



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GICHERU, AKIWUMI & SHAH, JJ.A.)**

**CIVIL APPLICATION NO. NAI 234 OF 1995 (111/95 UR)**

**BETWEEN**

**KUKYAMA MBUVI.....APPLICANT**

**AND**

**MUTISYA KISANGI.....RESPONDENT**

(Application for stay of execution in an intended appeal

from a judgment and decree of the High Court of Kenya Nairobi

(Mr. Justice Bosire) dated 9th February, 1995

in

HC. MISC. C.C. NO. 417 OF 1989(O.S))

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**RULING OF THE COURT**

The applicant seeks under Rule 5(2)(b) of the Rules of this court, a stay of execution of the decree of the High Court for his eviction from the suit land, which is the subject matter of the litigation between him and the respondent, and against which decree he intends to appeal, until the determination of that appeal. He also seeks orders restraining the respondent from evicting him from the suit land and from disposing of it, until the determination of his intended appeal

The applicant had by originating summons, sought at the High Court a declaration that he was the owner of the suit land which had previously belonged to the respondent, by reason of his having been in undisturbed adverse possession of it for twelve continuous years. Conflicting evidence as to facts was given by both sides and the learned judge of the High Court had to make up his mind which evidence to believe.

He came to the conclusion that the applicant had not satisfied him that he had been in uninterrupted and peaceful adverse possession for twelve years by the time when he brought the suit against the respondent. But the applicant's main ground of appeal is that the learned judge erred in holding that the applicant had not satisfied him that he was entitled to the suit land through adverse possession. This is not a frivolous ground. Moreover, it is one that can best be determined at the hearing of the intended appeal.

However, would the applicant's appeal, if successful, be rendered nugatory if the prayers sought by him are not granted? If the applicant is evicted from the suit land as ordered by the learned judge of the High Court, but which incidentally, was not the particular relief sought by any of the parties to the litigation, the respondent could dispose of the land so that if the applicant were successful in his intended appeal, it would have been an exercise in futility.

The applicant having satisfied the two conditions that this court normally looks for, before granting the interlocutory prayers now sought, those prayers as contained in the applicant's Notice of Motion filed on 3rd October, 1996, are hereby granted. Costs to abide the determination of the intended appeal.

Dated and delivered at Nairobi this 27th day of November, 1996.

**J. E. GICHERU**

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**JUDGE OF APPEAL**

**A. M. AKIWUMI**

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**JUDGE OF APPEAL**

**A. B. SHAH**

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**JUDGE OF APPEAL**

I certify that this is

a true copy of the original.

**DEPUTY REGISTRAR**