



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT NAIROBI**  
**CORAM: OMOLO, AKIWUMI & O'KUBASU, JJ.A.**  
**CIVIL APPLICATION NO. NAI 181 OF 2000 (UR 81/2000)**

BETWEEN

STEPHEN MUGO MUTOTHORI  
MACHITHI TROUT FARM LTD. ....APPLICANTS  
AND  
KENYA COMMERCIAL BANK LTD  
KENYA COMMERCIAL FINANCE CO LTD .....RESPONDENTS

(An application for stay of execution pending appeal in an  
intended from the judgment & decree of the High Court of  
Kenya at Nairobi (Gacheche, Commissioner of Assize) dated  
22nd June, 2000  
in

H.C.C.C. NO. 2245 OF 1991

CONSOLIDATED WITH

H.C.C.C. NO. 2382 OF 1991)

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**RULING OF THE COURT**

This being an application for stay of execution under Rule 5 (2) (b) of the Court's Rules , the applicants, ***Stephen Mugo Mutothori and Machithi Trout Farm Ltd*** , were obliged to satisfy us on two points, namely:

1.that their intended appeal is arguable and is not a frivolous one;

and 2.that unless we grant to them a stay of execution of the superior court's decree their intended appeal, even if successful, would have been rendered nugatory. By their re-amended plaint of 8th December, 1997 and lodged in the superior court on 15th December, 1997, Kenya Commercial Bank Ltd and Kenya Commercial Finance Company Ltd, the respondents to the present motion, sought against the two applicants and one Priscilla Wangari Mugo, the following orders, namely:

(i)an injunction restraining the applicants from interfering with the fixtures and fittings of a mortgaged property, i.e. L.R. No. 3452/1 (I.R. No. 4123) Nyeri which is owned by Machithi Trout Farm Ltd, the 2nd applicant;

(ii)possession of the said mortgaged property;

(iii) judgment against the 2nd applicant in the sum of Shs.3,721,139.75 with interest thereon at the rate of 20% per annum from 1st September, 1991 until payment in full;

(iv) judgment against Stephen Mugo Mutothori (the 1st applicant) and Priscilla Wangari Mugo in the sum of shs.1,735,000/= with interest thereon at the rate of 19% per annum from 5th October, 1985 until payment in full; and (v) the costs of the suit.

It is clear from these prayers that the respondents never asked the superior court to decree the sale of the mortgaged property and as far as we can tell from the judgment of the Commissioner of Assize dated 22nd June, 2000, which is the subject of the intended appeal, no order was given for the sale of the mortgaged property. The Commissioner says in that judgment, and we quote her:

"In the circumstances, this application succeeds, and upon review of my earlier order, I hereby order that judgment be and is hereby entered for the applicants against the 1st and 2nd defendants as prayed for in the application dated 13/5/99."

The prayers in the application dated 13th May, 1999 were that:

"1. Judgment be entered for the plaintiffs [respondents] as against the 1st and 2nd defendants [1st and 2nd applicants] as prayed in the plaint; and 2. The 1st and 2nd Defendants do pay the costs of this application."

So that the judgment of the superior court simply gave to the respondents the reliefs they sought against the 1st and 2nd applicants, in the re-amended plaint. There cannot, therefore, be any question of the respondents selling the mortgaged property on the basis of the orders made by the superior court. All the respondents are entitled to do in terms of the orders of the superior court, is to take possession of the mortgaged property and if they choose to sell it, they can only do so on the basis of some other law or rules.

On the issue of whether the applicants have an arguable appeal, we listened to the submissions of Mr Njiru for the applicants and Mr Gichuhi for the respondents, and having done so, we think the intended appeal is arguable and cannot in any way, be said to be frivolous. The Commissioner of Assize had, on 21st December, 1999, held that:

*"The defendants also contend that the suit is time -barred under the law of limitation. This raises a triable issue. If defendant shows that they have any bona - fides (sic) triable issues, even one, they must be given leave to defend the suit. For the above reasons I find that the defence raises triable issues and is not a sham. In the circumstance, the application [of 13th May, 1999] is hereby dismissed with costs."*

On 3rd February, 2000, a notice on motion was lodged in court asking the Commissioner to review her order entered on 21st December, 1999 and upon such review, to enter summary judgement as had been prayed for in the motion of 13th May, 1999. The grounds upon which the review was sought were that: "(i) There was some mistake or error apparent on the face of the record;

and (ii) The law of limitation was not applied to the facts found thereof." The submissions made before the Commissioner in support of the review application, were that she had not addressed the issue of limitation fully and she concluded as follows:

*"For this court to review its decision, it must be satisfied that there was an error apparent on the face of the record. I agree with counsel for the applicants [respondents], the error could have arisen if the issue of limitation was not fully addressed. In view of the above, I find there was an error on the face of the record as I did not take into account the fact that the re - amended plaint was filed within time. Having found there was an admission of the debt, the defence becomes a mere denial. I find that it therefore raises no triable issues to warrant granting the orders that I had granted hereto ."*

It was conceded before us that all the relevant documents and facts were before the Commissioner when she made her order of 21st December, 1999. She had then concluded on the basis of the material placed before her, that there was a triable issue, namely the issue of limitation. What she was being told during the review application would appear to us to have been that she had not correctly appreciated the facts relating to the issue of limitation. Was she entitled to review her earlier order on that basis? In view of this Court's decision in the case of **NATIONAL BANK OF KENYA LIMITED V NDUNGU NJAU, Civil Appeal No. 211 of 1996 (Unreported)**, we think this is an arguable point. In that case, the Court remarked as follows:

*"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law. Misconstruing a statute or other provision of law cannot be a ground for review. In the instant case, the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment, which is not permissible in law. An issue which has been hotly contested cannot be reviewed by the same court which had adjudicated upon it."*

Is this what Commissioner Gacheche did? Mr Njiru for the applicants contended before us that it is what she did; Mr Gichuhi for the respondent contended the contrary. We do not have to decide it in the motion before us. But we are satisfied it is an arguable point and the intended appeal by the applicants cannot be said to be frivolous.

Will the intended appeal be rendered nugatory if we do not grant to the applicants the stay they seek? On this point, we are satisfied that the applicants failed to show us in what manner the success of their appeal will be rendered nugatory if we do not grant to them a stay of execution. According to one of the orders of the superior court, the respondents are entitled to take possession of the mortgaged property, but we do not see how this by itself, would render the appeal nugatory. It may be they are living on the property as they say and that they may be turned out if the respondents take possession but that possibility can be avoided by their paying over to the respondents the sums of money adjudged by the superior court to be due from them to the respondents. There was no allegation before us that the two respondents would not be able to pay back that money if the applicants paid it over to them and they (respondents) were to be ordered by the Court to refund it in the event of a successful appeal. That the applicants are not able to raise the decretal sum cannot be a lawful basis for granting an order of stay.

The applicants were bound to satisfy us on the two requirements, namely that they have an arguable appeal and that unless we grant to them an order of stay, their intended appeal, if successful, will be rendered nugatory. They have satisfied us that they have an arguable appeal, but they have not satisfied us that unless we grant to them an order of stay, their appeal, if successful, will be rendered nugatory. That being our view of the matter, the notice of motion dated and lodged in court on the 10th July, 2000, must fail and we order that the same be and is hereby dismissed with costs to the respondents.

Dated and delivered at Nairobi this 18th day of July,

2000.

R. S. C. OMOLO

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JUDGE OF APPEAL

A. M. AKIWUMI

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JUDGE OF APPEAL

E. O. O'KUBASU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR