



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
Criminal Appeal 48 of 2009
NATIONAL CEREALS & PRODUCE BOARD APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal from the Ruling of Honourable Mr. S.M. Mungai P.M dated 6th March 2009 in Machakos CM'S CR.MISC. APPL. No. 2 of 2009)

RULING ON A PRELIMINARY OBJECTION

1. The Application before me seeks a stay of execution of the orders of the Principal Magistrate in **CM'S Court Miscellaneous Criminal Application No. 2/2009** in which the learned magistrate ordered that 285 bags of maize in the custody of the Applicant to be destroyed. An Appeal against the said order was filed on 31/3/2009 simultaneously with the Application aforesaid.
2. Mr O'Mirera in an oral objection to the hearing of the application stated that this court in **Misc. Appl. 22/2009** considered the matter and concluded that the learned magistrate's order was lawful and that the Applicant ought to comply with it. Instead the Applicant, already in contempt, has refused to do so and belatedly seeks to stay the said order. That the Application should be struck off and the maize destroyed.
3. The response by Mr Maina is that the Applicant is desirous of being heard on its appeal and the reason for preferring the appeal is that it was never heard before the order of 12/1/2009 was made and that in any event the objection is premature and misconceived.

4. I have considered the rival submissions and I note from a perusal of **CM'S Criminal Application No. 2/2009** and **H.C. Misc. Appl. 22/2009** that in fact this court was called upon in **H.C. Revision cases Nos. 3 and 4 of 2009** to make certain orders touching on the orders made on 12/1/2009. The Applicant had sought an order that this court should set aside and/or vary those orders and stay the orders in the meantime. I declined to do so and the Applicant then sought leave to file an appeal out of time in **H.C. Misc. Appl. 22/2009** which was granted. In that Application, which was not opposed, I granted leave to appeal out of time and **H.C. Crim. Appeal No. 48/2009** was then filed together with the Application under attack. Mr O'Mirera's submissions are therefore mistaken as no substantive Ruling on matters under dispute was made in that Application. The issue would have been live had he referred to **Revision Cases No. 3 and 4 of 2009** and since he has not, it is for this court to ask the question; having filed a Revision pursuant to Section 362 and Section 364 can the Applicant later file an appeal and seek stay orders of the order appealed from? I have perused the Criminal Procedure Code and it seems to me that Section 362 – Section 367 of the code create a special mechanism for the High Court to supervise the proceedings before subordinate courts and are in no way an alternative to the appellate process under Section 347 – Section 361 of the code although the effect may be the same in the ultimate. In fact in my ruling in Revision 3 and 4/2009 I merely determined whether the proceedings before the learned were correct, legal, proper or regular and I said they were. I see no bar for me to either hear the Application for stay of the disputed order and/or the substantive Appeal.

5. In the end, I see no merit in the objection and the same is overruled.

6. Orders accordingly.

Dated and delivered at Machakos this 20th day of April 2009.

ISAAC LENAOLA

JUDGE

In presence of: **Mr Wang'ondy for Respondent**

N/A for Applicant

ISAAC LENAOLA

JUDGE