REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
Civil Case 3619 of 1983

GATHARA CHUCHU & 473 OTHERS:: PLAINTIFFS/OBJECTOR

VERSUS

GITITU COFFEE GROWERS CO-OPERATIVE SOCIETY:::::::::::::::::::::::::::::: 1st DEFENDANT

KENYA PLANTERS CO-OPERATIVE UNION LTD::::::::::::::::2ND DEFENDANT/RESPONDENT

RULING NO. 2

The second defendant had moved to this Court vide an application by way of Notice of Motion dated 12th October, 2007 and filed the same date, brought under Order IXLI rule 4 Civil Procedure rules, and under the inherent powers of the Court, seeking among others, an order that the execution of the order, made against the second defendant on 12th July 2006, be stayed until the determination of the appeal, there from and the appeal against the order made herein on the 17th of February 2006, and the costs be provided for.

The application was agued inter parties and a ruling on its merits was delivered by this Court on the 8th day of May 2008. In its final pronouncement the court stated thus "*For the reasons given, the Court declines to grant stay herein, and directs that this is a proper case for the court appealed to, to revisit the request for stay pending appeal and dispose it off. For this reason and for ends of justice to be met to both parties, this court, can only accord a temporary stay pending appeal, to the applicant pending filing of a formal application to seek the same from the court, appealed to. 30 days will be adequate. The Court, therefore proceeds to make the following orders.*

(a) There will be a temporary stay of execution for a period of 30 days from today's date during which time the applicant is to seek stay from the court appealed to.

(b) Each party will bear own costs".

The same applicant has come back to this court by way of notice of motion under Section 3A of the Civil Procedure Act, the inherent power of the Court, and order L rule 1 of the Civil Procedure Rules. Among others the prayers sought are "*pending the hearing and determination of this application the order of stay of execution made by lady Justice Nambuye, on 8th may 2008 be extended.*

(2) Pending the hearing and determination of Court, of Appeal civil application number Nai 109 of

2008 (UR 66/08) the Order of stay of execution made by lady justice Nambuye on 8th May 2008 be extended.

(3) Costs be proved for.

When the matter came up for hearing, Counsel, for the respondent intimated to the Court, that he had a Preliminary Objection to rise. Counsel for the 2nd defendant applicant required notice of the same so that he could prepare a response. Parties were allowed time till the afternoon to enable the Preliminary Objection to be filed and served.

When served the court noticed that it contained three grounds namely:-

(1) That this Court having heard and determined an application for stay pending hearing of the appeal has no further jurisdiction to hear and determine an application for extension of stay orders and the application herein is already Res Judicata.

(2) That the thirty (30) days period granted for stay has not expired and the court, cannot extend that which is still in force.

(3) That the high Court, having granted stay of execution for thirty (30) days to enable the applicant to file a formal application for stay in the Court, of Appeal and the applicant having duly filed the formal application to the Court, of Appeal the same cannot be revisited again by the high Court which is subordinate to the Court of Appeal."

Due to the urgency of the matter and the fact that tempers were high on both sides, the Court, agreed not to adjourn the matter but to dispose of the Preliminary Objection forthwith.

Counsel for the Plaintiff/objector reiterated the grounds of objection and then stressed the following points:-

(1) That the Court has no jurisdiction to revisit the issue of stay pending appeal as it declined to grant the same and directed the current applicant to the Court of Appeal which direction the applicant has already complied with by moving to the Court of Appeal and filing an application for stay.

(2) The Court bound itself by stating that it was only granting stay for 30 days and it cannot go round that.

(3) Order 41 is very clear that whoever is aggrieved by a stay order can move to the Court, of Appealed to discharge the same. In the circumstances of this case, since the applicant is aggrieved by the 30 days stay granted by this court, he should move to the Court, of Appeal. Allowing this court to revisit that issue will be tantamount to asking this Court to sit on its own appeal over its own decision.

(4) That as at the time of argument the 30 day stay granted on 8.05.08 was still running and as such the Court, could not extend that which had not expired.

(5) Since the applicant has already filed an application in the Court, of Appeal, the effect of that, is that, the Court of Appeal, is already seized of the matter and this court being inferior to the Court of Appeal it cannot be invited to consider the same as doing so is likely to contradict the Court of Appeal and it is likely to be perceived as belittling the Court of Appeal

The applicant who is the respondent to the Preliminary Objection opposed the same on the following rounds:-.

(1) All that they have come to ask this Court, to do is to extend the stay orders.

(2) They contend that all they are asking for is extension of time so that ends of justice to both parties

can be done.

(3) The Court, has jurisdiction to grant the said orders being sought.

(4) Res judicata does not arise as the application is not for stay but for extension of time.

(5) The orders are due to lapse on 7th hence the need to have them extended today. They cannot be extended on Monday as they will have lapsed.

(6) Legal Principles and case law relied upon by them go to show that this court has inherent jurisdiction to grant the orders sought and therefore the Court, is urged to grant the same.

In reply counsel for the plaintiff/objector reiterated the earlier submission and then added that the legal principles and case law cited are not applicable to the current situation. They apply to a situation where by the affected applicant has not moved to the Court of Appeal.

On principles of law and case law, the Court was referred to Mulla on the Code of Civil Procedure, Act V of l908 fifteenth edition volume 1 page 925 on inherent powers of the court. The court has "*inherent jurisdiction to do numerous things among them to stay execution or operation of the order appealed from so that the order which might be passed on appeal might not be rendered infuctous.*

The case of USAGAR SINGH VERSUS RUNDA COFFEE ESTATES LTD (1966) EA 263 in which it was held inter alia that since there could be no doubt that the High Court had power to order a stay of execution either in the exercise of its inherent jurisdiction or under order XLI rule 4 Civil Procedure Rules (revised l948) it followed that a like jurisdiction was conferred on the Court of Appeal by Section 3(2) of the Appellate Jurisdiction Act l962."

The case of **ERINFORD PROPERTIES LTD VERSUS CHESHIRE COUNTY COUNCIL [1974] 2 EAR 448, where** it was held inter alia that "*where a judge dismisses an interlocutory motion or an injunction, has jurisdiction to grant the unsuccessful applicant on injunction pending an appeal against the dismissal, it is not necessary for the applicant to apply to this Court of Appeal."*

There is no inconsistence in granting such an injunction after dismissing the motion for the purposes of the order as, to prevent the Court of Appeals decision from being rendered nugatory should that Court reverse the judge's decision.

The case of A.N. NDAMBIRI & CO. ADVOCATES VERSUS MWEA RICE GROWERS MULTI-PURPOSE COOPERATIVE SOCIEITY LTD NAIROBI, MILIMANI COMMERCIAL COURT MISC. APPLICATION No. 698 of 2004. At page 2 of the ruling Waweru J. made observations at line 10 from the bottom thus "*the learned applicant/advocates submitted that the Court has no jurisdiction to entertain the application as there is already another application seeking the same relief which Court of Appeal. In the opinion of the learned Counsel, there being another similar application pending before a higher court, this court has no jurisdiction to deal with the same matter and the court is finctus officio".*

At page 3 of the ruling line 5 from the bottom, the learned judge ruled "*His submission that this court would not have jurisdiction to entertain an application for stay of execution merely because there is a similar application pending before the Court of Appeal is not supported by law or authority, had the respondent/client come under order XLI rule 4 of the Civil Procedure Rules, the Court, would have entertained its applications. It would have jurisdiction to do so".*

The case of MADHU PAPER INTERNATIONAL LIMITED VERSUS KERR [1985] KLR 840 where the Court of Appeal held inter alia that "*where a judge dismisses an application for interlocutory injunction, he has jurisdiction to grant the unsuccessful applicant an injunction pending an appeal against the dismissal and there is no inconsistency in doing so as the purpose of granting the injunction would be to prevent the decision of the appellate Court from being nugatory should the appeal succeed.*

(2) It is preferable for the High Court to deal with an application pending an appeal from its decision not so much as to protect the Court, of Appeal, from inconvenience but more because the Court of appeal would have the advantage of seeing what the High Court, judge, made of the application. The judges of the High Court, should take note of the concurrent jurisdiction which the two courts have and exercise theirs.

(3) The Court of Appeals' is to be exercised judicially and not arbitrarily. It would be wrong to grant the injunction where the appeal is frivolous or where to grant it would inflict greater hardship than it would avoid.

The case of KUTIMA INVESTMENTS LIMITED VERSUS MUTHONI KIHARA AND COMMISSIONER for mines and Geology Nairobi CA. Appl. 120 of 2005 under. Consideration was an application for an injunction brought under rule 5(2) (b) of the Court of Appeal, appellate jurisdiction rules. At page 2 of the said ruling the learned Law Lords of the Court of Appeal quoted with approval their own decision in the case of MUDHUPAPER INTERNATIONAL LIMITED VERSUS KERR (SUPRA) at line 17 from the bottom thus "*It is preferable for the High Court, to deal with such an application in any event, not so much as to protect this court from a sudden inconvenient dislocation of its lists but more because this court would have the distinct advantage of what the judge made of it. The learned judges of the High Court should take note of this concurrent jurisdiction which the two courts have and exercise theirs".*

At the same page 2 line 10 from the bottom, the learned judges quoted with approval their own decision in the case of OTIENO VERSUS OUGO AND ANOTHER (No. 2) [1987] KLR 400 where the Court of Appeal had held "*that the object of granting an injunction pending an appeal is to safeguard the rights of the appellant and to prevent the appeal if successful from being nugatory"*

The Court of Appeal went on to cite a principle from ERINFORD PROPERTEIS LTD VERSUS CHESHIRE COUNTRY COUNCIL [197] 2 AER also cited with approval in the MANDHUPAPER CASE (SUPRA) thus "*when a party is appealing exercising his undoubted right to appeal, the court ought to see that the appeal if successful is not nugatory".*

This Court has given due consideration to the rival arguments for and against the Preliminary Objection raised against the applicants and respondents application for extension of the stay orders granted herein. These have been considered in the light of the provisions of law and case law cited. A number of issues have emerged from the said arguments for this courts determination. These are:-

(1) Whether the Preliminary Objection raised satisfies the ingredients for raising a preliminary objection, and therefore qualifies to be considered on its own merits.

(2) Whether the issues presented or sought to be canvassed in the application in respect of which the said preliminary objection is raised are issues which are res judicata.

(3) Whether this court has jurisdiction to entertain the intended application in view of its orders to grant a limited stay of execution pending appeal sought to be extended by the application objected to, in the light of a similar application having been presented to the Court appealed to and which is pending consideration by the said Court.

(4) Whether even if this Court, finds that it has no jurisdiction to deal with the said extension because of the matter pending in the Court, of appeal none the less in the circumstances of the scenario displayed herein, this Court, can invoke the inherent jurisdiction powers invested in it and entertain the intended application already on record and grant the relief sought?

(5) What is this Courts understanding of the Court of Appeal, decisions that the superior Court has concurrent jurisdiction with the court of appeal in circumstances where it has dismissed an interlocutory application?

Due consideration of the said issues have duly been made by this court in the light of the facts demonstrated by both sides and in the light of legal provisions of law applicable herein, as well as case law and this court proceeds to make the following findings.

On the issue of satisfaction of the ingredients for raising a preliminary objection, the yard stick is found in the well known decision of MUKISA BISCUIT MANUFACTURING CO. LTD VERSUS WEST END DISTRIBUTORS LTD [1969] EA 696. This decision has been cited with approval by both the superior courts and the Court of Appeal laying down the principles on what amounts and what does not amount to a preliminary Objection. At page 700 Law J.A. as he than was at paragraph D-E had this to say "*so far as I am aware a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration*". Where as Sir Charles New bold P. at page 701 on the same subject at paragraph A-C had this to say "*A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is thee exercise of judicial discretion*"

Applying these ingredients to the preliminary objection raised, it is clear that the mention of the matter being res judicata and the court lacking jurisdiction to entertain the application objected to are pure points of law. The is therefore satisfied that the preliminary objection satisfies the ingredients required for sustaining a preliminary objection and it will be dispose doff on merit.

On res judicata, all that the objector is required to do to succeed, is to bring himself within the ambit of the ingredients of Res judicata as set out in section 7 of the Civil Procedure Act. It reads "*No Court, shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit, or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court*" All that the objector needs to establish as per the foregoing ingredients is that:-

(i) There is a suit in court

(ii) The matter directly or substantially in issue has been directly and or substantially dealt within a former suit.

(iii) It must be between the same parties or others claiming through them.

(iv) Parties must be litigating under the same title.

(v) The Court must be competent to try the suit.

(vi) The issue must have been subsequently raised.

(vii) It must have been heard and finally decided by such a court.

Applying these identified ingredients to the facts demonstrated herein, and considering them in line with the arguments herein, the court, finds that the issue of stay of execution pending appeal was heard and finally determined by this court when the court arrived at a determination that it would only allow the 2nd defendant applicant 30 days stay to enable him proceed to the Court of Appeal and seek stay of execution there from as the court appealed to. It therefore follows that in so far as the issue of stay pending appeal in its original form is concerned, this court cannot revisit it as that was finally determined by this Court.

It is appreciated that parties are still litigating in the same capacity as applicant and respondent as previously ruled upon. The competence of the Court is not in dispute. What is in dispute is the issue

before this court as previously ruled upon and the issue intended to be ruled upon by this Court as presented in the application objected to, as to whether they are one and the same thing. The objector says they are, where as the applicant says they are not. The reason why the objector says they are is because the subject matter is the same, namely stay pending appeal. Where as the applicant says they are different because the first application dealt with stay pending filing an application for stay pending appeal, where as the current application deals with extension of the 30 days leave granted. Due consideration has been given to the two rival arguments, and this Court finds that what was determined finally was 30 days stay of execution pending appeal in the Court of Appeal. The issue of extension of these 30 days stay was not and has not been an issue before nether has it been ruled upon and so it is a new issue. Being a new issue, it has not been finally determined by this Court and so Res judicata does not apply. This means that in preliminary objection is uprooted, the application objected to will be heard on merit.

On jurisdiction, the court notes that the objection has risen because this court made a final order granting the current applicant 30 days stay pending, presentation of an application for stay pending appeal to the Court appealed to. The said application has indeed been presented to the Court of Appeal and it is pending adjudication. The stand of the objector is that this courts role has ended. It is therefore finctus officio. While the applicant says No. Before determining the issue, it is proper to set out principles of law as regards issues of jurisdiction.

This court had occasion to make observation on the issue of jurisdiction in the very ruling delivered herein on 8.05.08. At page 26 line 3 form the bottom, this Court, quoted with approval from the Court of Appeals decision in LILIANS VERSUS CALTEX OIL (K) LTD [1989] LLR (CAK). In the said case at page 9 lines 13 from the bottom. It is observed "*by jurisdiction is meant, the authority which a court has to decide matters that are litigated before it, or to take cognizance of the matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charger or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limits is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the action and matters of which the particular court has cognizance or as to the area over which the jurisdiction shall extend or it may partake of both these characteristics ….. The court or the tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction ……. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. …. Jurisdiction is everything without it a court has no power to make one more stop. Where a court has no jurisdiction there would be no basis for a continuation of proceeding and providing of other evidence. A Court of Law does downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".*

The case of DESAI VERSUS WARSAME [1967] 350 to the effect that no court can confer jurisdiction on itself.

The case of AIR ALFARAS LIMITED VERSUS RAYTHEON AIRCRAFT CREDIT COOPERATION AND ANOTHER [2000] KLR 624 where it was held inter alia that any issues regarding jurisdiction ought to be considered first so that in the event of that court coming to the conclusion that it has no jurisdiction, the intellectual exercise of going into the merits of the application would be futile.

The case of ESTHER WAMBUI MAHIA VERSUS GEOFFREY NJOGU KIMANI NAIROBI HCCC MISC. APP. 412 OF 2003 delivered on 6th day of June 2005 where at page 6 of the ruling line 5 from the top Mutungi J. observed thus "*To reiterate this court, must be properly moved, under the current legal provisions for it to have jurisdiction to grant the relief or the reliefs sought….*

Section 3A Civil Procedure Act Cap.21 Laws of Kenya applies where there are no specific provisions to the contrary….".

From the foregoing case law, jurisdiction is conferred by statute, charter or commission under which the court is constituted, and may be extended or restricted by the like means. The parties or litigants

right, power, and or authority to confer jurisdiction on the court is ruled out.

Section 60 (i) of the Kenya Constitution reads "*There shall be a high Court which shall be a superior court of record and which shall have unlimited original jurisdiction and such other jurisdiction and powers as may be conferred on it by this constitution or any other law"* This courts construction of this provisions is that this jurisdiction is not absolute. It is fettered, in that the jurisdiction to be exercised in that given to it by the constriction itself, and *any other written* law.

One such restriction or limitation or conferment of jurisdiction is that which is found in order 4` rule 41 Civil Procedure Rules, on the power to grant stay pending appeal and Section 3A of the Civil Procedure Act, on the exercise of its inherent powers.

The applicant invoked this order 41 rule 4(1) Civil Procedure Rules and Section 3A Civil Procedure Act seeking stay pending appeal. This court exercised that jurisdiction in the manner it did and granted stay only for 30 days under the order 41 rule 4(1) procedure. This court had jurisdiction to grant a conditional or none conditional relief it awarded a conditional relief.

The relief granted was granted by this court in its capacity as the Court appealed from. A reading of the said provisions reveals, that a decision by this court, whether favourable or not favourable is not a bar to the beneficiary from seeking favorable terms of the same relief from the court appealed to.

The applicant has already availed himself of that avenue and right. There is in place a notice of appeal to the court appealed to which was filed even before this court made the conditional relief. There is also an application for stay to the court appealed to awaiting adjudication. As to whether this court has power to extend the 30 days, conditional stay, pending the hearing of the application filed in the court of appeal, will depend on what the relevant statute say about it. The relevant statute are order 41 rules 4(1) civil Procedure Rules, Section 3a of the Civil Procedure Act, and the appellate jurisdiction rules.

Order 41 rule 4(1) Civil Procedure Rules reads in part…… *a decree or order appealed from except in so far as the court appealed to may order but the court appealed from may for sufficient cause order stay of execution of such decree or order and whether an application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty on application being made, to consider such application and to make such order thereon as may to it seem just, but application shall in every case be made in the first instance to the court from whose decree or order the appeal is taken and, any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such an order set aside".*

This court's construction of this provision is as follows:-

(i) There is no automatic stay of execution may it be on a first appeal or a second appeal.

(ii) There is a mandatory requirement that to avail himself/herself one must of necessity address the request for it to the court appealed from in the first instance.

(iii) As per order 41 rule (5) the request may be made informally immediately following the delivery of the judgment or ruling.

(iv) There is a discretion bestowed upon the court appealed from to order a stay of execution or not.

(v) The court appealed from has jurisdiction and mandate to order a stay of execution only for sufficient cause

(vi) Irrespective of whether a stay of execution has been granted, or refused by the court, appealed from, the intending beneficiary of the stay orders has a right to seek the same relief from the court appealed to. This arises in instances where the court appealed from either declined to grant the relief; or it grants the same on terms not favoruable to the beneficiary .

(vii) The jurisdiction of the court appealed to is invoked at the moment an application to that effect is made to the court appealed to.

(viii) Upon becoming seized of such an application for stay of execution the court appealed to has liberty to make such order thereon as may to it seem just.

(ix) The handing over of jurisdiction from the court appealed from to the court appealed to takes place or effect the moment an application is made by the intending beneficiary for stay of execution to the court appealed to.

(x) There is no mention in this provision that during the pendence of the disposal of the application presented to the court appealed to, any partly to the appeal is at liberty to come back to the court appealed from, to seek any relief in so far as the stay of execution orders either made or declined is concerned.

(xi) This courts assertion in number (x) above is confirmed by the fact that there is provision that "*any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate court to have such, order set aside*".

In view of the foregoing construction of the provisions of Order 41 rule 4(1) this court, is satisfied that the handing over session between this court as the court appealed from and the court of appeal as the court appealed to, took place and became effective the moment the applicant of the application objected to moved to the Court of Appeal and filed an application for stay. There is no provision for the said applicant to turn back to the court appealed from for a second bite of the issue of stay. Had this been the position, then there would have been no need for any person aggrieved by the stay order made by the court appealed from being directed to seek redress from the court appealed to as opposed to seeking redress from the court appealed from which court had in fact made the grieving orders

Despite the presence of order 41 rule 4(1) Civil Procedure Rules this court was urged to be guided by the case law as regards the granting of interim relief pending appeal in the wake of a dismissal order on the substantive prayer in the interim relief. ERINFORD PROPERTIES LTD CASE (SUPRA) and the A.N. NDAMBIRI AND CO. ADVOATES cases are of persuasive authority as one is from a foreign jurisdiction, where as the other one is from a court of concurrent jurisdiction.

On the other hand, the case of MADHUPAPER INTERNATIONAL LTD (SUPRA) and the case of KITUMA INVESTIMENTS LTD (SUPRA) are from the Court of Appeal of this jurisdiction and are therefore binding on this Court. In holding number 2 in the Madhu International Ltds case (supra), states "*it is preferable for the high court to deal with an application for injunction pending an appeal from its decision not so much as to protect the Court of Appeal from inconvenience, but more because the Court of Appeal would have the advantage of seeing what the high court judge made of the application. The judges of the High Court should take note of this concurrent jurisdiction which the two courts have and exercise theirs*".

Holding 1 on the other hand reads "*where a judge dismisses an application for interlocutory injunction, he had jurisdiction to grant the unsuccessful applicant an injunction pending an appeal against that dismissal and there is no inconsistence in doing so, as the purpose of granting the injunction would be to prevent the decision of the appellate court from becoming nugatory should the appeal succeed*".

Likewise in the Kituma Investments Limited case (supra) as noted earlier on the Court of appeal quoted with approval its own decision in the Madhu Paper International Limited at page 2 of the ruling thus "*It is preferable for the High Court to deal with such an application in any event not so much as to protect this Court from a sudden inconvenient, dislocation of its lists but more because this court would have the distinct advantage of what the judge made of it. The learned judge of the High Court should take note of this concurrent jurisdiction which the two courts have and exercise theirs … when a party is appealing, exercising his on doubted right of appeal the Court ought to see that the appeal in successful is not nugatory*".

*Of importance in these two passages from the decisions of the highest court of this land is first a determination of when this concurrent jurisdiction arises in the first instance. And in the second instance, a determination as to when and how it is exercised. In answer to the first question of when this jurisdiction rises, the court has no alternative but to go back to the provisions of order 41 to seek an answer. For the High Court the jurisdiction arises as provided for in order 41 rule (5) Civil Procedure Rules which reads "*An application for stay of execution may be made informally immediately following the delivery of judgment or ruling "where as for the court of appeal the jurisdiction arises in the first instance as per the provisions of order 41rule 4 which reads "*For the purpose of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the rules of that court a notice of appeal has been given"* Rule 74(1) of the appellate jurisdiction Act Cap. 9 Laws of Kenya reads "*Any person who desires to appeal to the court shall give notice in writing which shall be lodged in duplicate with the registrar of the superior Court.*

This court's construction of these provisions in line with the Court of appeal, decisions this Court is of the view that the jurisdiction of the high court on matters of stay pending appeal rises immediately a judgment or ruling is delivered and an aggrieved party by that decision decides to proceed on appeal and then proceeds to make either an oral application pending presentation of a formal application or foregoes the making of the oral applications and then presents a formal application in which he seeks exparte order of stay of execution pending hearing inter parties of the formal application.

Whereas the Court of appeal becomes seized of the said concurrent jurisdiction as soon as the notice of appeal is lodged in the Court of Appeal.

In this courts view the arguments of Counsel of the respondent to the Preliminary Objection tended to imply that both courts can deal with the matter simultaneously. As explained by this court when construing the ingredients of order 41 rule 4(1) above, the concurrent jurisdiction arises in that both the superior court as the court appealed from and the Court of Appeal as the Court appealed to have the power, mandate and authority to entertain an application for say of execution pending appeal. All that an intending beneficiary needs to do is to follow the steps set out in Order 41 rule 4(1) and (5) Civil Procedure Rules. That is:0-

(1) address it to the court appealed from in the firs instance either formally or informally. The applicant/respondent to this preliminary objection exercised that right by presenting a formal application disposed off in the ruling delivered on 8.05.08.

(2) The second step is that irrespective of the orders made by the court appealed from the litigant is at liberty to seek the same relief by way of a formal application being made to the court appealed to, seeking the same relief. In the circumstances of this case this happened upon the presentation of the formal application to the Court of Appeal which application is pending in disposal.

(3) As construed by this court when dealing with construction of order 41 rule 4(1) Civil Procedure Rules, the handing over of the jurisdiction occurs upon presentation of the application to the court appealed to for the same relief. This court noted that proof of the existence of the handing over of jurisdiction to the court to appeal occurs at this point, is proved by the fact that that any party aggrieved by the superior court or the court appealed from is directed to direct his/her grievances to the Court appealed to.

It therefore follows that a reasonable construction of the mentioned "*concurrent jurisdiction*" means that both the court appealed from and the court appealed to, have equal powers to grant a litigant stay pending appeal, and since the legal provisions provides that (order 41 rule 4(1)) requires that the application should go to the Court appealed from first, the call on the court appealed from is that when so made the court appealed from should make a concussive determination of that application and if so give reasons as to why it has either declined grant the same or as to why it has granted the same unconditionally. This would in turn assist the court of appeal when it becomes seized of the matters, to consider those reasons and arrive at its own conclusion either agreeing or disagreeing with the superior court or vary, set aside or impose its own terms completely. It also means that where the court appealed from makes an order or orders granting a stay pending hearing and determination of the appeal, where no party moves to the

Court of Appeal to upset them, such orders when so made will remain in force till the appeal is heard and determined. Likewise orders are made by the court appealed to and course no grievance to either party, and remain in force till the appeal is heard and finally determined both courts are deemed to have exercised their concurrent jurisdiction. The concurrency herein in the opinion of this Court, is to be limited to the ability of both courts to determine and make a pronouncement which are binding in so far as issues of stay of execution pending appeal is concerned. It dos not mean that both courts can handle the same issue at the same time. Had it been otherwise, there would have been no need for the rules committee in order 41 rule 4(1) Civil Procedure Rules to direct an aggrieved party to the Court of Appeal immediately after making provisions to the effect that not withstanding that, the court appealed from has made an order granting stay or not may by application, apply to the court appealed to, seek stay of execution pending appeal". and then immediately there after make provisions, that any aggrieved party may apply to the court appealed to is sufficient proof that once an application for stay pending appeal is presented to the court appealed to, the concurrent jurisdiction is handed over to the court appealed to by the court appealed from.

It is the finding of this court, hat this court is the court appealed from satisfied the ingredients in the two decisions relied upon by, making a pronouncement on merit on the issue of stay and providing inside as to some of the reasons which made it decline to make an order of stay pending appeal and made it run the full length of the stay pending hearing and determination of the appeal. This is found at page 27 of the ruling dated 8.05.08 at line 8 from the bottom.

It is observed thus "*If this same court ruled so earlier on (that the court had no jurisdiction and this point is being taken as an arguable point on appeal then the best forum to determine whether it is a valid ground for earning the applicant stay is the Court appealed to. This Court says so because where as it is limited to consider matters surrounding the circumstance that led to the making of the grieving orders intended to be appealed against, the Court of Appeal will be at liberty to review all that has transpired on the record including its own orders on the issue. Any attempt by this Court to delve into that will amount to trespass to the earlier order made by this court as it is not sitting on review of those orders and also a trespass to the Court of Appeals orders already in place*". Upon perusal of the said ruling, the Court of appeal will note that one of the reasons for this Court, as the court appealed from not granting stay to last till the final determination of the intended appeal was issues of lack of jurisdiction.

Having disposed off the issue of Res Judicata and jurisdictions, the court moves to determine whether this court can invoke its inherent powers to grant the extension sought. The relief sought to benefit from the courts inherent jurisdiction is prayer 2 and 3 of the application objected to. These read:-

"2. *Pending the hearing and determination of this application, the order of stay of execution made by Lady Justice Nambuye on 8th May 2008 be extended.*

3. pending the hearing and determination of Court of Appeal civil Application Number Nai 109 of 2008 (UR 66/08) the order of stay of execution made by Lady Justice Nambuye on 8th May 2008 be extended".

The reservoir for the Courts inherent jurisdiction of this court is section 3A,and Section 63 (e) of the Civil Procedure Act and case law. These two sections read:

"*3A Nothing in this Act shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the court. 63(e) make such other interlocutory orders as may appear to the Court to be just and convenient".*

Case law on the subject, has interpreted the extend to which the Court's inherent powers can be invoked and in what circumstances. In the case of WANJAU VERSUS MURAYA [1983] Kneller JA as he then was held inter alia that

"*section 3A of the Civil Procedure Act Cap.21 although saving the inherent powers of the court to make such orders as may be necessary for the ends of justice or to prevent the abuse of the power of the*

court should not be cited where there is an appropriate section or order and rule to cover the relief sought."

The case of MEDITERRANEAN SHIPPING CO.S.A. VERSUS INTERNATIONAL AGRICULATURAL ENTERPRISES LTD ETCO (MSA)LTD [1990] KLR 183 where Bosire J. as he then was(now JA) held inter alia also that "*It is now trite law that the inherent jurisdiction of the court should not be invoked where there is specific statutory provisions which would meet the necessities of the case.*

(2) Section 3A of the Civil Procedure Act ought not to be called into the aid of the litigant in all situations not specifically legislated for. It all depends on the circumstances of the case"

In the case of TANGU VERSUS ROTEL 1968 E.A. 618 where it was held inter alia that the courts inherent jurisdiction should not be invoked where there was a specific statutory provision to meet the case.

There is also the decision in the case of DEPOSIT PROTECTION FUND BOARD VERSUS KAMAU AND ANOTHER [1999] 2 EA (CAK67) where it was held inter alia that the inherent jurisdiction of the court may only be called into aid within the confines of the jurisdiction by statute on the administration of justice, but not the authority upon which to move the court for a remedy.

These decisions have to be considered along side the decision of MADHU PAPER INTERNATIONL LIMITED CASE(SUPRA) holding number in which reads "*where a judge dismisses an application for interlocutory injunction, he has jurisdiction to grant the unsuccessful applicant an injunction pending an appeal against the dismissal and there is no inconsistency in doing so as the purpose of granting the injunction would be to prevent the decision of the appellate court from being nugatory should the appeal succeed"*.

Also holding number 1 in the persuasive decision in the case of ERINFORD PROPERTIES LTD (SUPRA) to the effect that where a judge dismisses an interlocutory motion for an injunction he has jurisdiction to grant the unsuccessful applicant an injunction, pending an appeal against the dismissal. It is not necessary for the applicant to apply to the Court of Appeal. There is no inconsistence in granting such an injunction, after dismissing the motion, for the purpose of the order, is to prevent the Court of Appeal's decision from being rendered nugatory should that court reverse the judge's decision"

Applying the foregoing Courts decisions to the facts demonstrated herein, it is clear that this court had jurisdiction to make an interim protective measure to prevent the Court of Appeal's decision being rendered nugatory. In this Courts own opinion that jurisdiction was exercised and taken by declining to grant stay pending appeal but allowing a limited stay of 30 days pending the applicants presentation of an application seeking stay pending appeal from the court appealed to.

As for the exercise of the inherent jurisdiction of the court, the same is available to a litigant on condition that the following two conditions are met namely:-

(a) That there is no provision of law catering for the situation sought to be remedied.

(b) That the Court has jurisdiction to grant the same. When applied to the scenario herein, it is this courts view that the exercise of the inherent jurisdiction for the Court is not available to the applicant herein because:-

(i) There is in place provisions of law namely order 41 rule 4(1) Civil Procedure Rules covering that relief namely stay of execution pending appeal.

(ii) There is no jurisdiction on the part of this court to revisit that issue because as explained herein, this court handed over its jurisdiction to the Court appealed to, when the applicant presented to the Court of Appeal an application seeking the same relief in the first instance. In the second instance this Court is

incapable of making orders concerning a matter pending before the Court of Appeal. It is the Court of Appeal itself which now has authority to grant temporary orders of stay pending the hearing and determination of the said application inter parties. Any purported pronouncement on that pending application will be an exercise in futility.

Lastly although this was not raised as part of the objection this court, made observations of it in the course of disposing of the objection. This concerns the heading of both the application objected to as well as the preliminary objection itself.

The application objected to is headed Githara Chuchu & 473 others members of Gititu coffee Growers Cooperative society Ltd as Plaintiffs Versus Gititu Coffee Growers Co-operative Society Ltd as the first defendant and Kenya Planters Co-operative Union Ltd as the second defendant. There is no indication as to which of the said parties has made the application and which party is responding to it.

Likewise the heading of the preliminary Objection is also framed in a similar manner. It does not indicate which party is objecting, and which party is responding to the objection. Counsel for the 2nd defendant in the application objected to has correctly described himself as Counsel for the 2nd defendant applicant. Whereas counsel for the preliminary objector has simply described himself as advocate for the plaintiff/respondent with no indication that the same plaintiff/respondent to the application objected to is the one raising the preliminary objection.

This Court had occasion to rule on misdiscription of parties in its ruling delivered on 15th February, 2008 in the case of Murrithi Kamau and 3 others Versus Stanley Gathogo Gikonyo Nairobi C.A. No.81 of 2003. At page 3 of the ruling line 4 of from the bottom this court observed "*An application is a plea to the court for a specific relief, hence the need for a clear description of which party is seeking that relief and against whom especially in stances where there are multiple parties like in the instant case*". At page 4 the court went on to observe "*The counsels too should have described themselves properly to indicate which of them is appearing for which party*". At page 5 line 4 from the top it is stated "*The afore described defects are not curable under the provisions of order 50 rule 12 Civil Procedure Rules as they are not limited to failure to state rules under which application is brought. Neither are they curable under Order VI rule 12 Civil Procedure Rules which cures lack of form. They are fundamentally defective. As noted, an application like any other pleading known in law is usually a plea to the court, by a particular party to the proceedings against another particular party to the proceedings. It can never be granted clandestinely*".

In the cited own ruling this Court struck out the said application for misdscritpion but gave leave to the affected party to present a proper application.

Applying that to the facts herein a proper heading for the application objected to should have read:-

GITHARA CHUCHU & 473 OTHERS, MEMBERS OF THE GITITU COFFEE GROWERS CO-OPERATIVE SOCIETY LTD PLAINTIFFS/RESPONDENT VERSUS GITITU COFFEE GROWERS CO-OPERATIVE SOCIETY LIMITED 1st defendant KENYA PLANTERS CO-OPERATIVE UNION LIMITED 2nd defendant/applicant.

Whereas the heading of the Preliminary Objection should have read GITHARA CHUCHU & 473 OTHERS MEMBERS OF GITITU COFFEE GROWERS CO-OPERATIVE SOCIETY LTD – Plaintiffs/objector versus Gititu Co-operative Society Ltd 1st defendant, Kenya Planters Co-operative Union Limited ……2nd defendant/respondent.

Had the Court had jurisdiction to hear the application objected to, the same would have been struck out for misdescritpion of parties with leave to present a proper application with properly described parties. Likewise the preliminary objection is also a proper candidate for striking out for the reason that the parties are misdescribed. However since the court has ruled that it has no jurisdiction to entertain the matter, which in effect disposes off the preliminary objection, striking it out will not serve any purpose.

The court will therefore exercise its discretion and excuse the error as neither party was prejudiced by the said mis description.

In conclusion the preliminary objection succeeds in part on the following grounds:-

(1) the Preliminary objection save for the mis description of the objector and the respondent to the objection, which has been excused by the court, raised points of law outlined above and therefore satisfied the ingredients for raising a preliminary objection as established by the decision in the case of MUKISA BISCUITS COMPANY LTD VERSUS WEST END MANUFACTURING COMPANY LTD [1969] E.A.696.

(2) The issues raised and or sought to be canvassed in the application objected to are not Res Judicata because this court ruled and finally determined issues of stay, but did no finally determine issues of extension of the 30 days stay pending appeal, pending presentation of application for stay pending appeal to the court appealed to.

(3) This court has no jurisdiction to entertain the application objected to, because had there been jurisdiction for the court appealed from to revisit the issue after an application seeking the same had been presented to the court appealed to, the provisions in order 41 rule 4(1) would not have provided that "*any party aggrieved of such an order should apply to the court appealed to for setting aside*" By aggrieved party being directed to the court appealed to after presentation of an application to the court appealed to is recognition that from the moment of presentation of the application to the court appealed to a transfer of jurisdiction from the court appealed from to the court appealed to, takes effect.

(4) In this courts construction of the Court of Appeal case law on concurrent jurisdiction of the superior court and the Court of Appeal, on the granting of the relief of stay pending appeal, it does not mean that both courts can become seized of the matter, handle it simultaneously and rule on it differently at the same time. It simply means that both courts are competent to grant the relief in their respective jurisdictions. And as per the provisions of Order 41 rule 4(1) Civil Procedure Rules, if the superior Court is the one seized of the matter it can grant the stay of execution pending hearing and determination of the appeal. However where the superior court declines to grant the same or gives un favourable terms, the aggrieved party can move to the Court of Appeal and seek the same relief.

(5) Inherent jurisdiction of the court cannot be invoked by the applicant to oust this courts finding on lack of jurisdiction at it can only be invoked where no provision of law exists to cover that particular relief. Here in order 41 rule 4(1) covers the issue of stay pending appeal and when the court appealed from and that appealed to can become seized of the matter and exercise their jurisdiction over it.

(ii) It is also established by case law that it can only be invoked where jurisdiction to grant the relief sought exists. It in itself cannot be used as a base to anchor a remedy.

(6) The Plaintiff/Objector will have costs of the preliminary objection.

DATED, READ AND DELIVERED AT NAIROBI THIS 10TH DAY OF JUNE 2008.

R.N. NAMBUYE

JUDGE