



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(Coram: Nyarangi, Platt and Gachuhi, J J A)
CIVIL APPLICATION NO NAI 127 OF 1986

(In the matter of an intended appeal)

BETWEEN

MAHESCHANDRA SHAMJIBHAI GHEEWALAAPPLICANT

AND

1. ARUNA B. GHEEWALA

(Sued in her personal capacity and as executrix of the estate of Bhupendra S Gheewala)

2. ALKA B GHEEWALA

3. JAGDISH R. MORJARIA RESPONDENTS

4. JAGDISH BHATT

5. FLOWERS INVESTMENTS LIMITED

(Appeal from the order of the High Court of Kenya at Nairobi (Shields, J) dated July 23, 1986

IN

Civil Case 1395 of 1986)

RULING OF THE COURT

The application for an injunction under rule 5(2) (b) of the Rules of this court is in our judgment irresistible. The affidavits which were filed by the parties in support of their respective arguments disclose several clear issues of fact and law, which will no doubt be canvassed during the hearing of the appeal. The appeal cannot be said at this stage to be obviously without merit or frivolous because, inter alia, there is a serious dispute as to the ownership of the subject matter. It is relevant that the plaintiff prays for specific performance of the disputed sale of the shares. In these circumstances the usual rule is that an injunction is granted to preserve the property pending the determination of the dispute.

In this case the view was urged that the circumstances of the case did not attract the operation of the general rule.

Looking at this dispute we are not persuaded that there are special circumstances which should cause us not to preserve the subject matter pending the appeal. The decision in Madhupaper International Limited v Paper Kerb and Others Civil Application Nai 116 of 1985 turned on the peculiar facts of that case. We hasten to state that the facts of this case are within the established practise of this court founded in M M Butt v The Rent Restriction Tribunal, Civil Application No Nai 6 of 1979 and Erinford Properties Ltd v Cheshire County Council, [1974] 2 All ER 448 and emphatically not on Giella v Cassman Brown & Co. Ltd [1973] EA 358. The purpose of an application such as this under rule 5(2) (b) is to preserve the subject –matter in dispute so that the rights of an appellant are safeguarded and to prevent the appeal, if successful, from being nugatory.

We allow the application and grant the injunction. We will now hear counsel on the terms of the injunction.

Costs of the application to the applicant. Delivered at Nairobi this 14th day of October, 1986

J O Nyarangi

Judge of Appeal

H G Platt

Judge of Appeal

J M Gachuhi

Judge of Appeal

I certify that this is a true copy of the original

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DEPUTY REGISTRAR

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FURTHER ORDER OF THE COURT

The applicant shall give the usual undertaking as to damages in writing.

The appeal shall be filed in the next 21 days.

The earliest possible date for hearing this action shall be allocated.

Liberty to apply.

Delivered at Nairobi this 21st day of October, 1986

J O Nyarangi

Judge of Appeal

H.G Platt

Judge of Appeal

J M Gachuhi

Judge of Appeal

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DEPUTY REGISTRAR