

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 106 OF 2003

JOHN WAGACHA THUORESPONDENT

VERSUS

JOSEPH MUYA1ST APPELLANT

SAMUEL KIMOTHO2ND APPELLANT

RULING

This is an application under Order XL1 Rule 4 (1), (2) and (6) of the Civil Procedure Rules. In it, the Appellants seek, in the main, stay of execution of the Ruling in NAKURU CMCC No. 1387 OF 2003 dated and delivered on June 30, 2003 pending the hearing and determination of this appeal.

It is evident from the material before me that this is a dispute between the founders and or sponsors of Golden Bridge Children Home. The parties before me have taken different positions and it is not in doubt that they were in the same conflict before the Lower Court when that Court gave the Ruling which is the subject of the Appeal. I have not had the benefit to look at the record of the Lower Court and the decision of that Court to understand why the learned Magistrate came to the decision he did yet Counsel proceeded before me as if it was the Appeal itself which was under consideration. Although I agree with what was said by the Late Justice Pall in Indar Singh Gill Ltd. v. Njoroge Gichara HCCC 2411 of 1990, this Court is warned not to decide an appeal at this stage without benefit of the record of the Lower Court. What is required to be shown is that the intended appeal is not frivolous.

There are other principles set out under Order XLI Rule 4 (2) of the Rules in dealing with applications of this nature but this a very unique case in which adherence to strict legal principles may result in greater injustice than the justice sought to be achieved by the process. The parties before me may not themselves come to feel the pain of this litigation. It is the institution in issue which, unfortunately, is not before me. I do not know (and I cannot tell from the material before me) who to believe between the opposing parties before me. I do not know their real interests in the institution in dispute and I do not want to speculate. It is the institution which is in real need of this Court's protection. I am burdened but I have to decide this case one way or the other. I am of the view that the best order in the circumstances is as follows: The parties shall maintain the status quo ante obtaining before the matters leading to the suit in the Lower Court arose pending the hearing and determination of this appeal.

That is the order of this Court. Costs shall abide the appeal.

Dated and Delivered at Nakuru this 30th day of July, 2003.

ALNASHIR VISRAM

JUDGE