



**IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: OMOLO, AKIWUMI & O'KUBASU, J.J.A.)
CIVIL APPLICATION NO. NAI. 20 OF 2001 (UR.13/2001)**

BETWEEN

THE OFFICIAL RECEIVER (Suing as the Interim Liquidator of

**CONTINENTAL BANK OF KENYA LTD (IN
LIQUIDATION)APPLICANT**

AND

**MUGO MUKUNYA (practising as an Advocate of the High Court of Kenya under the name
and style of MUKUNYA & COMPANY ADVOCATES 1ST RESPONDENT**

RESORTS LIMITED 2ND RESPONDENT

AND

**CAASIN LIMITED 1ST OBJECTOR/APPLICANT/INTERESTED
PARTY**

**TOM OTIENO OSIMBO 2ND OBJECTOR/APPLICANT/INTERESTED
PARTY**

**(An application for stay of Execution of the Ruling and
Order of the High Court of Kenya at Nairobi
(Commissioner of Assize Ransley) dated 3rd January,**

2001

in

H.C.C.C. NO. 8 OF 1998)

RULING OF THE COURT

This matter is somewhat convoluted. The Applicant filed a suit against the 1st and 2nd Respondents for the recovery of the balance of the purchase price of the suit land, L.R. No. 1160/585, which the Applicant had sold to the 2nd Respondent and for the loss thereby suffered by the Applicant. This suit also sought damages from the 1st Respondent, an advocate, for the breach of his professional undertaking, to pay the balance of the purchase price of the suit land. Upon obtaining judgment in the

suit, the Applicant had by an ex parte notice of motion dated 14th October, 1999, and to which only the 1st and 2nd Respondents were parties, obtained from the honourable Ransley, Commissioner of Assize, inter alia, orders restraining the 2nd Respondent from transferring or mortgaging etc the suit land, the attachment of the suit land in execution of the decree obtained by the Applicant against the 1st and 2nd Respondents, and the payment of the decretal sum by the 1st and 2nd Respondents.

Subsequent to this, the Applicant obtained, ex parte, the placing of a caveat on the suit land. By a notice of motion of 21st November, 2000, the 2nd Objector/Applicant/ Interested Party, Tom Osimbo, who had purchased the suit land from the 2nd Respondent and in whose name the suit land was then registered, applied for the review of the aforesaid orders made by Commissioner of Assize Ransley. After considering the rival pleadings filed, and the submissions made, in this application, the Commissioner of Assize on 3rd January, 2001, reviewed his earlier orders, inter alia, because Tom Osimbo who had purchased the suit land without notice and whose interest in the suit land was affected by his orders of 14th October, 1999, should have been made a party to the Applicant's related notice of motion of 14th October, 1999; and that the Applicant's suit against the 1st and 2nd Respondents dealt merely with the 1st Respondent's breach of professional undertaking which was outside the ambit of section 52 of the Indian Transfer of Property Act which applies only to proceedings in which the right to immovable property is specifically in issue and which in such a case, also forbids dealings in the immovable property except where authorized by the court. The lifting of the caveat was also not objected to by counsel for the Applicant.

The review orders made by the Commissioner of Assize were as follows

: **"IT IS ORDERED:-**

1. THAT the applicant be and is hereby made a party to this suit as the applicant being the aggrieved person by this court's order has a right to seek review of it as the order was made being based on false information and as the court has shown clearly in the interest of justice, this order be and is hereby set aside.

2. THAT all the consequential orders based on this Court's Judgment made on 14th October, 1999 relating to the applicant's property known as L.R. No. 61856, and L.R. No. 1160/585 be and are hereby set aside.

3. THAT the caveats lodged against L.R. No. 1160/585 and Registered by the Registrar of Titles be and are hereby removed.

4. THAT costs of this application will be paid by the plaintiff to the applicant.

5. THAT leave to appeal be and is hereby granted. GIVEN under my hand and the seal of the court this 3rd day of January, 2001. "

On 5th January, 2001, the Applicant filed a notice of appeal in respect of the Commissioner of Assize's decision of 3rd January, 2001. And on 2nd of February, 2001, the Applicant filed the present application for stay and which is the only one before us, namely, Civil Application No. NAI. 20 of 2001 (UR.13/2001) and which is designated as:

"An Application for stay of Execution of the Ruling and all orders of the High Court Honourable the learned Commissioner of Assize Ransley on 3.1.2001 in respect of Application by the 2nd Objector/Applicant/ Interested Party in H.C.C.C. No. 8 of 1998."

The Applicant by an application filed in the High Court, on 5th January, 2001, sought stay of the orders of 3rd January, 2001, for fourteen days to enable an application for stay to be filed in this Court. The main ground for this was that if the caveat lodged on the suit land was not maintained, Tom Osimbo was likely, rather incomprehensibly, to "dispose the suit land to innocent purchasers who would be difficult to follow". Tom Osimbo in his replying affidavit deponed that he earned a sufficient salary that

would enable him to compensate the Applicant should his intended appeal be successful. In a further affidavit of 18th January, 2001, filed in support of the application, whilst it is deponed that:

"... the Applicant's Civil Appeal in view of the provisions of the Constitution section 75(6)(a) and Court of Appeal judgment in Civil Appeal No. 134 of 1993 seem to be arguable Civil Appeal ...",

no where is it deponed that Tom Osimbo's financial standing was so poor that if the Applicant were to succeed in his intended appeal, it would be rendered nugatory.

After considering the Applicant's application of 5th January, 2001, the pleadings filed, and submissions made, therein, the Commissioner of Assize on 18th January, 2001, granted stay for forty five days subject to the Applicant paying within seven days, Kshs.6 million into an interest bearing account in the names of the Advocates of the parties in a reputable bank. The Applicant must have been unhappy with this order but did nothing about it as he had in respect of the former orders of 3rd January, 2001, and which is the matter now before us. It is only in the affidavit in support of the Applicant's Certificate of Urgency to hear this application for stay, Civil Application No. NAI. 20 of 2001 (UR.13/2001) urgently, and not in support of the application itself, that it has been deponed that the Applicant being in receivership, cannot afford to deposit Kshs.6 million. The application itself, before this Court, is grounded on the proposition that the transfer of the suit land to the 2nd Respondent was "fraudulent, illegal and unconstitutional", that its transfer by the 2nd Respondent to Tom Osimbo was similarly tarnished and that the subsequent sale of the suit land by Tom Osimbo to a new buyer "would add more confusion to the already confused state". Whilst in the supporting affidavit of 26th January, 2001, to the present application sworn to by A. N. Muga, it is deponed on behalf of the Applicant that:

"... the Applicant do consider that he has a good case which is arguable as the 2nd Respondent did not have any right to the suit land ...",

it is not deponed that the appeal would be rendered nugatory if successful, because of Tom Osimbo's financial inability to compensate the Applicant who in the first place, had only sued the 1st and 2nd Respondents for the payment of the balance of the purchase price of the suit land and damages.

We have considered the Applicant's voluminous grounds of appeal against the Ruling of Commissioner of Assize Ransley of 3rd January, 2001, which is the subject of the Applicant's intended appeal and even though we may think, like has been advanced in the supporting affidavit of the application before us, that the Applicant's intended appeal may be arguable, we certainly do not think, and indeed, no evidence has been adduced to that effect, that the intended appeal would be rendered nugatory if it is successful.

In the result, the Applicant's application for stay is dismissed. Costs to be in the intended appeal.

Dated and delivered at Nairobi this 2nd day of March, 2001.

R. S. C. OMOLO

.....

JUDGE OF APPEAL

A. M. AKIWUMI

.....

JUDGE OF APPEAL

E. O. O'KUBASU

.....

JUDGE OF APPEAL

I certify that this a true copy of the original.

DEPUTY REGISTRAR.