



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NYARANGI, APALOO JJA & MASIME Ag JA)

CIVIL APPLICATION NO. 105 OF 1987

PATRICIA HUDGES SCOTT

DUNCAN SCOTT.....APPLICANTS

VERSUS

KAGO & 2 OTHERS.....RESPONDENTS

(Application for stay of execution pending disposal of an appeal from an order

of the High Court at Nairobi, Akiwumi J)

JUDGMENT

This is an application under Rule 5(2)(b) of the rules of this Court by Patricia Huges Scott and Duncan Scott, respectively mother and son, for an order for stay of execution in the High Court Civil Case No 1421 of 1987 of the interlocutory order made on June 4, 1987. It is deponed in the affidavit in support of the application that the applicants run the business at the City Hall Restaurant exclusively on a lease executed and registered between the first applicant and the landlord Nairobi City Commission, that if there is no stay of execution the applicants would be evicted and thereafter will be in breach of the contract and face litigation. Lastly, that the appeal if successful will be rendered nugatory unless execution is stayed. Mr Khaminwa for the appellants informed us that the second respondent is dead and that the applicants are shareholders and directors of the third respondent, Patrician Enterprises Ltd, which owns the business.

The main ground on which Mr Hira, for the respondents, resisted the application is that even without stay of execution there is no question of the appeal if it succeeds being rendered nugatory. The status quo will be maintained except that the business would be run by the third respondent and the rights of the applicants safeguarded. It is common ground that the business is owned by the third respondent. Nonetheless the tenancy of the business premises is in the name of the first applicant. She is the lessee of the premises. The first applicant can be heard to say that if she was evicted she would be in breach and as a consequence risk being sued. The landlord leased the premises to the first applicant together with the rights to her and all persons authorized by her.

The lessee covenanted and agreed with the landlord with regard to the period of the lease, payment of the monthly rental, payment for water, electricity, rates, costs of supplying and maintaining meter for metering electric current etc etc.

That is not, in our opinion, however, the end of the matter. It is a striking fact that the first respondent owns the majority shareholding in the third respondent company. It is quite clear that initially it was intended that the

City Commission should lease the premises to the third respondent. The applicants don't deny the evidence of the first and second respondents that they advanced money for the payment of one year's rent in advance. There is room for doubt if the respondents will have put their money in the business if the lease was going to be registered in the name of the first applicant.

Quite plainly, there is a serious dispute as to the manner by which the lease of the material premises was procured, and as to the accounts of the business operations. In these circumstances the usual rule is that an order for stay of execution is granted to preserve the property pending the determination of the dispute. But here there are special circumstances which would cause us not to preserve the subject matter. We would say that the facts here are distinguishable from those in *MM Butt v The Rent Restriction Tribunal*, Civil Application No NAI 6 of 1979, *Gheewala v Aruna Gheewala & Others*, Civil Application No NAI 127 of 1986, *Joash Ougo v Wamboi Otieno*, Civil Application No NAI 2 of 1987 and *Erinford Properties v Cheshire County Council*, [1974] 2 All ER, 448, upon which the usual practice of the court is based. We would emphasise that the decision in *Giella v Cassman Brown & Co Ltd* [1973] EA 358, has no relevance to the court's practice. It is important to bear in mind that the purpose of an application such as the present one is to preserve the subjectmatter 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 nugatory. In the present case, it seems to us that the respondents have an interest in the subject-matter which ought to be safeguarded pending the hearing of the appeal. An order of stay of execution would inflict more hardship than it would avoid. In the result, this application fails.

Costs of the application shall be costs in the appeal.

Dated and Delivered at Nairobi This 9th Day of July, 1987

J.O. NYARANGI

.....

JUDGE OF APPEAL

F.K APALOO

.....

JUDGE OF APPEAL

J.R.O MASIME

.....

AG JUDGE OF APPEAL