group Ranch land namely titles numbers Samburu/East Waso/1 to 43; prohibiting any further registrations or dealings in the said titles until this motion is heard and determined.*

*ii. THAT an injunction do issue directed against the defendants herein jointly and severally from in any way alienating, committing act (sic) of waste, entering upon and fencing, and or erecting any such barriers, physical or otherwise that would prevent the membership of Losesia Group Ranch from freely accessing and utilizing the full extent's of land comprised in title numbers Samburu/East/1 to 43 pending the hearing and determination of the suit herein.”*

The motion was supported by the affidavit of **RAPHAEL LEKILWAL** sworn on 27<sup>th</sup> January, 2017, on his behalf and on behalf of the other applicants. In his affidavit, the deponent averred that he together with the other applicants are members of Losesia Group Ranch; that they sued the management of Losesia Group Ranch for illegally hiving off 39, 841.62 hectares (or thereabouts) of their grazing land; that the suit was against the individual members of the Group Ranch who had acted illegally; that unless an injunction is granted, there is an imminent risk to life and property as their livestock will seriously be exposed for want of grazing land.

As would be expected, the motion was opposed by all the respondents. On behalf of the 1<sup>st</sup> respondent, **Mr. Chivai**, the 1<sup>st</sup> respondents' counsel swore an affidavit dated 11<sup>th</sup> April, 2017. In opposing the motion, he deponed that the applicants' originating summons dated 25<sup>th</sup> April, 2016, having been struck out, there was no order capable of being stayed by this court. Further, that the applicants will not suffer any prejudice in the event that this court was to disallow their application.

The 2<sup>nd</sup> respondent, **ALOIS LESUAN EFREM LERIWALA**, on his own behalf and on behalf of the 3<sup>rd</sup> - 37<sup>th</sup> respondents and 39<sup>th</sup> -48<sup>th</sup> respondents, swore an affidavit dated 24<sup>th</sup> February, 2015 in opposition to the motion. He deponed that the applicants intended appeal was not arguable and neither would it be rendered nugatory if the order for stay is not granted. Further, the 2<sup>nd</sup> respondent deponed that the order sought to be stayed was a dismissal order and hence a negative order incapable of being stayed; that the Notice of Appeal was served upon them outside the mandatory 14 days period and finally, that they have filed an application to strike out the appeal on account of late service of the Notice of Appeal.

**Mr. Githui** on behalf of the 38<sup>th</sup> respondent swore an affidavit dated 13<sup>th</sup> March, 2017 in opposition to the motion. He deponed that the Notice of Appeal filed on 18<sup>th</sup> January, 2007 was served upon them outside the 14 days period; that he had filed an application to strike out the said notice; that the application for the stay is misplaced as there is no order arising from the ruling of Waithaka J. that is capable of being stayed and that the conservatory order of prohibition being sought by the applicants fall outside the purview of **Rule 5(2)(b)** of this Court's rules and finally, that the applicants ought to have filed a derivative suit.

The motion came before us for hearing on 19<sup>th</sup> April 2017. **Mr. Karweru**, learned counsel for the applicants adopted his skeleton submissions dated 23<sup>rd</sup> February, 2017. In urging the motion, Counsel asked us to find that the learned trial Judge erred in finding that the applicants lacked inalienable individual right to sue the officials of a Group Ranch to enforce their community rights against those who have acted illegally and against the beneficiaries of the illegal acts. On the finding that the suit ought not to have been brought by way of an originating summons, counsel urged us to find that the officials of the Group Ranch held fiduciary powers of trust and hence are trustees and it was proper for the applicants to have instituted suit against them by way of an originating summons. He faulted the trial judge for having held that the filing of an originating summons in the instant matter was fatal. On the nugatory aspect, it was learned counsel's submission that the land to be hived off is choice grazing land of a people who are pastoralists and any alienation of this land would be damnation as their livestock would be greatly affected.

On behalf of the 1<sup>st</sup> respondent, Mr. Chivai opposed the motion and placed reliance on the written submissions dated 11<sup>th</sup> April, 2017. In his oral submissions before us he reiterated that the applicants' originating summons having been dismissed, there was no order capable of being stayed; that there was no relationship of a beneficiary under a trust in respect of the applicants vis-à-vis the respondents to warrant the institution of a suit by way of an originating summons and finally, that the intended appeal will not be rendered nugatory if this court was to decline to grant the order of stay as sought by the applicants.

Mr. Karanja, learned counsel for the 2<sup>nd</sup> to 37<sup>th</sup> respondents as well as the 39<sup>th</sup> to the 48<sup>th</sup> respondents, whilst acknowledging that the law allowed the conversion of an originating summons to a plaint, contended that the presupposition is that the originating summons was properly before the court, unlike in the present circumstances, and that **Section 80** of the Registered Land Act (repealed) specifically prohibits the institution of a suit by way of an originating summons where one is seeking cancellation of a title. On the issue of locus, it was counsel's submissions that a Group Ranch is a body corporate and the members of it could only file a derivative suit, and further that there was no order capable of being stayed. He relied on the authorities of **NAIROBI METROPOLITAN PSV SACCOS UNION LIMITED & 25 OTHERS VS COUNTY OF NAIROBI GOVERNMENT & 3 OTHERS [2014] eKLR, GEORGE OLE SANGUI & 12 OTHERS VS KEDONG RANCH LIMITED [2015] eKLR** for the proposition that a negative order is not capable of being stayed, save for costs. As for the proposition that the applicants had no locus to file suit and that their recourse (if any) ought to have been by way of a derivative suit, Mr. Karanja relied on the following cases:-

- 1. NKOIRISHA OLE NTOMPO & 4 OTHERS VS THE CHAIRMAN LORNGOSUA GROUP RANCH & 9 OTHERS [2001] eKLR**
- 2. SIMON TAPAI SANTETO KIMUNYAK OLE SALE (SUING ON BEHALF OF 78 OLEPOLOS VILLAGE MEMBERS VS ITA OLE BULATI & 8 OTHERS eKLR**
- 3. AMIN AKBERALI MANJI & 2 OTHERS VS ALTAF ABDULRASUL DADANI & ANOTHER [2015] eKLR**

For the proposition that a company as legal person is the one to sue for any wrong doing against it and/or to have its rights enforced.

It was his further contention that the applicants' prayer for injunction could not be granted as titles in respect of the hived portions were granted in 2016, a process that took ten years to accomplish.

**Mr. Githui**, learned counsel for the 38<sup>th</sup> respondent, a public body, submitted that no injunction can issue against a public body, that the reliefs of prohibition and conservatory orders sought by the applicants cannot issue under **Rule 5(2)(b)** and that the applicants had failed to demonstrate that they had an arguable appeal. Mr. Githui concluded his submissions by pointing out that the notice of appeal had been served upon the 38<sup>th</sup> respondent outside the stipulated 14 days contrary to **Rule 77** of this Court's rules and hence the motion before us was incompetent as it was predicated upon an irregular Notice of Appeal. He too, refuted the applicants' contention that they had locus to institute suit against the respondents.

In a brief rejoinder, **Mr. Karweru** urged us to find that the applicants had locus as they were litigating in respect of community land; that the Group Ranch was not a body corporate contrary to the authorities cited by Mr. Karanja which in his view, were made per incuriam and that it did not matter that the titles to hived portions of land were issued in 2010, as what was critical is when the applicants got to know of the issuance, which was in the year 2016.

We have anxiously considered the motion and its supporting affidavit, the affidavits in opposition to the motion, the written submissions of the applicants and of the respondents, the authorities cited before us as well as the law.

Our jurisdiction under **Rule 5 (2) (b)** of this Court's rules is now well settled. Firstly, an applicant has to show that he has an arguable appeal. Tied to this is that an applicant must demonstrate that unless we grant an order of stay the appeal would be rendered nugatory. In **MULTIMEDIA UNIVERSITY & ANOTHER –VS- PROFESSOR GITILE N. NAITULI** (2014) eKLR this court whilst considering an application under **Rule 5 (2) (b)** expressed itself as follows:

*“When one prays for orders of stay of execution, as we have found that those are what the applicants are actually praying for, the principles on which this Court acts, in exercise of its discretion in such a matter, is first to decide whether the applicant has presented an arguable appeal and second, whether the intended appeal would be rendered nugatory if the interim orders sought were denied. From the long line of decided cases on Rule 5(2) (b), the common vein running through them and the jurisprudence underling those decisions was summarized in the case of Stanley Kangethe Kinyanjui vs. Tony Ketter & Others [2103] eKLR as follows:*

*i. In dealing with Rule 5(2) (b) the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial Judge's discretion to this Court.*

*v. The discretion of this Court under Rule 5(2) (b) to grant a stay of injunction is wide and unfettered provided it is just to do so.*

*vi. The Court becomes seized of the matter only after the notice of appeal has been filed under Rule 75.*

*vii. In considering whether the appeal will be rendered nugatory the Court must bear in mind that each case must depend on its own facts and peculiar circumstances.*

*viii. An applicant must satisfy the Court on both the twin principles.*

*ix. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised.*

*x. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous.*

*xi. In considering an application brought under Rule 5(2) (b), the Court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.*

*xii. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.*

*xiii. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.”*

The applicants herein (the then plaintiffs) filed an originating summons dated 25<sup>th</sup> April, 2016. It would also appear that they filed two other applications which although referred to in the ruling of the High Court that gave rise to the instant application, the same was not part of record of appeal. During the pendency of the originating summons and the two applications, a preliminary objection dated 6<sup>th</sup> May, 2016 was raised. In the preliminary objection the respondents raised several issues including the assertion that the applicants had no locus as they were members of Losesia Group Ranch which group had not authorized the filing of the suit and secondly, that the suit was defective for want of form as it offended the provisions of **Order 37 of the Civil Procedure Rules**. The learned Judge considered the issues raised in the preliminary objection and in a ruling delivered on 18<sup>th</sup> January, 2017 upheld the preliminary objection. The applicants were aggrieved by this outcome and duly filed a notice of appeal on 18<sup>th</sup>

January, 2017, thus paving the way for the motion before us.

During the plenary hearing before us, **Mr. Githui** did point out that the notice of appeal was served upon them outside the stipulated period. He duly filed a notice of motion to have the appeal dismissed. The motion is still pending for hearing. In view of the fact that the motion has not been heard and determined, we do not wish to comment on the matter lest we embarrass the court that will be seized of the motion. However, for the purposes of this motion, we take the view that the motion is yet to be determined in favour of the 38 respondents and hence it has not been found to be invalid. Having come to that conclusion, the next issue for our consideration is whether a negative order is capable of being stayed.

The issue of whether a negative order is capable of being stayed was considered in the case of **GEORGE OLE SANGUI VS KEDONG RANCH LIMITED CA NAI 55 OF 2015** where this court while determining an application under **Rule 5(2)(b)** of this Court's rules that sought to stay the dismissal of a negative order framed the issues 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.”**

The court further stated that

**“in considering these issues we propose to deal with the last issue because the success or otherwise of the application reposed on it.”**

We too, take the view that the issue as to whether a negative order is capable of being stayed will determine the success or otherwise of the motion before us.

In the case of **WESTERN COLLEGE FARTS AND APPLIED SCIENCES VS ORANGA & OTHERS [1976]** KLR 63 this court whilst considering whether an order of stay can be granted in respect of a negative order 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.”**

Similarly in **REPUBLIC VS KENYA WILDLIFE SERVICE & 2 OTHERS.** (CA NO. NAI 12 OF 2007) this court held 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”**

See also **STANBIC BANK KENYA LTD VS KENYA REVENUE AUTHORITY** [2000] eKLR (C.A. No. 294/2007) **SHIMMERS PLAZA LIMITED VS NATIONAL BANK OF KENYA LTD** [2013] eKLR (CA 38 of 2013) and **KENYA HOTEL PROPERTIES LIMITED VS WILLSDEN INVESTMENTS LTD** [2011] eKLR (CA No. Nai 131 of 2010).

In the motion before us the applicants sought a stay of the striking out of the O.S. This was a negative order which, by parity of a long line of decisions of this court as demonstrated above, is incapable of

being stayed.

Having said that, it is not lost to us that the applicants in their prayers sought an order of injunction. In NAIROBI METROPOLITAN PSV SACCOS UNION AND 25 OTHERS VS COUNTY OF NAIROBI GOVERNMENT & 3 OTHERS (supra) this court stated as follows:

**“In granting orders sought in application for stay or grant of an injunction as the case may be this court exercises original jurisdiction....”** and proceeded to cite the case of EQUITY BANK LIMITED VS WEST LINK MBO LIMITED CA NO. NAI 78 OF 2011 wherein Githinji JA stated that.

**“It is trite law in dealing with 5(2)(b) applications the court exercises discretion as a Court of first instance. It is clear that rule 5 (2) (b) is a procedural innovation to empower the court entertain an interlocutory application for preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals.”**

Having come to the conclusion that we are properly seized of the application seeking an injunctive relief, the next issue is to determine whether the applicants have demonstrated that they are deserving of this relief. In LAKE TANNERS LIMITED & 2 OTHERS VS ORIENTAL COMMERCIAL BANK LIMITED [2010] eKLR (CA No. 64 of 2010) it was held that the purpose of an injunction pending appeal is to preserve the status quo. In the motion before us it is common ground that titles have been issued in respect of parcels of land hived off from land allegedly belonging to the Group Ranch. An injunctive relief would therefore serve no purpose.

In view of the above, we have come to the conclusion that the motion dated 26<sup>th</sup> January, 2017 cannot succeed and is for dismissal. It is accordingly dismissed with costs to the respondents.

*Dated and delivered at Nyeri this 10<sup>th</sup> day of May , 2017.*

**G.B. M. KARIUKI**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR**