



IN THE COURT OF APPEAL

AT NAKURU

(CORAM: TUNOI, AGANYANYA & NYAMU, J.J.A.)

CIVIL APPLICATION NO. NAI 132 OF 2010 (UR 98/2010)

BETWEEN

KISHOR KUMAR DHANJI

VARSANIAPPLICANT

AND

MRS PUNNY BARBIR

KAURRESPONDENT

(An application for stay of further proceedings from a ruling in the High Court of Kenya at Nakuru (Ouko, J) dated 29th April, 2010

in

H.C.C.C.NO.247 OF 2002)

RULING OF THE COURT

This is an application under **rule 5(2)(b)** of the Court of Appeal Rules and also expressed to be made under **3A** and **3B** of the Appellate Jurisdiction Act. The substantive order sought is to the effect that pending hearing and determination of the appeal there be a stay of further proceedings in Nakuru **H.C.C.C. 247 of 2002**.

What triggered the filing of the application is a ruling in **H.C.C.C. 247 of 2002** by the superior court (**Ouko, J.**) in which the superior court reinstated the suit which had abated on 4th August 2006 one year after the death of the Plaintiff **Amolak Singh** on 4th August 2005. The orders of reinstatement and revival were made upon the application of the widow of the **Amolak Singh, Mrs Puny Balbir Kaur** made pursuant to Order 23 of the Civil Procedure Rules. The applicant was aggrieved by the said order for the reasons that the superior court had by virtue of the ruling given a greenlight for litigation over an unregistered and unexpressed lease given on a non-existent subject matter; that the ruling had opened a can of worms whose effect would be unprocedural; that the court has allowed litigation to proceed over a non-existent subject matter without regard to due process and the constitutional protection of the right to property; that the interest of a registered owner of property overrides that of a lessee with an unregistered interest; that the court had put into question land titles which were issued after the suit had abated without following the due process; that the court transposed an inter-partes contract to third parties; that if proceedings proceed in this matter, the plaintiff may claim a lease over a property belonging to the 2nd defendant leading to substantive loss and undesirable results if the Court of Appeal overturns the ruling and finally that the constitutional court has since held that the intended plaintiffs have no locus standi over what was, the company property.

It is common ground that the subject matter of the suit which gives rise to this application is a piece of land which was leased to a third party **Kassam Ramji** before the applicant acquired the land under circumstances challenged in several suits involving the applicant and the respondent, including some individuals who were joined as plaintiffs after the commencement of the suit by order of the Court and a limited liability company under the name **Ndeffo Ltd**. Ndeffo Ltd claims that the subject of land was subdivided by the applicant even during the pendency of **H.C.C.C. No.247 of 2007** contrary to a court order resulting in the creation of a new land reference number so as to frustrate the pending suit, although the Ndeffo Ltd was the registered owner and that the applicant holds the title pursuant to an illegal act on the part of the applicant and that the intended stay arises from the applicant's apprehension that the finalization of the suit might result in the rectification or cancellation of the title held by the applicant illegally. The applicant's counsel **Mr Ojienda** in his submissions conceded that he had not served the three individuals who were joined to the proceedings by virtue of a Court order and therefore he had not complied with Rule 76 of the Court's Rules; that the interest of the respondent had lapsed with the death of the late Kaur and further the matter had abated on 12th August 2006 twelve (12) months after the death of the deceased; that there was no recognized subletting interest under Order 23 of the Civil Procedure Rules and that **Land Parcel Kabati/ Block 2806** had ceased to exist on 21st September, 2007 and finally that the superior court did not deal with the issues raised in the applications and the court assumed the position of the parties in the circumstances which in itself was an error in law.

In response to the application the 1st respondent counsel **Mr P.G. Ng'ang'a** submitted that **Mrs Kaur** became a party as the legal representative of the deceased, on 29th April 2010 when the Court also allowed the joinder of 2nd, 3rd and 4th plaintiffs; that it was not true as alleged by the applicant that H.C.C.C. No.247 of 2002 had abated as there were other plaintiffs in the matter apart from the deceased; that parcel Bahati/Kabatini/Block 1/2806 is a portion of the former Engashara Farm in Bahati Division which was 7,118 acres in area owned by Ndeffo Ltd; that at the time of his death the deceased was running a family quarry business on the land in question; that until 1967 when the farm on which the quarry is was bought by Ndeffo Ltd, the same was owned by a British farmer who leased it to the deceased's family between 1945 and 1967; that between 1967 and 4th August 2005 the deceased occupied the quarry by virtue of leases granted to him by Ndeffo Limited over Bahati/Kabatini Block/2806 and that the lease was granted on 22nd October 1988 by Ndeffo Ltd for twenty (20) years and that the lease had since been renewed for a further term of 20 years pursuant to the renewal clause for a consideration in the sum of kshs.5 million; that in 2002 some directors of Ndeffo and the applicant entered into some dubious arrangement with a view of taking the quarry away from the deceased hence the filing of **H.C.C.C. of 2002** by my late Mr Kaur against the Ndeffo Ltd and the applicant (**Amolak Singh vs Ndeffo Ltd & Kishor Kumar Dhanji Varsani**); that in 2004 the deceased was joined by three other plaintiffs namely

Kenneth Ndungu, Onesmus Matheri, Ndegwa and Daniel Njoroge; that on 17th February 2003 the superior court ordered that the status quo in respect of the deceased's quarry and that of the applicant be maintained, but the applicant had since procured a certificate of title in respect of 43 acres and also started a subdivision purportedly consolidated with Bahati/Kabati Block 1/2806 into parcels which was given sub-division number Bahati/Kabatini/Block 1/1058; that while **H.C.C.C.NO.247 of 2002** was pending the applicant filed two other suits **Nak Chief Magistrate Court Civil Suit No. 587 of 2008 Kishor Kamar Dhanji Varsani v Amolak Singh Dandher** and **Nak H.C.C.C. No.170 of 2009 Kisher Kumar Dhanji Varsani vs Ndeffo Ltd & 5 others** and finally that an application for consolidation of various suit is scheduled for hearing on 12th October 2011 (including **H.C.C.C. 247/2002** and **H.C.C.C. 170 of 2009** and in the circumstances no prejudice would be suffered by the applicant if the court were to refuse to give an order for stay because the final hearing will involve the applicant and all other directly affected parties.

Taking the above submissions into account we are of the view that while the applicant has been able to establish that the intended appeal would not be frivolous, he has not been able to demonstrate that it would be rendered nugatory if an order of stay of the proceedings in **H.C.C.C. 242 of 2002** was not granted in that the hearing could result in a hearing on merit of the applicant's case and that of the defence which final hearing, could still result in a final appeal as regards the consolidated suits.

In addition, we think that as a Court in order to further the overriding objective pursuant to **sections 3A and 3B** of the Appellate Jurisdiction Act, we consider that we have a duty to discourage the hearing of interlocutory appeals in situations where a procedure of consolidation could be used to achieve finality in all suits pending which touch on the subject matter of the intended appeal.

In our view, a grant of stay order would not result in the expeditious disposal of the matter in view of the multiplicity of suits filed in the superior court. In the circumstances, we are of the view that the interests of justice would be served better by declining a stay so that the superior court is left with an opportunity to reach finality as regards all the suits filed. Indeed one of the requirements of the overriding objective is that the Court has to be broadminded in its endeavour to do justice. In this regard we cannot in the circumstances ignore the existence of a multiplicity of the suits and the pending application to consolidate them, a procedure which is clearly appropriate to the attainment of a final determination.

It is also not in dispute, that this application was not served on the three additional plaintiffs although they were made parties pursuant to a court order. Rule 76 of this Courts rules stipulates that service must be effected on such parties unless court's leave to dispense with service has been sought and granted. In our view this omission is also fatal to this application. We think that Rule 76 requirements, are fundamental to our system of justice in that failure to serve interested party denies such a party the right of access to court and the right of hearing.

In the result, the application is dismissed. Costs to abide the outcome of the appeal.

It is so ordered.

DATED and delivered at Nairobi this 25th day of March 2011.

P.K. TUNOI

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR