



**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL OF KENYA  
AT NAIROBI**

**Civil Appli. 89 of 2009 (UR. 55/2009)**

- 1. WALTER KABETU BACHA**
- 2. JAMES KARIKO BACHA**
- 3. LEONARD KINUTHIA BACHA**
- 4. HARRY BACHA NJUGUNA**
- 5. MATHEW NJOROGE BACHA ..... APPLICANTS**

**AND**

- 1. THE LANDS DISPUTE TRIBUNAL KIAMBU WEST**
- 2. THE SENIOR RESIDENT MAGISTRATE'S COURT KIKUYU .... RESPONDENTS**

(Application for stay of execution pending the hearing and determination of an intended appeal from the ruling and order of the High Court of Kenya at Nairobi (Osiero, J.) dated 10<sup>th</sup> December, 2008

**in**

**H.C. MISC. APPL. NO. 88 OF 2008)**

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**RULING OF THE COURT**

This is an application under **Rule 5 (2) (b)** of the Court of Appeal Rules for an order that the Court be pleased to:

**“..... grant a stay of any further proceedings in any court in this Republic and or the execution of the 1<sup>st</sup> respondent’s decision dated 23<sup>rd</sup> May, 2008 ordering the excision of one acre from the parcel known as Kabete/Kibichiku/49 pending the hearing and determination of the appeal against the ruling of the superior court of 10<sup>th</sup> December, 2008”.**

The applicants intend to appeal against the decision of the superior court (Osiero J.) in *High Court Miscellaneous Application No. J.R. ELC. No.88 of 2008* dated 10<sup>th</sup> December, 2008 whereby the superior court dismissed an ex parte application seeking leave to apply for judicial review orders of certiorari and

prohibition.

The five applicants are sons of **Ernest Bacha Kibinu** (Ernest) who died sometime in 1988. The respondent **Hottensiah Millicent Kibinu** (Hottensiah) is the widow of **Lewis Kibinu Bacha**, the eldest son of **Ernest Bacha Kibinu** and a brother to the applicants. The respondent's husband died sometime in 1977. Sometime in 1982 Ernest transferred his three pieces of land registered as land titles No. Kabete/Kibichiku/49 comprising of 2.49 Hectares; Kaebete/Kibichiku/82 comprising of 5.1 acres and Kabete/Kibichiku/1.73 comprising of 0.21 acres to the five applicants to hold in common in equal shares and the five applicants were issued with title deeds for the respective titles.

Sometime in 1990, Hottensiah filed a claim to the three pieces of land before the Land Dispute Tribunal, Kiambu West District on behalf of the estate of her deceased husband. The claim was filed under the *Land Dispute Tribunal Act No. 18 of 1990* (Act). The Tribunal after hearing the dispute on the merits made an Award dated 23<sup>rd</sup> May, 2008 giving Hottensiah one acre from land title Kabete/Kibichiku/49 to be located where the grave of her deceased husband is situated. The Award was registered in the Senior Resident Magistrate's Court at Kikuyu as *Land Case No. 17 of 2008* as required by the Act. The Award was subsequently read to the parties on 19<sup>th</sup> September, 2008. On 8<sup>th</sup> December, 2008, Hottensiah filed an application in the Magistrate's Court at Kikuyu seeking judgment in terms of the Award.

On 22<sup>nd</sup> October, 2008 the five applicants applied to the superior court under **Order LIII Rule 1 and 2 Civil Procedure Act** for leave to apply for an order of certiorari to quash the decision (Award) of the Land Disputes Tribunal dated 23<sup>rd</sup> May, 2008 and an order of prohibition prohibiting the respondents from executing the decision. The applicants also sought an order that the grant of leave do operate as a stay of implementation of the decision.

The application was dismissed by Osiemo J on 10<sup>th</sup> December, 2008 and subsequently on 17<sup>th</sup> December, 2008 the applicants filed a notice of appeal signifying an intention to appeal against the dismissal of the application.

The principles upon which the Court exercises its discretion under **Rule 5 (2) (b)** are notorious. For the application to succeed an applicant has to satisfy the court both that the appeal or intended appeal is arguable and that unless the order sought is granted, the appeal, if ultimately successful, would be rendered nugatory.

It is not necessary to inquire whether the applicants have satisfied the two prerequisites because it is our view that the application is inherently incompetent.

The applicants seek either a stay of any further proceedings in any court in the Republic or a stay of execution of the decision of the Land Disputes Tribunal or both orders. The first order sought is too general and does not refer to any specific proceedings in any specific court. In any case, the superior court made a finding, thus:

**“Further the decision of the Tribunal having been entered as a judgment of the court the only open way for the applicants to go about it to extract a decree as provided for under the Civil Procedure Act as contained under Section 7 (2) of the Act and take any necessary action to seek remedy”.**

The superior court has already made a finding that there are no pending proceedings in the magistrate's court relating to the enforcement of the Award. If that is the correct position, and, the applicants have not shown otherwise, then, there are no pending proceedings in the subordinate court that can be stayed.

The second order relates to a stay of execution of the decision of the Land Disputes Tribunal dated 23<sup>rd</sup> May, 2008 to the effect that one acre be excised from land title No. kabete/Kibichiku/49 and be transferred to Hottensiah. It is clear that the application relates to a stay of a decision of Lands Disputes

Tribunal established under the Land Disputes Tribunal Act. Needless to say, this Court exercises appellate jurisdiction from the decisions of the superior court and derives its jurisdiction to grant orders specified in **Rule 5 (2) (b)** from the filing of the Notice of Appeal. This Court has on many occasions held that the stay of execution referred to in **Rule 5 (2) (b)** can only relate to the subject matter of the notice of appeal – that is, the decision of the superior court appealed from.

As an example, in **David Thiongo t/a Welcome General Stores vs. Market Fancy Emporium – Civil Application No. Nai. 47 of 2007** (unreported) this Court, said:

**“It is obvious from Rule 74 (1) as read with Rule 74 (6) that a notice of appeal relates to a decision of the superior court ..... It is the lodging of the notice of appeal which gives this Court jurisdiction to grant an order of stay of execution under Rule 5 (2) (b) of the Rules. It follows therefore that the stay of execution can only relate to the subject matter of the notice of appeal which is the decision of the superior court – that is the decision appealed from”.**

The superior court did not make any order capable of execution save the order for costs. The applicants do not seek a stay of execution of the orders of the superior court. It follows that this Court lacks jurisdiction under **Rule 5 (2) (b)** to stay execution of the decision of the Land Disputes Tribunal.

Lastly, it is our view that this Court as an appellate court has no jurisdiction to grant interim reliefs under **Rule 5 (2) (b)** that the superior court had no jurisdiction to grant. **Section 3 (2)** of the Appellate Jurisdiction Act provides

**“3. (2) For all purposes of and incidental to hearing and determination of any appeal in exercise of jurisdiction conferred by this Act, the Court of Appeal shall have in addition to any other power, authority and jurisdiction conferred in this Act, the power, authority and jurisdiction vested in the High Court”.**

**Rule 1 (4)** of Order LIII Civil Procedure Rules provides;

**“The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the Judge so directs, operate as a stay of the proceedings in question until the determination of the application or until the Judge orders otherwise”.**

It is clear from that Rule that it is upon granting leave to apply for an order of certiorari or prohibition that the superior court can direct that the grant of leave should operate as a stay of proceedings in question. In other words, granting of leave is a prerequisite to granting a stay of the impugned proceedings.

In this case, since the superior court did not grant leave to the applicants to apply for orders of certiorari or prohibition it would have had no jurisdiction to grant a stay of proceedings. It is upon the hearing of the intended appeal that this Court will determine whether or not leave to apply for judicial review should be granted to the applicants. This Court like the superior court cannot act *in vacuo* and can not competently grant a stay of proceedings on the expectation that leave may ultimately be granted.

In the light of the foregoing, the application is incompetent. It is struck out with no orders as to costs

**Dated and delivered at Nairobi this 3<sup>rd</sup> day of July, 2009.**

**P. K. TUNOI**

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**JUDGE OF APPEAL**

**S. E. O. BOSIRE**

.....

**JUDGE OF APPEAL**

**E. M. GITHINJI**

.....

**JUDGE OF APPEAL**

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

DEPUTY REGISTRAR