

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO.169 OF 1987

RAHAB NJERI GICHUHI

SAMUEL KINAI GICHUHI.....PLAINTIFFS

JUSTICE GITHUMBI GICHUHI

VERSUS

JOSEPHINE NYAKIO GICHUHI.....DEFENDANT

R U L I N G

The application before court is the NOTICE OF MOTION dated 16th October, 2003, and brought under Order XVI Rule 4(1) of the Civil Procedure Rules and Section 3A of the Civil Procedure Rules. The substantive order sought is for a stay of execution of the Judgment and decree of this Honourable Court of 21st March, 1996 and a preservation of the status quo pending the hearing and determination of an appeal to the Court of Appeal.

The main grounds of this application is that the applicant has filed a fresh notice of appeal after the first one was struck out on 23rd September, 2003. That if orders are not granted the applicant may be evicted and if so he stands to suffer irreparable loss and damage.

The application is opposed.

Part of the grounds of opposition are the fact that the application is bad in law, incompetent, totally defective and an abuse of the court process. That the Notice of appeal is improperly on record, that one of the applicants is deceased and was never substituted. That the Notice of appeal has not been served upon the Respondent as required and so is incompetent. I have considered the submissions by both counsels. The decree sought to be stayed was issued in 1996. It followed the Judgment of the court which was delivered on 5th March, 1992, 12 years ago. It is quite clear from the record that the applicants have filed two Notices of appeal one in 1992 and other in 1996 both which were struck off.

The one filed in by Counsel for the applicant in his affidavit was filed one day after the second Notice of Appeal was struck off by the Court of Appeal. It is true there was no need to seek leave to file the further affidavit since application had not been served upon the Respondent. Consequently there is a valid Notice of Appeal which cannot be ignored. It is true that this appeal has taken too long to be heard. The applicant herein claims that they have no place to move to if evicted in execution of the court order. That fact is not challenged. It is therefore probable that irreparable loss and damage will be caused to the applicants if the order is not given. Further that the appeal will be rendered nugatory.

The applicants have declared their preparedness to deposit any security the court may call for. By applicants I mean the surviving applicants to the suit. The fact one of them is deceased does not affect the rights of the surviving ones. I will allow the application on condition that the applicants deposit Kshs.1 million or its equivalent in securities to be ascertained by the Deputy Registrar of the Court whether they meet the value required by the court. Failure to deposit the said sum or securities of similar value, within 30 days from date herein the stay order will automatically vacate or cease.

Dated this 6th day of March, 2004 at Nakuru.

JESSIE LESIIT

JUDGE