



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Platt, Gachuhi JJA & Masime Ag JA)

CIVIL APPLICATION NO NAI 3 OF 1988

BETWEEN

GITAHU & ANOTHER..... APPELLANT

AND

WARUGONGO.....RESPONDENT

(Application for stay of execution pending appeal from a judgment of the High Court at Mombasa, Bosire J)

RULING

February 17, 1988, **Platt, Gachuhi JJA & Masime Ag JA** delivered the following Ruling.

On January 29, 1988, at Mombasa, the court decided to grant a stay of execution upon terms that the respondent pay Kshs 100,000 to the widow (on certain terms as to disbursement amongst the widow and her children), and the balance was to be secured. A banker's guarantee was proposed.

But Mr Wambua was unable to be present in court, and therefore the matter was stood over to be mentioned in Nairobi to make sure of the final terms.

Now here in Nairobi, Mr Muthoga appeared for Mr Gikandi. Mr Wambua accepted the terms proposed. He offered a banker's guarantee over the balance of Kshs 120,000. Anticipating Mr Muthoga's objection, he relied upon Parker LJ's views in *Rosengrens Ltd v Safe Deposit Centres Ltd* [1984] 3 All ER 198 where at p 200 the learned Lord Justice remarked:-

“The process of giving security in one which arises constantly ... So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way which is the least disadvantageous to the party giving that security.

It may take many forms. Bank guarantee and payment into court are but two of them... so long as it is adequate, then the form of it is a matter which is immaterial.”

Mr Muthoga addressed the court with great persistence arguing that

Rosengren's case did not apply. That was, he said, a matter of summary judgment under the English Rules of the Supreme Court. Security was being asked for in that connection. Here judgment had been given the respondent had acquired rights. She should get the benefit of the judgment now, but that had to

be delayed because of the stay. The respondent was entitled to have the decretal sum deposited in an interest bearing account.

After all the applicant was a wealthy insurance company and the money must have been set aside with which to pay off its liabilities. Therefore it would not suffer if the money were deposited so that either side would benefit according to the result of the case.

Mr Wambua did not cite the opinion of Sir John Donaldson, MR in *Rosengren's* case. He said at page 200 before Parker, LJ gave his opinion as follows:-

“We are faced with a situation where a judgment has been given. It is subject to appeal. It may be affirmed or it may be set aside. We are concerned with preserving the rights of both parties pending that appeal. It is not our function to disadvantage the defendant while giving no legitimate advantage to the plaintiffs ... It is our duty to hold the ring even-handedly without prejudicing the issue pending the appeal. For that purpose it matters not whether the plaintiffs are secured in one way or another. If it would be easier for the defendants or if for any reason they would prefer to provide a bank guarantee rather than by cash, I can see absolutely no reason in principle why they should not do so.”

The Court of Appeal (in England) interfered by varying the order of the judge to provide that the defendants might provide a bank guarantee as they desired.

It will be observed that the facts in *Rosengren's* case are very similar to those in this case, namely that a stay of execution pending appeal is the substance in both cases. In both judgment has been given. There is therefore no ground upon which to distinguish *Rosengren's* case. The aim is to make sure, in an even-handed manner that the appeal will not be prejudiced and that the decretal sum is available if required. The respondent is not entitled, for instance, to make life difficult for the applicant, so as to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest at court rates. Indeed in this case there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it.

In our view the principles set out in *Rosengren's* case are eminently worth adopting. We order that Kshs 120,000 be secured by banker's orders as we had originally proposed, and observed the applicant prefers.

The final orders are therefore-

- 1) That the sum of Kshs 100,000 be paid over within 14 days of today's date;
- 2) The sum of Kshs 120,000 be secured by banker's guarantee within the same period;
- 3) The respondent shall give a written undertaking to reimburse the applicant if the damages are reduced;
- 4) The disbursement of the Kshs 100,000 will be as set out in the order of January 29, 1988;
- 5) In default the stay shall be lifted; and
- 6) Costs as already ordered.

Dated and delivered at Nairobi this 17th day of **February 17, 1988**

H.G. PLATT

.....

JUDGE OF APPEAL

J.M. GACHUHI

.....

JUDGE OF APPEAL

J.R.O. MASIME

.....

Ag. JUDGE OF APPEAL