



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Nyarangi JA, Gicheru & Kwach AG JJ A)

CIVIL APPLICATION NO NAI 26 OF 1989

JETHWA.....APPLICANT

VERSUS

SHAH T/A SUPREME STYLES.....RESPONDENT

JUDGMENT

(Application for stay of execution in an intended appeal from a judgment and decree of the High Court at Nairobi, Pall Ag J,

in

HCCC No 1943 of 1988 dated 6th February 1989)

July 10, 1989 the following Judgment of the Court was delivered.

The Court has before it an application under rule 1 (3) and rule 5 (2) (b) of the Rules of this Court for an order for execution of the decree and taxed costs be stayed upon terms giving security on stated modes.

Generally, an applicant in these circumstances would be entitled to an order of stay of execution to preserve the subject-matter so that the appeal if successful is not rendered nugatory.

The applicant has a money decree against him. So, besides demonstrating that any success in the intended appeal would be rendered nugatory, he has to persuade us that the respondent is so impecunious that the applicant will never be able to get his money back.

The respondent denies the applicant's claim that a post-dated cheque was given as an escrow and that, he, the respondent, knew that the cheque was given conditionally. The issue raised by the cheque can, therefore, be determined after the intended appeal, where it will be directly in point, is heard and determined.

It is not a factor in proof of the claimed impecuniosity of the respondent. The agreement made between the parties concerning the previous sale agreement dated 14th July, 1987 was cancelled by mutual agreement.

The applicant depones *inter alia* in his Affidavit in support of the Notice of Motion that from his many dealings with the respondent he is able to swear that the latter's financial position is unsound. With respect, it is not sufficient for the applicant merely to swear. He ought to have furnished facts and figures of the many dealings. The burden was all the time on the applicant to prove as required that the respondent is impecunious. The respondent had no such burden to establish his healthy financial position by producing bank statements as the burden did not at any stage of the proceedings shift to him.

The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

In *Jogoo Kimakia Bus Service Ltd. v Electrocom International Ltd*, Civil Application No NAI 63 of 1984, the Court of Appeal, on the facts of that case, held that balance sheets would have been prepared and produced in support of the argument that one year later, the respondent's financial position will improve. This is not that case. Here, it is incumbent on the applicant to show that he has sufficient grounds for a stay.

In *Kundanlal Restaurant v Devshi & Company*, (1952) XIX EACA 77, the question of merits was whether or not there were triable issues contained in the affidavit supporting the application for leave to appear and defend. That decision has no relevance to the instant application and so did not advance the applicant's case. We were referred to Paragraph 699, *Halsbury's Laws of England*, 4th Edition Vol 37. Of course the lodging of a Notice of Appeal or the instituting of an appeal *per se* does not operate as a stay of execution or proceedings. That is why the applicant's lawyer filed the Notice of Motion under rule 5 (2) (b). Again, we do not appreciate the relevance of that paragraph to this matter.

The purpose of an application such as this is to preserve the subject matter in dispute so that the rights of an appellant who is exercising his undoubted right of appeal are safeguarded and the appeal, if successful, is not rendered nugatory. The submissions that the respondent is impecunious are not well-founded.

Secondly, on the material before us, there is no other ground on which it can be said that in all the circumstances of the case the intended appeal, if it were to succeed, will be rendered nugatory. In this case, the respondent, the successful party in the Superior Court, has an interest in the subjectmatter which ought to be safeguarded pending the hearing of the appeal.

For these reasons, we think there is no merit in the Notice of Motion which is ordered to be dismissed.

The costs of the Notice of Motion shall be costs in the intended appeal.

Dated and delivered at Nairobi this 10th day of July , 1989

J.O. NYARANGI

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JUDGE OF APPEAL

J.E GICHERU

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AG. JUDGE OF APPEAL

R.O KWACH

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AG. JUDGE OF APPEAL

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

DEPUTY REGISTRAR