IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Madan, Miller and Potter JJA)

CIVIL APPLICATION NO. NAI 6 OF 1979

BETWEEN

BUTT .....APPLICANT

AND

RENT RESTRICTION TRIBUNAL.....RESPONDENT

RULING

Madan JA The applicant's application for stay of execution having been refused in the first instance by the High Court from whose order an appeal is intended to be taken, the applicant has made an application to this court under Order XLI rule 4 of the Civil Procedure Rules for an order to stay.

On January 9, 1979, the High Court dismissed the applicant's application for issue of prerogative orders of Prohibition and Mandamus to be addressed to the Nairobi Rent Restriction Tribunal. The applicant was granted a temporary order of prohibition on June 22, 1978 of assessment of standard rent of the suit premises by the Tribunal which was rescinded by the order of January 9, 1979. If this application succeeds, the temporary order of prohibition would be restored pending the hearing of the appeal against the Order dated January 9, 1979.

In the course of his ruling refusing to stay execution, the learned judge said:

> "I have of course anxiously considered whether by refusing the application, I, a newly appointed judge might appear to arrogate to myself a notion of infallibility … I must act on what I see to be the guiding and overriding principle namely that what is the least tortuous path to an end of this litigation and I have come to the conclusion that the appellate path from Section 8(2) and 35(2) of Cap 296 is the shortest way to finality and, more important from the applicant's point of view, that his position will not be irretrievably changed thereby so that if my decision was wrong, his appeal will not be nugatory."

Earlier the learned judge also said he considered that a 'linear appeal' was the most satisfactory way of airing the applicant's complaints, should he be dissatisfied in the event, with the Tribunal's decision.

A judge is a judge whether he is newly appointed or an old fogy. The former has the benefit of his latest learning, the latter the advantage of experience. Both are men of honour and scholarly gentlemen. Both are conscientious and judicious individuals and imbued with reason. Both are dependable and do not make wild surmises. Both act upon consecrated principles. Both get a fair share of juristic spills. Both are jealously scrupulous and impartial. Both are 24 carat gold. Both act free from doubt, bias and prejudice.

Both carry the conviction of correctness of their decision. Both speak no ill of any litigant. Both are torch bearers for stability of society. Both are strugglers for liberty. Neither should, however, become an advisor instead of an adjudicator. The litigants and their professional advisors are the best judges of their affairs. If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings.

It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in *Wilson v Church* (No 2) 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p 458:

> "I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory."

Megarry J, as he then was, followed *Wilson* (supra) in *Erinford Properties Limited v Cheshire County Council* [1974] 2 All ER 448 at p 454 and also held that there was no inconsistency in granting such an injunction after dismissing the motion, for the purpose of the order is to prevent the Court of Appeal's decision being rendered nugatory should that court reverse the judge's decision. The court will grant a stay where special circumstances of the case so require, per Lopes LJ in the *Attorney General v Emerson and Others* 24 QBD (1889) 56 at p 59. The special circumstances in this case are that there is a large amount of rent in dispute between the parties and the appellant has an undoubted right of appeal.

Proceeding on this narrow basis, that is to prevent the appeal, if successful, from being nugatory, I would grant the stay asked for pending determination of the appeal by this court against the decision dated January 9, 1979 but upon terms, as authorised by the provisions of Order XLI rule 4(2)(b), that the applicant will deposit in court within thirty days the sum of Kshs 60,000 as security for the due performance of such decree or order as may ultimately be binding upon him, failing which the stay shall lapse without a further order of this court being necessary. I would order the costs of this application to be costs in the appeal.

As Miller and Potter JJA agree, it is so ordered.

Potter JA. I also would grant the stay sought by the applicant upon the terms set out in the ruling of Madan JA and I agree that the costs of this application should be costs in the appeal.

Miller JA. I have read the draft ruling of Madan JA in this application. I agree with it and the order he has proposed.

Dated and delivered at Nairobi this 16th day of July, 1979.

C.B MADAN

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JUDGE OF APPEAL

C.H.E MILLER

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JUDGE OF APPEAL

K.D POTTER

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR