



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Kwach, Akiwumi & Tunoi JJ A)

CIVIL APPLICATION NO NAI 233 OF 1993

MBOTHU & 8 OTHERS..... APPLICANTS

VERSUS

WAITIMU & 10 OTHERS..... RESPONDENTS

(Appeal from the Ruling of the High Court at Nairobi)

(Shields J) delivered on August 11, 1993)

RULING

This is an application under rule 5(2) (b) of the Court of Appeal Rules for a stay of the order of Shields J made on 11th of August, 1993, by which he dismissed an application by the applicants to set aside an *ex parte* judgment obtained against them by the respondents on 1st February, 1993. By that judgment and decree, the applicants were ordered to pay the respondents damages in excess of Shs 1,680,000/- together with interest back-dated to 8th December, 1983.

On the day the suit came before the learned judge for assessment of damages, an application was made on behalf of the applicants for an adjournment on the ground that Mr Nowrojee who was acting for them in the matter was in Mombasa. The application was refused and counsel who held Mr Nowrojee's brief for the purpose of the application for adjournment then left, taking no further part in the proceedings. Subsequently an application was made by the applicants to set aside that *ex parte* judgment and the learned judge dismissed it, giving rise to the present application.

Having obtained the *ex parte* judgment, the respondent's advocates then caused a decree to be issued without any reference to the applicants' advocates contrary to the mandatory provision of order 20 rule 7 of the Civil Procedure Rules governing the preparation of decrees. This omission has not been seriously denied and Mr Baiya, for the respondents, submitted that even if that was true, no prejudice has been caused to the applicants. In our view, the fact that the applicants have been deprived of an opportunity to challenge the quantum of damages awarded against them which in the event turned out to be colossal is some evidence of prejudice. The assessment was undertaken in their absence and the circumvention of the rules governing the preparation of decrees must have been intended to make it difficult, if not impossible, for the applicants to do anything about the award. This Court will not allow any party to flout the rules of procedure.

The second point taken by Mr Nowrojee was that the assessment was undertaken after two of the

plaintiffs and one defendant had died without any application being made for the substitution. As death took place before the conclusion of the trial, order 23 r 11 cannot be of any assistance to the respondents.

All in all, we are satisfied that the applicants have an arguable appeal which, if successful, would be rendered nugatory if a stay is refused. Accordingly, we allow this application and stay the execution of the decree issued on 22nd March, 1993, and the decision of 11th August, 1993, until the hearing and final determination of the intended appeal or further order. Costs to be in the appeal.

Dated and Delivered at Nairobi this 10th day of December, 1993

R.O. KWACH

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JUDGE OF APPEAL

A.K. AKIWUMI

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JUDGE OF APPEAL

P.K.TUNOI

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JUDGE OF APPEAL