



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gachuhi, Cockar JJ.A. & Omolo Ag. J.A.)

CIVIL APPLICATION NO. NAI. 30 OF 1991 (NAI.11/91 UR)

BETWEEN

LESIOLO LIMITED.....APPLICANT

AND

SAMUEL NG'ANG'A.....RESPONDENT

(Appeal from the Ruling and Order of the High Court of  
Kenya at Nairobi (Tank, J.) dated 9.1.91

in

Civil Case No. 3840 of 1987)

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RULING OF THE COURT:

There is before the Court an application under Rule 5(2)(b) on a certificate of urgency seeking for an order of stay of execution of an ex-parte decree, and alternatively, that if execution has taken place the sale proceeds be deposited in Court until further orders of the Court.

This Court granted an interim order for depositing in Court of all monies paid by the applicant to the Court Broker in execution of the decree pending the hearing and determination of this application.

The respondent filed a suit in the High Court claiming special and general damages on alleged lease of land in Maralal District in 1985. The respondent obtained an ex-parte judgment in default of appearance on the hearing date and proceeded to execute the decree by attachment and sale of the judgment debtor's moveable property. The applicant applied before the High Court for stay of execution and for setting aside the said judgment which application was dismissed giving rise to this application. The applicant having filed a notice of appeal moved this court in its original jurisdiction for stay of execution pending the hearing and determination of the intended appeal.

The applicant urges this Court to grant the order prayed for on the ground that if the proceeds of execution are paid to the respondent the intended appeal, if successful, will be rendered nugatory.

The respondent claimed that the order prayed for should be rejected as this is a money decree and relied on Kenya Shell Ltd. v. Benjamin Karuga Kibiru and another C.A. Nai. 97 of 1986 (unreported). Mr. Gross for the applicant submitted that the Kenya Shell Ltd. decision is distinguishable from the

present application because in Kenya Shell the decision was obtained after a full trial while the present judgment is an ex-parte decree which is capable of being set aside. He also argued that though the respondent was held to be capable of refunding the decretal amount, there was no proof that he would be able to do so or proved his means of refunding the decretal amount of Shs. 340,630/-. Mr. Kibicho relied on the finding of Shields J. without showing respondent means.

From the submissions made to us supported by the authorities referred to it appears that the intended appeal cannot be said to be frivolous and that if the orders prayed for are not granted the intended appeal if successful will not be rendered nugatory occasioning the applicant to suffer irreparable loss. The principles upon which this Court acts in applications of this nature are set out in *Erinford Properties Ltd. vs. Cheshire Country Council* (1974) 2 All ER. 358, *M.M. Butt vs. The Rent Restriction Tribunal C.A.* NAI. 6/79 (unreported) and *Maheschandra Shamjibhai Gheewala and Arun B. Gheewala and others C.A.* NAI. 127/86 (unreported).

As the principle set out in the decision above has been satisfied we grant the orders of stay pending the hearing and determination of the intended appeal. We further order that the money deposited in Court be deposited in an interest earning account in the joint names of the advocates of the applicant and of the respondent and the same not to be withdrawn without the orders of this Court.

The cost of this application is to be costs in the intended appeal.

Dated and delivered at Nairobi this 7th day of June, 1991.

J.M. GACHUHI

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JUDGE OF APPEAL

A.M. COCKAR

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JUDGE OF APPEAL

R.S.C. OMOLO

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AG. JUDGE OF APPEAL

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

DEPUTY REGISTRAR