



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: GICHERU, KWACH & O'KUBASU, J.J.A.

CIVIL APPLICATION NO. NAI 39 OF 2002 (23/02 UR)

BETWEEN

GRACE WANJIRU NJIHIA APPLICANT

AND

JOSEPH MBURU KIMUKURESPONDENT

**Being an application for stay of eviction from the
judgment of the High Court of Kenya at Nairobi
(Aganyanya J) dated 26th February, 2001**

in

H.C.C.C. NO. 2115 OF 1999)

RULING OF THE COURT

This is an application by way of notice of motion brought under rule 5(2) (b) of the Court of Appeal Rules in which the applicant Grace Wanjiru Njihia, is seeking the following orders:

"1.That this Honourable Court deems it fit to stay the eviction in execution of decree of the High Court of Kenya at Nairobi in H.C.C.C. No.2115 of 1999 given on 26th February, 2001 until the applicant's intended appeal against the ruling delivered by the Honourable Justice Aganyanya on 15th November 2001 is heard and determined.

2.That the costs of this application be provided for:

The applicant herein was the defendant in the High Court Civil Case No.2115 of 1999 which suit proceeded by way of formal proof since the applicant entered no appearance nor filed any defence. The respondent appeared on the day fixed for hearing and after his evidence a judgment was delivered in which the following orders were made:-

"(a)A declaration that the defendant has no interest in the parcel of land known as L.R. NO. Komothai/Kiambururu/456 and that Wamaitha's interest therein lapsed with her death.

(b)The defendant, her tenants agents and any other person claiming any interest in L.R. No. Komothai/Kiambururu/456 is/are hereby given 3 months from the date of this order to vacate the said land.

(c)The said defendant her tenants agents and any other person claiming an interest in the suit land through

her be and is/are hereby restrained permanently from entering remaining or in any other manner interfering with the land known as Komothai/Kiambururu/456.

(d)Costs of this suit, either agreed or taxed to be paid to the plaintiff by the defendant."

That judgment by the superior court (Aganyanya J.) was delivered on 26th February, 2001. Then on 5th June 2001 the applicant filed a Chamber Summons application in the superior court seeking, among other reliefs, the setting aside of the judgment delivered on 26th January, 2001. Her main grounds in support of that application were that she had never been served with summons to enter appearance and that she had a good defence that raised triable issues. The learned Judge considered submissions made by counsel for both parties and in the end dismissed the application on 15th November, 2001. It is that order of dismissal that the applicant intends to appeal against. But before that appeal is determined the applicant is seeking a stay of the orders made on 26th February 2001. As we have already said the intended appeal arises from the ruling delivered on 15th November, 2001.

In dismissing the applicant's application to set aside judgment the learned Judge stated inter alia:-

"Moreover, given the order of the late Gachuhi J. as he was then dated 19th day of January 1984 and issued on 12th March 1984 in HCCC No. 669 of 1978 which clearly directed that the deceased Wamaitha had only a life interest in the disputed land and that this interest dies with her. I do not see what interest the applicant is pursuing even if she was married to the said Wamaitha deceased."

Mr. Mbigi for the applicant contended that the applicant had given credible explanation to the effect that she was not served with the summons. Mr. Kiama Njau for the respondent submitted that service had been effected and that the intended appeal did not raise any arguable point.

In dealing with an application under rule 5(2)(b) of the Court of Appeal Rules, the applicant has to satisfy us that the intended appeal or appeal is arguable and that if the application is not granted the intended appeal or appeal if successful, would be rendered nugatory. We have carefully considered the history of this rather interesting litigation in which a woman is said to have married another woman and it is our view that this application has no merits. The same is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 8th day of March, 2002.

J.E. GICHERU

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JUDGE OF APPEAL

R.O. KWACH

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JUDGE OF APPEAL

E.O. O'KUBASU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR