IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Akiwumi, Tunoi & Shah JJ A)

CIVIL APPLICATION NO 169 OF 1995

Between

JEAN P. DE-LEU.....APPELLANT

AND

ADRIAN G. MUTESHI .....RESPONDENT

(Application for stay of execution pending appeal of order of Hayanga J

in (Nrb)

HCCC No 3227 of 1994)

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RULING

On the 12th day of July 1995 Hayanga J made orders against the applicant (hereinafter referred to as "the defendant") as follows:

> "That the defendant will:-

Cut down and remove from or near the joint border between plots LR No 3734/402 and LR No 3734/401 3 cypress or any other tree within the said number that grow on 3734/401 but immediately behind the house on plot No 3734/402

And also:-

Cut down as aforesaid 4 such trees as aforesaid that stand and grow at the area opposite the car park.

And also:

Cut down as aforesaid any other such trees not being more than 3 as contained in diagram marked AGM1 annexed to affidavit of Adrian G Muteshi sworn on 16th January, 1995. That this order be effected by the defendant within 21 days of this order. That the plaintiff's (*sic*) counsel and the defendant's counsel do supervise the carrying out of this order."

The reason why we have set out the learned judge's orders in full is that, of necessity, mandatory orders

must be clear, precise and without the difficulty of due compliance.

In this case we see no sufficient precision or clarity to enable anyone to decide which particular tree is to be uprooted.

Generally, it is not enough for the defendant to know that the present position gives rise to a nuisance, trespass, passing off, breach of contract, or other wrong; it must be made clear to him in what exact respect he must ensure that the present position is changed in order to comply with the order(s) of the court.

The remedy sought was equitable and equity like nature does not act in vain. It has been held so time and again.

It is also clear that the normal principles for granting of temporary mandatory injunction have not been considered by the learned judge. It was said quite clearly by the predecessor of this Court in the case of *KIG Bar & Grocery Limited vs Gatabaki* [1972] EA 503 that such principles must be considered. These are, such as, substantial undertaking as to damages, consideration of hardship that the order will create; whether or not there would be restoration to status quo ante possible etc.

The appeal proposed to be filed is not frivolous. If what the plaintiff said in the superior court is right would damages not be an adequate remedy? Is there a nature of nuisance (if any) which calls for drastic remedy of mandatory temporary injunction? Is there a nuisance of the nature requiring uprooting of trees keeping in mind that trees take a long time to grow and are aesthetically pleasant?

These are not frivolous points and if the appeal is decided against the plaintiff, the defendant's success will be rendered nugatory as the trees will not be there any more assuming the 'right' trees are uprooted.

Mr Raballa who appeared before us after Mr Nagpal had opened his arguments stated that had he come in time he would have taken a preliminary point as regards the jurisdiction of this Court to invoke its powers under rule 5 (2) (b) of Court of Appeal Rules prior to the invoking by the applicant the powers of the superior court under order 41 rule 4 of the Civil Procedure Rules.

Rule 4 (1) of order 41 of Civil Procedure Rules states where relevant:-

> "but application shall in every case be made in the first instance to the Court appealed from whose decree or order the appeal is taken, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside".

Mr Raballa invoked, in aid of his argument, Mr Nagpal's informal application for stay in the superior court (under order 41 rule 4 (3) (presumably) when he (Mr Nagpal) was granted 14 days stay to file a formal application for stay in the superior court.

Rule 5 (2) (b) of Court of Appeal Rules reads where relevant:-

> (2) Subject to provision of sub-rule 1, the institution of an appeal shall not operate to suspend or to stay execution but the Court may – (a)…
>
> (b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 74, order a stay of execution or an injunction or stay of any other proceedings on such terms as the Court may think just.

Once a notice of appeal is filed in time under rule 74 of Court of Appeal Rules this Court has jurisdiction to deal with such an application as is before us here. Such jurisdiction is coterminous with that of the superior court under order 41 rule 4 of Civil Procedure Rules. It is the rule 74 notice of appeal that gives jurisdiction to this Court.

It has long been established that this court's jurisdiction to grant orders for injunction or stay are unfettered by any application (similar) in the superior court and we feel that it may even be, at times, prudent for an intended appellant to come to this Court rather than putting the judge below in the invidious position of saying "I could be wrong" although most judges would not flinch at following what Megarry J, (as he then was) said in *Erinford Properties Ltd vs Cheshire County Coucil* [1974] 2 All ER 448, page 454C.

In *Stanley Munga Githunguri vs Jimba Credit Corporation Ltd* Civil Application No NAI 161 of 1988 (unreported) this Court consisting of Apaloo JA (as he then was) Gicheru JA and Kwach Ag JA (as he then was) said:-

> "We think this court's jurisdiction under rule 5 (2) to grant either a stay of execution, an injunction or stay of any further proceedings, arises if a notice of appeal has been lodged against the decision or ruling appealed from in accordance with rule 74. And we are then clothed with jurisdiction to grant any of such orders "on such terms as to the Court may think just". That rule confers an independent original jurisdiction on us and we have to apply our minds *de novo* on the suitability or otherwise of the relief sought. It is not an appeal from the learned judge's discretion to ours".

We go by what was said in *Githunguri* case (supra) as it is but right.

The order 41 rule 4 jurisdiction given to the judge of the superior court is conditional whereas our jurisdiction under our rule 5 (2) is one which requires exercise of our discretion. In *Kenya Shell Ltd vs Kibiru & another* [1982 – 88] 1 KAR 1018 Hancox JA (as he then was) said:-

> "However, we are not presently concerned with this aspect, but with the application for stay, which I note, is made only under rule 5 of Court of Appeal Rules, and not under order 41 rule 4 (1) of the Civil Procedure Rules as Mr Kwach appearing, on behalf of Kenya Shell said at the beginning of his submissions. There is no requirement under rule 5, that the application for stay shall give security for the due performance of the decree as order 41 rule 4 (1) provides. All that is required as a precondition for the exercise of our discretion under rule 5 is that a notice of appeal has been filed…"

We find no substance in Mr Raballa's preliminary point and as already pointed out there is sufficient material before us to grant a stay of execution of the orders made by Hayanga J on 12th July 1995. Such execution is stayed pending the hearing and determination of the proposed appeal. We so order. Cost of this application will be costs in the proposed appeal.

Dated and delivered at Nairobi this 28th day of July 1995

A.M AKIWUMI

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JUDGE OF APPEAL

P.K TUNOI

.....

JUDGE OF APPEAL

A.B SHAH

.....

JUDGE OF APPEAL

I certify that this is a true copy of theoriginal.

DEPUTY REGISTRAR