IN THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A.)

CIVIL APPLICATION NO.61 OF 2016

BETWEEN

COSMAS KITI & OTHERS ……..APPLICANTS

AND

CHARLES K. WANGUHU ……1ST RESPONDENT

JOHN WAWERU ……...2ND RESPONDENT

(Being an application for stay of execution pending the lodging, hearing and determination of an appeal from the Judgment of the Environment & Land Court at Malindi (Angote, J.) dated 6th March, 2015

in

E & L.C..C. No. 76 of 2006)

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RULING OF THE COURT

By a Notice of motion dated 14th September, 2016, pronounced to be filed under **Rule 4**, and **5(b)**(sic) of the Rules of this Court, the applicants through the firm of Richard O. & Co. Advocates seek *"an order of stay of execution of the judgment and decree dated 6th March, 2015 pending the filing of the record and the hearing of the substantive appeal"*

In his affidavit in support of the motion, Leonard Thuya Kenga deposes that judgment was entered against him and the other applicants in Malindi H. C. C. C No. 76 of 2006 on 6th day of March, 2015. In the said judgment, the court made a finding that the applicants herein were squatters on Plot No. 176 section 111 Mainland North, Kanamai, Kilifi County measuring 23.75 acres and ordered them to vacate the same, failing which they would be evicted therefrom.

They did not vacate and instead, filed a Notice of Appeal dated 6th March, 2015 on 9th March, 2015. We observe that to date, the record of appeal has yet to be filed.

According to the applicants, they have a good appeal with overwhelming chances of success and if stay orders are not granted, their intended appeal, in the event it succeeds would be rendered nugatory, as

more than 300 families will be rendered homeless.

The application is opposed by the respondents vide the replying affidavit of John Waweru Mwangi, the 2nd respondent herein dated 15th June, 2017. According to the 2nd respondent there is no possibility of having a proper appeal filed because although the Notice of Appeal was served on counsel for the respondent, the respondent's counsel was never served with any letter bespeaking the proceedings of the High Court to enable the applicants seek refuge under **Rule 82 (2)** of the Rules of this Court, which would allow them to file the record of appeal out of time.

The respondent further deposes that the applicants' application does not meet the threshold under **Rule 5 (2)(b)** of the Rules of this Court and it should therefore be dismissed for being frivolous and vexatious. At the plenary hearing of the application, Mr. Otara, learned counsel for the applicants reiterated the contents of the affidavit in support of the application. He told the Court that the record of appeal is ready and they can file it within 14 days. He did not however address the very important issue raised by the respondent to the effect that they did not serve the respondents' counsel with the letter bespeaking the proceedings of the trial court. In absence of an averment or annexure to controvert that deponment, the only logical conclusion we can make is that indeed no such letter was ever copied to the respondent, and so the intended appeal may only be an illusion in view of **Rule 82 (2**) Court of Appeal Rules. We do not however need to get into details of that aspect of the application given that at this instance, all this Court is supposed to concern itself with is the question as to whether there is a Notice of Appeal which has been filed against the impugned judgment. As stated earlier, there is indeed a Notice of Appeal, and the application is therefore properly before Court.

What we need to consider now is whether the application passes the test or threshold set for applications predicated on order **5 (2)(b)** of the Rules of this Court.

The principles, for the court to consider when dealing with an application such as this one are well settled.

First, the applicants have to establish that they have an arguable appeal; and second whether if the application is not allowed the applicant's appeal, were it to succeed will be rendered nugatory.

These two principles, as we have maintained in a litany of our decisions are conjunctive, and not disjunctive. The applicants need first and foremost to establish that their intended appeal is arguable. After doing so, then they should establish the nugatory aspect. (See **Reliance Bank vs Norlake Investments Ltd [2002] I CA 218 (CAK),** and **Githunguri vs Jimba Credit Corporation Ltd [1988] KLR 838).**

On the first limb on arguability, we wish to reiterate that arguability itself does not mean that an appeal or intended appeal must succeed. It means one that raises a *bona fide* issue that would merit or call for consideration, and determination by the Court, on appeal. **(**See **Kenya Tea Growers Association & Another vs Kenya Planters Agricultural Workers Union, Civil Application No. Nai 72 of 2001)**.

It is also settled that an applicant only needs to establish one arguable point (see **Ahmed Musa Ismael vs Kumba ole Ntamorua & 4 Others [200] KLR 31**.

What we need to ask ourselves first and foremost is whether the applicants have satisfied this Court that they have an arguable appeal. The applicant's affidavit is silent on this issue. Other than stating that the intended appeal has "overwhelming" chances of success, we have not been given reasons to support that assertion. The trial court made a solid finding to the effect that the respondents are the registered owners of the suit property and that has not been contested. The learned Judge also found that the applicants herein invaded the suit premises in or around 2002. The suit in question was filed in 2006, four years after the illegal invasion, which makes the applicants' occupation of the said land eight years short of the prescriptive period that would provide basis for a claim based on adverse possession.

In our view, therefore, the applicants have failed to satisfy the first requirement of having an appeal that is arguable. Having failed to establish the first principle, it is not necessary to go into the realm of nugatory

aspect, because as we said earlier the two principles are conjunctive and not disjunctive. We can only state that if the applicants file their appeal and the same succeeds, if they will have been evicted from the suit land, they will have other remedies available to them, which would include filing a claim for damages for wrongful eviction.

We need not say more. The upshot of the above analysis is that the application before us is devoid of merit. We dismiss the same with costs to the

respondents.

Dated and delivered at Mombasa this 21st day of September, 2017

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M.K.KOOME

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR