



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI

CORAM: GICHERU, OMOLO & LAKHA, JJ.A.
CIVIL APPEAL NO. 161 OF 1996

BETWEEN

JULIUS NTOGAI M'ETHANGATHA

JASON KIIRU MBEERIA

HENRY ETHAIBA

M'IGUATHU M'KIRITI APPELLANTS

AND

THE DISTRICT LAND ADJUDICATION OFFICER

(NYAMBENE DISTRICT)

M'MUTUA M'IKOMBO RESPONDENTS

(Being an appeal from the ruling of the High Court of Kenya at
Nairobi (Justice Pall) dated 2nd July, 1996

in

H.C. MISC. A. NO. 1296 OF 1995 CONSOLIDATED WITH
H.C. MISC. A. NO. 1346 OF

JUDGMENT OF THE COURT

There is really no merit in this appeal. By a chamber summons under Order 53 Rule 1(?), (2), (3) and (4) of the Civil Proceedings Rules the, appellants asked the High Court to grant leave to apply for an order of prohibition and by prayer number three in the said chamber summons, the appellants specifically asked that if leave sought in prayer one was granted, the same should operate as a stay. That application was filed on the 29th November, 1995, and came up before Aluoch, J on the 11th December, 1995. On that day a consent order was made to this effect:-

"Prayer 3 of the application dated 29.11.93 in Misc. Application No. 1296 of 1995 be and is hereby granted."

Prayer 3, as we have said was the one asking that if leave was granted, it was to operate as a stay. Following this consent order the appellants filed the notice of motion asking for prohibition and when that motion came up for hearing before Pall, J, as he then was, on the 2nd July, 1996, he dismissed the same

on the ground that leave had not been granted to warrant the filing of the motion. It is against that order this appeal is brought.

We are unable to agree with learned counsel for the appellants that the consent order we have set out above amounted to the grant of leave to bring the motion. The prayer for leave was in paragraph one of the motion and we see no reason to assume, as the appellants obviously did, that leave must have been granted. Under the provisions of order 53 the grant of leave is mandatory and it is not right for us to assume that the decision to grant or not to grant leave is a formality. Leave must be granted or refused in plain terms. There was no order granting leave and we agree with the learned Judge that the motion in the absence of leave, did not lie. We dismiss this appeal with costs to the respondents.

Dated and delivered at Nairobi this 22nd May, 1997.

J. E. GICHERU

JUDGE OF APPEAL

R. S. C. OMOLO

JUDGE OF APPEAL

A. A. LAKHA

JUDGE OF APPEAL

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

DEPUTY REGISTRAR