



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GICHERU, OMOLO & LAKHA, JJ.A.)

CIVIL APPLICATION NO. NAI. 243 OF 1996 (88/96UR)

BETWEEN

GICHUHI KIMIRA.....APPLICANT

AND

SAMUEL NGUNU KIMOTHO

SIMON MUGWERU WATHIRWA.....RESPONDENTS

(An application for stay of further proceedings in HCCC 880 OF 1977 consolidated with 908 of 1977

pursuant to the Order of the (Hon. Justice Bosire) given at Nairobi on 3rd day of July, 1996 pending

the lodging and hearing of the intended Appeal from the whole of the Ruling and Order

in

H.C.C.C. NO. 880 OF 1977 (CONSOLIDATED WITH H.C.C.C. NO. 908 OF 1977)

RULING OF THE COURT

This is an application by the unsuccessful defendant under rules 5(2)(b) and 42 of the Court of Appeal Rules (the Rules) seeking an order for stay of execution of the Order given by the superior court (Bosire, J.) on July 3, 1996 pending the hearing and final determination of an intended appeal therefrom. The application is made upon the grounds that the intended appeal is not frivolous and that it would be rendered nugatory if a stay of the enforcement of the Order of the superior court is not granted.

In 1977 the respondents instituted two suits being High Court Civil Case No. 880 of 1977 and 908 of 1977 in which they sought declaration that the farm known as L.R. 13041 (the property) was partnership property held by the applicant in trust for them and also asked for dissolution of the partnership and taking of accounts. The two suits were consolidated, heard and decided in the respondents' favour. The applicant appealed against the whole of the said decision being Civil Appeal No. 186 of 1995 which is pending before this Court. His application for a stay of execution of the decree pending the hearing and determination of the appeal was unsuccessful. The respondents as plaintiff/decree holders applied to the

superior court for orders set out in their application made by notice of motion and dated July 14, 1995 by way of steps in enforcement or execution of the decree given on October 6, 1989 and issued on March 30, 1990.

The principles on which this Court grants a stay under rule 5(2)(b) of the Rules are now well settled and need not be re-stated. It is said that the intended appeal would be rendered nugatory if a stay is not granted. We are not satisfied that in the circumstances of this case this is correct. There is already an undertaking by the respondents (pursuant to a Ruling of the superior court (Akiwumi, J.), as he then was, given on July 18, 1990) not to dispose, sell or otherwise alienate or encumber the property. This undertaking was confirmed before us by Mr. Kamau appearing on behalf of the respondents. In the face of, and on the basis of such an undertaking, we are not persuaded that the intended appeal would be rendered nugatory. As no transfer or disposition of the property can take place there is no likelihood of the substratum of the appeal being destroyed as contended by Mr. Muthoga for the applicant.

Accordingly, the second condition for the grant of a stay is not satisfied. That being so, it is unnecessary for us to consider if the intended appeal is arguable. The application fails and is dismissed with costs.

Dated and delivered at Nairobi this 9th day of August, 1996.

J.E. GICHERU

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JUDGE OF APPEAL

R.S.C. OMOLO

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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