



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: AKIWUMI, SHAH & LAKHA, J.J.A.)
CIVIL APPLICATION NO. NAI. 414 OF 1996 (UR.159/96)
BETWEEN

FRANCIS MWANIKI MATHENGE APPLICANT

AND

JACKSON MUGO MATHAI RESPONDENT

(Application for stay of execution in an intended Appeal

from a Judgment and Decree of the High Court of

Kenya at Nakuru (Justice Rimita) dated

24th September, 1996

in

H.C.C.C. NO. 266 OF 1977)

RULING OF THE COURT

If the applicant is to succeed in his application for stay of the judgment of Rimita J, he must not only show that there are arguable points to be canvassed at the hearing of the intended appeal, but also that the appeal if successful, would be rendered nugatory in this case, that the respondent will not be able to disgorge what he had obtained execution of the judgment.

The applicant says that the learned judge of the superior court erred in amending the plaint in the absence of his advocate. But the fault for this lay with the applicant himself. It was also submitted that the figure of 20,000/- per head of cattle awarded by the learned judge was not based on any reasonable evidence. This figure is much less than what was claimed by the respondent in his plaint but is not based on any evidence adduced at the trial. This could give rise to an arguable point at the hearing of the appeal as to the amount of the value of the respondent's cattle taken away by the applicant. But would the appeal be nugatory if stay is not granted? In this regard, it has been urged on behalf of the applicant, and this is not at all apt, that this applicant would be rendered a pauper if the threatened execution is not stayed. What in our view is more pertinent is whether the respondent and not the applicant will not be able to refund to the applicant upon his appeal succeeding, what the applicant had lost in the execution of the judgment against him.

On the evidence before the learned judge and also before us, the respondent is not a man of straw and

appears to be a person capable of making appropriate refund to the applicant should he succeed in his appeal.

For all the reasons that we have set out hereinbefore, the present application will be dismissed with costs to the respondent. It is so ordered.

Dated and delivered at Nairobi this 22nd day of January, 1997.

A. M. AKIWUMI

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL

A. A. LAKHA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.