



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: OMOLO & TUNOI, J.J.A & BOSIRE Ag.J.A.)**

**CIVIL APPLICATION NO. NAI. 299 OF 1996 (14/96 UR)**

**BETWEEN**

**NATIONAL BANK OF KENYA LIMITED.....APPLICANT**

**AND**

**KWANZA HOUSE LIMITED.....RESPONDENT**

(Application for stay of execution in an intended appeal from a decree of the High Court of Kenya at Nakuru (Mr. Justice Rimita) dated 10th June, 1996

in

H.C.C.C. NO. 303 OF 1995)

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**RULING OF THE COURT**

The applicant invites us to exercise our discretionary jurisdiction under rule 5(2)(b) of the Court of Appeal Rules to grant the following orders that:

1. Execution of the judgment in Nakuru High Court Civil Case No. 303 of 1995 dated 10th June, 1996 be stayed until the determination of the intended appeal.

and

2. Alternatively, that the inhibition registered against the suit property Title No. Nakuru Municipality/Block 9/90 be reconfirmed until the determination of the intended appeal.

However, before Mr. Nyamu, counsel for the applicant, opened his submissions Mr. Ochieng-Odhiambo, counsel for the respondent, took a preliminary point as regards the jurisdiction of this Court to entertain the application. He submitted that the appeal having

been struck out on 24th September, 1996 the applicant had to seek leave to lodge a fresh notice of appeal and the intended appeal out of time and that not having done so, this Court lacked jurisdiction to entertain this application because the notice of appeal filed on 1st October, 1996 was invalid. Mr. Nyamu did not really in earnest challenge this submission but he stated from the bar that he was abandoning the first prayer. He, however, urged us to grant the alternative prayer.

Nakuru Civil Appeal No. 197 of 1996 was struck out on 24th September, 1996 for being incompetent. This necessitated the applicant to start the whole process of appeal de novo. This, it did by lodging the application to have the time for filing the notice of appeal extended of which leave was granted on 11th October 1996. It is apparent, therefore, that when this application was filed on 26th September, 1996 the applicant did not have a valid notice of appeal. Without a valid notice of appeal this Court has no jurisdiction to deal with such an application as is before us. The extension orders granted on 11th October, 1996 were not retrospective and did not validate the notice of appeal filed on 1st October, 1996.

After the appeal was struck out on 24th September, 1996 all the orders made by the superior court in the suit as well as by this Court in the interlocutory application were spent and we do not see how we can grant the alternative prayer which is, in our view, misconceived since the Court would be acting in vacuo.

The preliminary objection succeeds and consequently this application is hereby struck out for want of jurisdiction. The applicant will pay the costs of this application. We so order.

Dated and delivered at Nairobi this 17th day of October, 1996.

**R. S. C. OMOLO**

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**JUDGE OF APPEAL**

**P. K. TUNOI**

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**JUDGE OF APPEAL**

**S. E. O. BOSIRE**

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**Ag. JUDGE OF APPEAL**

I certify that this is

a true copy of the original.

**DEPUTY REGISTRAR**