IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, MUSINGA & GATEMBU, JJ.A)

CIVIL APPLICATION NO. 14 OF 2015 (UR NO. 10/2015)

IN THE MATTER OF AN INTENDED CIVIL APPEAL

BETWEEN

WELLINGTON LUSWETI BARASA & 47 OTHERS ….....APPLICANTS

AND

LANDS LTD ..... 1ST RESPONDENT

KIBOGY PROPERTIES LIMITED..... 2ND RESPONDENT

(An Application for stay of execution arising from the Ruling of the High Court of Kenya, Environment and Land Court at Eldoret, (Ombwayo, J.) dated 17th March, 2015

in

ELDORET E & L CASE NO. 931 OF 2012 (FORMERLY ELDORET HCCC NO. 49 OF 2008, INITIALLY NAIROBI HCCC NO. 188 OF 1991 (O.S)

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RULING OF THE COURT

1. This is an application for stay of execution of the ruling of Ombwayo, J. delivered on 17th March 2015 in Eldoret Environment and Land Case No. 931 of2012. The historical background of the case is as follows.

2. On 21st December 1990, the applicants filed an originating summons in the High Court at Nairobi - HCCC No. 188 of 1990 (OS); in which they claimed that they had, by way of adverse possession, acquired title to the piece of land situate at Moiben in the then Uasin Gishu District (now Uasin Gishu County) and known as **L.R. No. 8319 (the suit land).**

3. That suit was initially against Lands Limited. Pursuant to the applicants' application dated 30th November 1999, Kibogy Properties Ltd, which had by that time bought the suit land, was on 16th February 2000 added as a second defendant in the suit. On 11th March 2008, the suit was by consent of the parties transferred from Nairobi to the High Court at Eldoret where it was registered as "Eldoret

HCCC No. 49 of 2008 (OS). In 2012 it was again transferred this time to the Environment and Land Court at Eldoret and registered as E & L Case No. 931 of 2012.

4. After hearing that case, in a judgment delivered on 30th October 2014, Munyao Sila, J. dismissed it with costs.

5. Aggrieved by that decision, on 4th November 2014, the applicants filed a notice of appeal and on 10th November 2014, they filed an application in which they sought stay of execution of the decree arising from that decision. Incidentally, the said Kibogy Properties Ltd, the 2nd respondent, also filed another application on the same day and sought the implementation of that decree by way of eviction of the applicants from the suit land. Ombwayo, J. heard the two applications together. In his ruling dated 17th March 2015, he allowed that of the 2nd respondent but dismissed the one by the applicants. That provoked the present application premised on the notice of appeal dated 24th March 2015, and filed in court on 30th March 2015.

6. The application is brought under the provisions of rules **5(2) (b)** and **47** of the **Court of Appeal Rules** and sections 3A and 3B of the Appellate Jurisdiction Act. It seeks in the main two orders that pending the filing, hearing and final determination of the· applicants' intended appeal there be a stay of execution of the order arising from the ruling delivered on 17th March 2015 in E & L Case No. 931 of 2012 and an injunction to restrain the respondents by themselves, their servants and/or agents from evicting the applicants from the suit land.

7. The application is based on the grounds stated on its body and the supporting affidavit which are that the applicants' intended appeal has high chances of success as it raises fundamental issues of law and that following the dismissal by the Environment and Land Court of the applicants' application for stay of execution and the grant of orders for their eviction, the applicants are likely to be evicted from the suit land anytime and their homesteads, spread over the 2098 acres of the suit land, are likely to be demolished. The other ground is that if stay is not granted and the applicants are evicted, they will not only suffer irreparable loss but their intended appeal will also be rendered nugatory.

8. Expounding on those grounds and basing himself on the averments in the said affidavit in support of the application as well as the further affidavit also sworn by the said Wellington Lusweti Barasa, **Mr. Nyarotso**, learned counsel for the applicants, submitted that besides the 75 applicants there are also their family members all numbering about 700 to 800 people on the farm who have nowhere else to go if evicted; that the respondents' grounds of opposition and replying affidavits raise trivial technicalities which, in the spirit of **Article 159** of the Constitution, should be ignored; and that the respondents stand to suffer no prejudice if this application is allowed.

9. The application is straneously opposed. Relying on his replying affidavit sworn and filed on 24th April 2015, **Mr. Kiarie**, learned counsel for the 1st respondent, argued that this application is a non-starter for the reason that the applicants' notice of appeal dated 4th November 2014 has not been served upon the 1st respondent; that in the absence of service upon the 1st respondent of a letter bespeaking the proceedings, the applicants cannot take advantage of the proviso to **rule 82 (1)** of the Court of Appeal Rules and the record of appeal having, to date, not been filed, their notice of appeal is, pursuant to **Rule 83**, deemed to have been withdrawn; that at any rate no leave to appeal, pursuant to **Order 43 Rules (2)** and **3** of the **Civil Procedure Rules**, has been sought or obtained; that the applicants have therefore no arguable appeal; and that granting this application is intended to perpetuate the applicants' trespass upon the suit land. Counsel therefore urged us to dismiss this application with costs.

10. For the 2nd respondent, learned counsel Mr**. Kibii** dismissed this application as incompetent as it was filed by counsel who are not properly on record for the applicants and the affidavit in support was commissioned by an unqualified commissioner of oaths. Counsel further submitted that since the dismissals by the Environment and Land Court of their suit and application for stay, the applicants have engaged in indiscriminate and wanton destruction of indigenous trees on the farm. An order of stay in their favour will therefore only serve to give them more time to cause environmental havoc and degradation to the suit land. In the circumstances, counsel passionately urged us to dismiss this

application with costs.

11. We have considered the application and the affidavit in support. We have also considered the replying affidavits filed on behalf of the respondents and rival submissions as well as the authorities cited by counsel for the parties.

12. It is now settled law that to obtain an order of stay of execution and/or injunction under **rule 5 (2) (b)** of the Court of Appeal Rules, the applicant has to satisfy the Court that he has an arguable appeal and that unless the stay and/or injunction sought is granted his appeal or intended appeal, as the case may be, will be rendered nugatory. Our law reports are replete with authorities on this proposition. Suffice it to cite **Equity Bank Ltd V Westlink Mbo Ltd Nairobi Civil Application No. Nai 78 of2011.**

13. We are also alive to the fact that an arguable appeal is not one which will necessarily succeed. It is one which is not frivolous, see **Dennis Mogambi Mongare V. Attorney General & 3 Others C.A. No. Nai 265 of2011.**

14. Having considered this application with these principles in mind, we entertain grave doubts as to the "arguability" of the applicants' intended appeal. This is because the applicants filed the notice of appeal against Munyao Sila J's judgment on 4th November 2014. During the hearing of the application before us, counsel for the applicants conceded that there is no proof of service upon the respondents of the letter bespeaking the proceedings. The applicants cannot therefore take advantage of the proviso to **rule 82 (1)** of the Court of Appeal Rules which enables one to obtain a certificate of delay and file one's appeal within 60 days of receipt of proceedings. It follows therefore that the applicants' intended appeal against the judgment given on 4th November 2014 does not lie, the period of 60 days within which they should have filed their appeal having expired. For the same reason, the foundation on which the applicants have urged that they have an arguable appeal against the decision of the High Court given on 17th March 2015 is shaken.

15. We are of course not oblivious of the fact that the applicants can, if they can satisfy the court that there was gpod reason for their failure to file their appeals in time obtain extension and file their appeals out of time. But as matters stand at the moment, there is no competent appeal upon which this application for orders of stay of execution and injunction can be anchored.

16. There is one more reason why we doubt if the applicants' intended appeal is arguable. **In the hearing of E & L case No. 931 of 2012**, the applicants called three witnesses who testified that all the applicants are and have been either employees or children of employees of the successive owners of the suit land, and that they are and have been on the suit land with the permission of the successive owners of the land including the 2nd respondent. It is trite law that, for purposes of a claim for adverse possession, time does not run in favour of a person who is in occupation of land with the consent of the owner. This legal position was stated thus in the case of **Delamare Estates Ltd V. Ndungu Njai & 42 others [2006] eKLR "** *If a person is ... by virtue of his employment ... allowed to reside on his employer's property, his entry and occupation thereon is not adverse to his employer's rights because he entered therein with [the} permission of his employer. "* Such person is a licensee or tenant at will in whose favour time does not run for purposes of a claim for adverse possession. See also **Hughes V. Griffin (1969) ALLER 460.**

17. In this case, in an effort to protect their occupation of the suit land, on 16th February 1988 the applicants describing themselves as licensees, registered a caveat against the title to the suit land. That caveat was on or about 29th September 1994 removed by the court order of 9th July 1991 that had dismissed the applicants' application for injunction and extension of that caveat. In the circumstances, as we have stated, we doubt if the applicants have an arguable appeal.

18. Having found that the applicants' intended appeal against Ombwayo J's ruling of 17th March 2015 is not arguable, we do not need to consider the second criterion of whether or not the intended appeal will be rendered nugatory if the application for stay and/or injunction is dismissed. Consequently, we find no merit in this application and we accordingly dismiss it with costs to the respondents.

Dated and delivered this 8th day of May 2015

D.K. MARAGA

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR