IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, MWILU & AZANGALALA, JJ.A)

CIVIL APPLICATION NO. NAI. 229 OF 2015 (UR 189/2015)

BETWEEN

REPUBLIC.....APPLICANT

AND

KAJIADO NORTH DISTRICT LAND REGISTRAR &

THE LAND DISTRICT REGISTRAR KAJIADO.....1ST RESPONDENT

COMMISSIONER OF LANDS.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

THE OLKEJUADO COUNTY COUNCIL.....4TH RESPONDENT

(An application for stay of execution and injunction pending the hearing and determination

of an intended appeal from the Ruling of the High Court of Kenya at Machakos

(Mutende, J.) dated 2nd June, 2015

in

H. C. Misc. Appl. No. 285 of 2011)

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RULING OF THE COURT

1. The application before us though titled as having been brought by the state has actually been filed by Simon Salaon Pertet (herein-after referred to as "the applicant"). We shall endeavor to explain his role later in this ruling. The application is anchored under ***Rules 5 (2) (b), 41 & 47*** of the Court of Appeal Rules (the Rules) and seeks *inter alia:*

> *i.* ***Stay of execution of the ruling dated 2nd June, 2015 in H.C. Misc. Applic No. 285 of 2011 pending the hearing and determination of the intended appeal.***

ii. ***An injunction restraining the respondents by themselves or through their agents from disposing, transferring or otherwise interfering with L. R. No. Ngong/Block/2/683 Plot No. 131 of Vol. II (suit property).***

2. The application is predicated on the grounds that the intended appeal is arguable and unless the orders sought are granted the substratum of the appeal will be disposed of rendering the appeal nugatory.

3. The background of the said application is that the applicant claims that the suit property was allocated to him in the year 1992 vide an allotment letter. Since then he has paid all the requisite fees for processing of the title document in his favour and has continued paying all incidentals as they accrue in respect of the suit property. However, in December, 2011 he learnt that the suit property had also been allocated to one Grace Wanjira. Consequently, he obtained leave and instituted judicial review proceedings against the respondents seeking;

i. ***An order of certiorari to quash the 1st respondent's decision to register Grace Wanjira as the proprietor of the suit property.***

ii. ***An order of mandamus compelling the 1st and 2nd respondents to register the applicant as the proprietor of the suit property.***

iii. ***An order of prohibition prohibiting the 1st respondent from registering, mortgaging, leasing or changing the user of the suit property.***

4. By a judgment dated 27th January, 2015 the learned Judge (Mutende, J.) struck out the substantive application on the ground that it was fatally defective having not been brought in the name of the State. Subsequently, the applicant herein filed a notice of motion dated 25th March, 2015 in the High Court seeking review of the above mentioned judgment on the ground that there was an error apparent on the face of the record. The applicant also sought an amended substantive application which had been drawn in the State's name to be deemed as properly filed in the judicial review proceedings. However, the High Court (Mutende, J.) by a ruling dated 2nd June, 2015 dismissed the said application. That is the decision which is both the subject of the intended appeal and the application before us.

5. On the arguability of the intended appeal, Mr. Wachakana learned counsel for the applicant, submitted that the learned judge erred in dismissing the review application. He argued that unless we grant the orders sought, the applicant would suffer irreparable harm since he had been in occupation of the suit property for a period of 20 years and had paid all rates and taxes in respect of the property.

6. Mr. Onyiso, learned counsel for the 1st, 2nd and 3rd respondents, argued that the intended appeal was not arguable because the applicant ought to have filed an appeal against the judgment dated 27th January, 2015 and not an application for review. M/s Mogusu, learned counsel for the 4th respondent, associated herself with the submissions made by Mr. Onyiso and added that no prejudice would be occasioned to the applicant since he had a choice of filing fresh judicial review proceedings.

7. We have considered the record, submissions by counsel as well as the law. It is trite that in an application under ***Rule 5 (2) (b)*** of the Rules, the applicant ought to establish two twin principles, namely, that the appeal is arguable and that unless the orders sought are granted the appeal will be rendered nugatory. However, as was observed by this Court in ***Mwambeja Ranching Company Ltd. -vs- Kenya National Capital Corporation Ltd. & Another (2010) eKLR*** there is one main reason which militates against the success of the application for stay. This Court in the above mentioned case expressed:

"The one main reason that militates against its success is that it is seeking an order to stay the execution of a negative order. The application before Okwengu, J. sought mainly an injunction and the learned Judge in her ruling, …… dismissed that prayer. The learned Judge did not direct the doing or not doing of anything. If she had ordered that something be done or some action be taken, then it could be perfectly in order to stay such an order. Of course subject to our

being satisfied on the principles stated above."

8. The application is clear that the stay sought is in respect of execution of the ruling dated 2nd June, 2015 wherein the applicant's review application was dismissed. That being the case this Court cannot stay a dismissal order as held by the predecessor of this Court in ***Western College of Arts & Applied Sciences -vs- Oranga & Others (1976) KLR 63*** wherein Law V.P 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***
>
> **….**
>
> ***In the instant case, the High Court has not ordered any of the parties to do anything, or to restrain 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 to restrain by injunction."***

We are also guided by the sentiments of this Court in ***Devani & 4 Others -vs- Joseph Ngindari & 3 Others – Civil Applic. No. Nai. 136 of 2004 (unreported)*** where we stated:

> ***"By dismissing the judicial review application the superior court did not thereby grant any positive order in favour of the respondents which is capable of execution. If the order sought is granted it will have the indirect effect of reviving the dismissed application. This court cannot undo at this stage what the superior court has done."***

9. Being mindful not to make final findings on the intended appeal, we cannot help but note that the applicant sought albeit strangely, to amend the substantive application which had already been struck out through the review application. We also note that despite the review application being anchored on the ground that there was an error apparent on the face of the record, no such error was demonstrated by the applicant. Consequently, we are doubtful as to the arguability of the intended appeal. On the nugatory aspect we find that the applicant has not demonstrated to our satisfaction how the intended appeal would be rendered nugatory in the event we do not issue the injunction sought. More so, taking into account that the applicant has not appealed against the judgment dated 27th January, 2015 wherein the substantive application in the judicial review proceedings was dismissed.

10. The totality of the foregoing is that we find that the application lacks merit and is hereby dismissed with costs.

Dated and delivered at Nairobi this 29th day of July, 2016.

ALNASHIR VISRAM

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR