IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

(CORAM: OKWENGU, KIAGE & J. MOHAMMED, JJ.A)

CIVIL APPLICATION NO. NAI. 13 OF 2016

BETWEEN

PARKIRESTEPHEN MUNKASIO.....1ST APPLICANT

RIPOI OLE NKORIR.....2ND APPLICANT

TOBIKO OLE MUNTET.....3RD APPLICANT

MUNYIRI OLE NTAIMPUT.....4TH APPLICANT

SADERA OLE NJIRI.....5TH APPLICANT

MURUNYA OLE KARATINA MUTUTUA.....6TH APPLICANT

THOMAS OLE TERERE MALOI.....7TH APPLICANT

JOHNSON OLE KASALE.....8TH APPLICANT

KOIPATON OLE MONYIS.....9TH APPLICANT

MACKNNON TINKOI.....10TH APPLICANT

LALETO OLE MURASMI RESON.....11TH APPLICANT

NJAAMAN OLE KOISAMOU.....12TH APPLICANT

NKARU OLE TORIS.....13TH APPLICANT

LESILEF OLE MOLO.....14TH APPLICANT

PEMBA OLE KARATINA.....15TH APPLICANT

(Suing on their behalf and on behalf of their families and all members of the Maasai Community living on Land Reference No.l8396 (IR.11977) situate in Kedong)

AND

KEDONG RANCH LIMITED.....1ST RESPONDENT

KENYA ELECTRICITY GENERATING

COMPANY LTD (KENGEN).....2ND RESPONDENT

AKIIRA ONE GEOTHERMAL COMPANY LTD.....3RD RESPONDENT

THE CS, MINISTRY OF ENERGY AND PETROLEUM.....4TH RESPONDENT

THE CS, MINISTRY OF INTERIOR AND

CORDINATION OF NATIONAL GOVERNMENT.....5TH RESPONDENT

THE NATIONAL POLICE SERVICE.....6TH RESPONDENT

THE INSPECTOR GENERAL OF THE

NATIONAL POLICE SERVICE.....7TH RESPONDENT

THE CHIEF LAND REGISTRAR.....8TH RESPONDENT

THE HON. ATTORNEY GENERAL.....9TH RESPONDENT

(Being an application for injunction pending the hearing and determination of an appeal from the judgment of the Environment and Land Court at Nakuru (Munyao, J.), dated 24th September, 2015

in

Petition No.57 of 2014)

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RULING OF THE COURT

The motion before us dated 2nd March 2015 is brought under **Rule 5(2) (b)** of the Court of Appeal Rules and seeks at prayer 3 and order that;

> ***"3. Pending the hearing and determination of this appeal from the judgment delivered by the Hon. Justice SilaMunyao dated in Petition 57 of 2014) this Honourable Court be pleased to grant a stay of execution of the said Judgment and particularly grant an injunction restraining the respondents either through themselves, agents, servants or employees from evicting the applicants from the suit land being L.R 8396 (L.R 1197)".***

That prayer does not mention the date of the judgment and decree sought to be stayed pending appeal but from the record it is quite clear it is the one delivered by the learned Judge on 24th September 2015.

On the face of the motion are the grounds on which it is founded and we note right away that they are inelegantly framed in a repetitive and verbose manner thus;

> ***1. By the judgment dated 24th September 2015 delivered in the Environment and Land Court at Nakuru, the learned Judge Justice SilaMunyao, inter alia.***

(a) Entered judgment to the effect that the appellants herein had failed to satisfy the factual allegations in Petition 57 of 2014 and consequently their rights to housing under Article 43(1) (d) of the Constitution, Education under Article 53(1) (b) of the Constitution, Clean and Health Environment under Article 42 of the Constitution, Property under Article 40 of the Constitution, Health under Article 43(1) (a) of the Constitution and other pleaded rights in the Bill of Rights had not been violated. The learned judge also refused to admit the applicants' evidence proving their actual occupation of the suit land and farther held that the applicants were not in actual possession of the sui land and had therefore not demonstrated any interest in relation to the suit land capable of being protected by the law.

2. Consequently, unless this Honourable Court restrains the respondents, the applicants are facing imminent danger of being evicted from the only place that they have known to be home since time immemorial without any alternative area as to settlement and without any form of compensation whatsoever in gross violation of the International Guidelines on Eviction.

3. The applicants are aggrieved by the said judgment and consequential orders and intend to appeal to the Court of Appeal against the same. The applicants have an arguable appeal with a probability of success and the appeal would be rendered nugatory if a stay of execution of judgment is not allowed.

4. The applicants are apprehensive that unless this Honourable Court grants the orders prayed, the applicants stand to suffer substantial loss and their appeal is going to be rendered nugatory as they are going to be evicted from the suit land and be rendered homeless together with their families and all the other families that they represent without any alternative place for resettlement or any form of compensation whatsoever thereby violating their right to housing as per Article 43(1) (d) of the Constitution.

5. The applicants have brought this application timeously and without unreasonable or unnecessary delay.

6. That it is in the interests of justice that this application be granted as prayed.

The evidential basis of the application is provided by the affidavit of one **Stephen ParkireMunasio**, a resident of Narash and of P.O. Box Number 663 Narok who is the first appellant/applicant and states that he has the authority of his co-appellants/applicants to swear the affidavit. The affidavit is long on narrative.It narrates that the applicants initiated a petition before the Environment and Land Court,Nakuru, seeking to be declared as being owners of the land L.R. No.8396 (IR 11977) in Kedong Ranch (the suit land) through ancestral ownership. They also prayed that the suit land be declared communal land under **Article 63** of the Constitution of Kenya, 2010. That Petition was attacked by the respondents for being the wrong procedure for asserting adverse possession and for being ***res- judicata,*** the matter ownership through adverse possession having been previously determined. The preliminary objection which had been raised on those premises was partly allowed and the matter then proceeded to determination on its merits. The applicants attempted to show the learned Judge that they were in actual possession of the suit property and that they were ***"not merely asking the court to protect [them] against several constitutional violation in a hypothetical set up."***

Judgment was due for delivery on 11th June 2015 but the applicants filed a motion dated 3rd May 2015, which they filed a month later on 2nd June 2015 seeking to stay the delivery of the judgment pending a site visit but that application was not considered and eventually the learned Judge delivered the impugned judgment on 24th September 2015 dismissing the applicants'petition.

The applicants filed a notice of appeal against the same and wrote to the Deputy Registrar of that court seeking certified copies of the proceedings. The deponent exhibited a memorandum of appeal in draft and swore that he had been advised by their advocate on record that the same "raises arguable points of law and has high prospects of success" and he has enumerated ten points on which it is asserted the learned Judge erred in law and fact.

The deponent then swears that unless this Court grants the prayers sought the applicants will suffer substantial loss and that appeal be rendered nugatory for the reasons that;

> ***(a) The applicants risk being forcefully evicted from the suit land thereby violating their rights to; adequate housing contrary to Article 43(1) (d) of the Constitution; torture and degrading treatment contrary to Article 29 of the Constitution; together with their right to human dignity as enshrined in Article 28 of the Constitution of Kenya.***
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> ***(b) The applicants' children risk their right to education being violated contrary to Articles 43 and 53 of the Constitution of Kenya as they will no longer have places to call home. Being homeless, psychologically tortured and landless, the applicants' children won't be able to attend their schools.***
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> ***(c) The application sought, if granted, and the intended appeal is successful, the applicants herein shall have been saved the indignity of being homeless, subjected to forceful evictions, torture and degrading treatment and having their children being unable to access educational facilities as a result of being homeless.***

It was finally averred that the applicants "***together with all the other families they represent"*** are now in eminent danger of forceful eviction from the suit land and being subject to torture and degrading treatment ***"amidst other various constitutional violations."***

Of all the respondents, only the 2nd, Kenya Electricity Generating Company Ltd (Kengen), elected to file a replying affidavit. It was sworn by Kengen's Corporation Secretary RebbeccaMiano on 25th April 2016 and is to the effect that the applicants neither have an arguable appeal nor will their appeal be rendered nugatory. She swore that the gist of the applicants' alleged occupation of the suit property had been raised and determined by the learned Judge and in a different suit,Nakuru ELC No.21 of 2010 which was filed by persons ***"suing on their own behalf and of their families and members of the Maasai Community living on Land Reference Nol8396 (LR.1197)"*** and was dismissed with that court finding that the applicants were not in occupation of the suit land. As there was no appeal against that finding the deponent swears that the question of the alleged occupation of the suit land cannot be the subject of appeal and that renders it unarguable.

The deponent then proceeds to aver that as the applicants are not in occupation of the suit land, allegation of the appeal being rendered nugatory by eviction as presented by the applicants cannot occur. Nor can any actual occupation of the suit land be a basis for arguing that the appeal may be rendered nugatory since such occupation could only be by trespassers who cannot be allowed to defeat the registered proprietors' rights. She swore further that there was nothing in the learned Judge's judgment that is capable of being stayed in the manner contemplated by the applicants and so urged that the application be dismissed with costs.

Arguing the application before us, Mr. Biko submitted that the applicant's intended appeal is arguable because the impugned judgment is erroneous in several respects and in particular the holding that the applicants were trespassers yet the same had not been pleaded and was not before the learned Judge. Asserting that even trespassers have rights, counsel submitted that the learned Judge was wrong to hold that the applicants had not established possession or occupation of the suit land.

Counsel next urged that the intended appeal would be rendered nugatory unless the application is granted because the applicants will be victimized by eviction. Citing the cases of **PKM -VS- RPM** [2015] eKLR and **BUTT VS RENT RESTRICTIONS TRIBUNAL** [1982] KLR 417, he pleaded with us to balance the parallel rights of the contending parties and grant the application so as to maintain the *status quo* to enable the applicants to agitate their grievances on appeal. He concluded by contending that the 2nd respondent had somehow admitted the presence of the applicants on the suit land.

Opposing the application **Mr. Kadima**, learned counsel for the 1st respondent who also held brief for **Mr. Tombe** for the 3rd respondent indicated that those respondents had not filed any affidavits in reply

and that they would rely on the record of the application as filed and his list of authorities. His first contention was simple: the case has already been determined. For that assertion, he drew our attention to this Court's decision in **GEORGE OLE SENGUI & OTHERS**(*suing on their behalf and on behalf of the person and families residing on what is commonly known as Kedong Ranch situated on LR. 8396 LR NO.11977)*-VS-**KEDONG RANCH LTD**, Civil Application No. Nai 55 of 2015, which rejected an application for stay of execution couched in terms similar to the present application. That other application was seeking to stay execution of the judgment of the High Court in Nakuru (L. N. Waithaka, J.) in Civil Case No.21 of 2010 which determined the issue of ownership of the suit land between the parties. The fact of the matter having been decided was raised before Munyao J, who agreed with them. The respondents having worn two cases before the High Court and a previous application for stay of execution in similar terms having been rejected by this Court, Mr. Kadima contended that the applicants do not have an arguable appeal.

He went on to argue that the applicants have lost their right to appeal by their own laches and dilatoriness not having filed a Memorandum and record of appeal more than a year after they filed their notice of appeal yet, by dint of **Rule 82** of the Court of Appeal Rules, they should have done so within 60 days. We were therefore urged to deem the notice of appeal as having been withdrawn under **Rule 83** of the Rules of Court.

Mr. Kadima pressed that the appeal as founded on "***historical injustices"*** is equally frivolous for the reason that the National Land Commission has not been invited to and had not investigated and made that conclusion.

On the nugatory aspect, counsel asserted that the applicants are not in occupation of the suit land. He sought to demonstrate the point by pointing out that whereas the suit land is in Kedong in Naivasha, the 1st applicant describes his physical residence and postal address as **Narashe, P.O. Box 63, Narok**. There therefore can be no basis for the applicants' claim that they are in eminent danger of eviction from the suit land.

Mr. Imende, the 2nd Respondent's learned counsel predicated his submissions on the aforesaid affidavit of Rebecca Miano and reiterated that the appellants' appeal is not arguable given that the court below had struck out the adverse possession portion of the applicants petition for being *res judicata* and the applicants never challenged that order and findings by way of appeal. Once adverse possession is excluded from the applicants' agitation, argued counsel, the only portion that remains is historical injustices' but that too is excluded for non-demonstration of Article 163 of the Constitution.

On the question of possession, **Mr. Imende** contended that the applicants did not place any evidence that they were in possession of the suit land before the High Court or this Court leading to inevitable holding that they were not in possession. He explained that the applicants were misreading the 2nd Respondents' submissions as constituting an admission that the applicants were in possession when, in fact, the 2ndRespondent had submitted that the process of resettlement had been completed without affecting the applicants because the applicants were not, and are not there. He added that there is neither urgency about this application (demonstrated by the fact that it was filed on 12th November 2015 but served on the respondent exactly five months later on 12th April 2016) nor any threat of eviction preciselybecause the applicants are not in possession of the suit land.

On his part, **Mr. Wachira**, learned state counsel for the 4th to 9th Respondents associated himself with and adopted the submissions made on behalf of the 1st and 2nd respondents in entirety. He restated that an application for injunction raising the very same issues at the High Court was dismissed on 16th February 2015 and no appeal having been prepared against the said dismissal, the instant application cannot lie.

Mr. Biko'sonly reply to those submissions for the respondents was that beyond the question of injunction, there were "***other constitutional issues***" that were not canvassed, by which we take him to mean there is something left untouched by the bar of *res judicata.*

We have given due consideration to this application, the affidavits for and against it and the rival submissions made by counsel together with the authorities cited. The precepts upon which this Court exercises its Rule 5(2) (b) jurisdiction are well settled; an applicant must show that he has an arguable appeal and that the said appeal would be rendered nugatory unless the stay of execution or injunction pending appeal sought is granted. It is incumbent upon the applicant to satisfy the court on both limbs in order to obtain the relief sought which is always at the discretion of the Court. See, **STANLEY KANGETHE KINYANJUI -VS- TONY KETTTER & 5 OTHERS** [2013] e KLR.

On a consideration of the first limb, whether the appeal is arguable, we bear in mind that an arguable appeal need not raise a multiplicity or even a plurality of grounds in order to succeed. A single *bona fide* ground of appeal raised would suffice and by that is not meant one that must necessarily succeed on appeal but rather one that is not frivolous and is therefore deserving of consideration on appeal.

See, **DAMJI PRAGJI, MANDAVIA -VS- SARA LEE HOUSEHOLD & BODY CARE (K) LTD**, Civil Application No. Nai 345 of 2004**; JOSEPH GITAHI GACHAU & ANOR -VS- PIONEER HOLDING (A) LTD & 2 OTHERS,** Civil Application No. 124 of 2008. We are also alive to the need for circumspection and so eschew the making of definitive or final findings of either facts or law at this interim stage so as to avoid embarrassing the bench that will hear and determine the issues.

It follows that when there is an arguable appeal, and subject to the second limb being satisfied, an application for stay or injunction ought to be granted. We think that there is also an equally important duty vested on the Court to candidly state that the appeal is frivolous and unarguable when that is the case.

Turning to the case before us, we are faced with rival contentions on the arguability of the appeal. Having perused the memorandum of appeal, however, it seems quite clear to us that there is no *bona fide* point to be argued on appeal. We say so because at the heart of the intended appeal is the question of possession or occupation of the suit land whether presented under the doctrine of adverse possession or the guise of the constitutional right to housing.

This very issue of possession was before the High Court at Nakuru in Civil Suit No. 21 of 2010. As the findings of Waithaka J, are critical, we quote the judgment *in extensu*;

> ***"32. During their testimony, the plaintiff's witnesses talked of a different number of families - 1,300. The number of families, if indeed they exist must be certain. At the time of filing suit, they were said to be 2,800. During the hearing they drastically declined to 1,300. Is this believable? During cross examination by the defencecounsel, the plaintiffs witnesses stated that families living on the suit land have actually constituted themselves into an organization called – Kitet-Sosion Group. They claim there is a register of members. Such register was not produced in court. The families were not even named by the witnesses while in the dock.***
>
> ***33. The inconsistencies as to the actual number and identity of such families leads to the conclusion that they do not exist. As a matter of fact, it is not clear if the rest of the twelve plaintiffs exists apart from the three who testified. Their particulars apart from the names were never provided. At the very least, even if they were not to testify, the details of the plaintiffs and the facts of their occupation of the suit land, the actual developments they have carried out on the land e.t.c. should have been introduced to court.***
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> ***34. As to their existence, this court is in doubt. Regarding the actual plaintiffs who testified, PW1 – PW3 also did not individually and specifically state what their developments if any, they have carried out on the suit land. One would have expected clear and succinct description of the extent of development and occupation. Generalized statements like " I have built a permanent structure" without pictures e.t.c. cannot do. Indeed, when the Deputy Registrar visited the land, in her report, she observed that there are, "a few semi-permanent structures (made of iron sheets were noted) most of which are still under construction…." Clearly, if developments are ongoing, it is doubtful that the plaintiffs and their fathers before them lived on the land. Some***

of the relations of the witnesses are said to have died and buried there. No evidence by way of death certificates was introduced and the Deputy Registrar did not indicate seeing any graves.

35. The witnesses' identity documentation was produced. It shows that they were born and hail from other localities and not where the suit land is situated. Although an individual can live very far away from their land of nativity, the plaintiffs clearly stated that they were born on the suit land. It follows therefore that such is in the information that would have gone into their identity documents.

36. The burden of proving possession lies with the plaintiff in a suit such as this. The plaintiffs failed to discharge the same.

37. Taking all the above into account, issue number (i) is answered in the negative. I therefore find that the plaintiffs have not been in possession or occupation of the suit land as they allege.

38. It follows therefore, that all the other issues collapse. One of the cardinal duties of a plaintiff in a suit for adverse possession is to prove possession of the suit land. Having failed to demonstrate possession, the suit must fail.

No appeal was preferred against those definitive findings and it is not surprising that the plea of *res judicata* on adverse possession was hoisted against the applicant's petition which Munyao J, really had no choice but to uphold. All that the aggrieved plaintiffs had done was file before this Court an application for stay of execution of the decree of Waithaka J. That application was in essence similar to the one before us and it, too, was dismissed.

Given those decisions, we are of the considered opinion that this present application is an attempt to dislodge the same through the back door and we cannot possibly aid the applicants in that enterprise. Litigation must come to an end and there is value in finality.

Without satisfying us that the appeal is arguable, the applicants plea before us cannot succeed and ought on that basis alone to be dismissed. Even a consideration of the nugatory aspect, which we need not go into but we do, shows that the application must fail. Much as the applicants raise alarm that they stand in imminent danger of eviction, torture, and violation of rights in the process of forcible ejection from the suit land, they have not placed before us any evidence that they are actually in occupation or possession of the same. One cannot be ejected from where one is not in the first place. Indeed, on the face of multiple findings by the High Court that the applicants are not in possession, we find rather curious the applicants' submission as probably their strongest point, that the respondent had admitted to their having been in possession of the suit land. Our own consideration of the record does not reveal any such admission and the position remains, as found by the High Court on more than one occasion and unreversed on appeal, that the applicants are not in possession of the suit land. There therefore is no eminent danger to be forestalled by grant of the orders sought even had the applicants an arguable appeal which, as we have found, they do not.

The upshot is that we find no merit in this application and it is accordingly dismissed with costs.

Dated and delivered at Nakuru this 8th day of December, 2016.

H. M. OKWENGU

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

J. MOHAMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR