



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: SHAH, BOSIRE & O'KUBASU, J.J.A.

CIVIL APPLICATION NO. NAI 98 OF 2000 (47/2000 UR)

BETWEEN

DAVID MATUNA & 21 OTHERSAPPLICANTS

AND

LUKENYA RANCHING & FARMING CO-OP SOCIETY LIMITEDRESPONDENTS

(Being an application for stay of execution in an intended appeal against a ruling & order of the High Court of Kenya at Machakos (Mwera J) dated 23rd February, 2000

in

MKS.H.C.C.C. NO. 97 OF 1997)

RULING OF THE COURT

This is an application by way of Notice of Motion stated to be brought under "Rule 5 (2) of the Court of Appeal rules and S.3A of the Civil Procedure Act ". The orders sought are set out as follows:

"a.THAT the instance (sic) service of this application be dispensed with.

b.THAT there be stay of execution of decree by way of eviction or otherwise and/or stay of further proceedings in MKS.H.C.C.C. NO. 97 OF 1997 pending filing, hearing and final determination of the Applicant's intended appeal.

c.THAT costs of this Application be costs in the intended appeal."

We can only say that the above could be phrased in a better way than what we have before us. However, we shall take the matter as presented before us.

The applicants are seeking stay of execution of the ruling delivered on 23rd February, 2000, by the superior court (Mwera J). That ruling was pursuant to an application to set aside the judgment of the superior court which application Mwera J dismissed. In dismissing that application the learned Judge of the superior court expressed himself thus:

"Having considered the history of this case (other cases went before it about the subject land) this

court is of the view that the Defendant's lawyers were served with hearing notice of the suit on 15th October, 1998. David Mutuna (1st Defendant) in his affidavit concedes this so did Mr Mutinda the lawyer for the rest of the Defendants. Although the proper provision of the law under which this application should have been brought is 0 9B r. 8, Civil Procedure Rules it is not shown by good cause, reason or explanation as to why Messrs Kivuitu & Company did not appear on 15th October, 1998 to defend the suit. Indeed there is no reason at all. This court has a wide discretion to exercise under 09B r 8 Civil Procedure Rules to set aside orders or judgment or vary the same. But that discretion should surely be judicially exercised on good cause or ground. None is advanced here and the application is dismissed with costs."

To date no explanation has been given for Messrs Kivuitu & Co Advocates' non-attendance in Court on 15th October, 1998, to defend the suit on behalf of their clients.

The applicants having lost in the application to set aside judgment and fearing imminent eviction from the suit land went back to the same Judge (Mwera J) with an application for stay and an order to restrain the respondent society from evicting them. That application was subsequently dismissed on 30th March, 2000.

The applicants intended appeal will be against the ruling of Mwera J delivered on 23rd February, 2000. They will be appealing essentially against the learned Judge's exercise of judicial discretion. This being an application for stay the applicants must show that their intended appeal is arguable and secondly, that unless a stay is granted then the intended appeal, if successful, would be rendered nugatory. As we deal with this matter we remind ourselves that we are exercising judicial discretion as was stated by this Court in ***TRUST BANK LIMITED & ANOTHER V INVESTECH BANK LIMITED & 3 OTHERS***, *Civil Application NOS. NAI 258 & 315 OF 1999 (unreported)* :

"The jurisdiction of the court under rule 5 (2) (b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable or put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal if successful will be rendered nugatory. Those are the guiding principles but these principles must be considered against facts and circumstances of each case. ..."

We have considered what has been urged before us in this application and having regard to the history of this dispute it is clear that the applicants not being members of the respondent co-operative society have been engaged in numerous cases in which they have been perennial losers. While we do not wish to express any views on the intended appeal we are satisfied that the applicants have not satisfied us that the intended appeal is an arguable one. The applicants appear to seek to perpetuate their stay on the suit land as is evident from the numerous attempts made by them to do so. As we are so satisfied, we need not concern ourselves with such an application as this one, to wit, whether success in the intended appeal would be rendered nugatory if stay of execution of the decree is not granted pending appeal.

The upshot of the foregoing is that this application for stay is dismissed with costs.

Dated and delivered at Nairobi this 11th day of May, 2001.

A. B. SHAH

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JUDGE OF APPEAL

S. E. O. BOSIRE

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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