



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT BUNGOMA  
MISC CIV APPLI 97 OF 2005**

**IN THE MATTER OF AN APPLICATION BY NZOIA SUGAR COMPANY  
LIMITED FOR AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL  
REVIEW  
AND**

**IN THE MATTER OF THE ARBITRATION ACT 1995  
AND**

**IN THE MATTER OF THE ARBITRAL AWARD DATED 24TH NOVEMBER  
1999 AND 23RD DECEMBER 1999, MADE IN ARBITRATION CAUSE NO.18 OF  
1988  
AND**

**IN THE MATTER OF THE CIVIL PROCEDURE ACT, CAP 21 OF THE LAWS  
OF KENYA  
AND**

**IN THE MATTER OF WARRANTS OF ATTACHMENT AND SALE ISSUED  
PURSUANT OF THE DECREE IN THE HIGH COURT MISC. APPL. NO.312 OF  
1999, BUNGOMA  
BETWEEN**

**NZOIA SUGAR COMPANY LIMITED ..... APPLICANT**

**VERSUS**

**1 THE ATTORNEY GENERAL.....1ST RESPONDENT**

**2 THE DEPUTY REGISTRAR**

**HIGH COURT OF KENYA, BUNGOMA.....2ND RESPONDENT**

**3 NZOIA OUTGROWERS COMPANY LIMITED....3RD RESPONDENT**

**RULING**

Nzoia Sugar co. Ltd., the applicant herein, applied for an order of stay of proceedings in this matter pending the filing, hearing and final determination of the intended appeal against this Court's order of 21st June 2005. The application is in a motion dated 5th July 2005 which is filed pursuant to the provisions of sections 8 and 9 of the Law Reform Act and under Order LIII of the Civil Procedure Rules.

The motion is opposed by Nzoia Outgrowers Co. Ltd., the 3RD respondent herein. There is no evidence that service was effected upon the 1st and 2nd Respondents. The 3rd Respondent has filed a preliminary objection and grounds of opposition to resist the motion.

Before considering the merits and the demerits of the motion let me set out the background of this dispute. In 1998 a dispute over arrears of payments in respect of sugarcane delivered to Nzoia sugar co. Ltd. arose between the applicant and the 3rd Respondent. Arbitration proceedings were commenced which gave rise to the arbitral awards of 23rd and 24th November 1999 in which the 3rd Respondent was awarded Ksh.475,655,799/= and costs of Ksh.6,613,675/=. The award was adopted as the order of this Court vide Bungoma H.C. Misc. application no.312 of 1999. A decree was issued on the 17th day of December 2004. Warrants of attachment and sale were issued on 22nd December 2004 to be executed by Siuma traders.

On 27th April 2005 the applicant was granted leave to institute judicial review proceedings in the nature of certiorari to remove into this Court for quashing the decree and the subsequent warrants of attachment and sale. The applicant was also granted leave to apply for orders of Prohibition to prohibit the 1st Respondent, Deputy Registrar of this Court, from issuing a decree which was inconsistent with the arbitral award and to further prohibit the 3rd Respondent from executing the decree. This court directed the aforesaid leave to operate as a stay hence effectively freezing any form of execution of the decree pending the filing of the substantive application.

When the 3rd respondent was served with the order of leave and stay, it promptly filed an application to set aside leave expressed in a motion dated 11th May 2005. The applicant then raised a preliminary objection against the aforesaid motion which gave rise to the ruling of 21st June 2005 in which the preliminary objection was dismissed. Being dissatisfied with that dismissal order, the applicant filed a Notice of Appeal to express its intention to challenge the decision in the Court of Appeal. That is the brief summary of the history of this matter.

Let me now consider the motion dated 5th July 2005. The applicant has urged this Court to stay proceedings in this matter until its intended appeal is filed, heard and determined. Mr Kibunja, advocate for the applicant, argues that the applicant is likely to suffer irreparable loss if the proceedings are not stayed because the 3rd respondent is likely to execute the decree. The learned advocate further argued that the intended appeal has high chances of success and that the same may be rendered nugatory.

On his part Mr. Masinde, advocate for the 3rd Respondent, urged this court to dismiss the motion for various reasons. First, it is argued that the applicant has not sought for leave to appeal and therefore the intended appeal is a non-starter in the absence of leave. Mr. Kibunja is of the view that since the preliminary Objection was raised under Order LIII of the Civil Procedure Rules one did not need to seek for leave because under Order XLII rule 1(1) e of the Civil Procedure Rules there was an automatic right of appeal. Secondly, that the applicant will not suffer substantial or irreparable loss because it can take advantage of section 34 of the Civil Procedure Act to seek for legal redress. Thirdly, that the application is meant to delay the matter. As far as I am concerned those were the main issues raised for and against the motion.

On the first issue as to whether or not the intended appeal would be rendered useless if the order of stay is not granted, I have considered the arguments for and against this ground. The applicant fears that if the application seeking to set aside leave is argued there is a likelihood that leave may be set aside and of course the stay orders would automatically go with it. That application is yet to be argued. I think the applicant's fears are purely pre-emptory. I do not think the applicant will suffer substantially neither will the appeal be rendered nugatory at this stage. If the application was made after the outcome of the motion dated 11th May 2005 I would have been persuaded by the applicant's arguments. Consequently I see no merit on that ground.

The second issue is whether or not leave is required for one to appeal against a decision arising out of a preliminary objection. To begin with, the Provisions of the Law Reforms Act and Order LIII of the Civil Procedure Rules do not provide for Preliminary Objections. Ordinarily the Court receives arguments for

and against preliminary points of law while exercising its inherent jurisdiction. The view I hold is that leave must be obtained first before one can claim to have a competent appeal or intended appeal against decisions arising from preliminary objections. In this case it is admitted that the applicant has not sought for leave to appeal against this Court's Order of 21st June 2005. It cannot therefore be said that the applicant has commenced the process to institute a competent appeal. It is not enough in circumstances of this case to show that one has filed a Notice of Appeal. One must also show that leave to appeal has been sought.

Lastly, the 3rd respondent has stated that the applicant is bent to delay the finalisation of this dispute. To be fair to the applicant, I think the 3rd Respondent has not satisfied me that there is evidence that the Respondent has schemes to have this matter delayed. I see no merit on this objection.

In the final analysis and for the above reasons the motion dated 5th July 2005 is dismissed with costs to the 3rd Respondent.

**Dated and delivered this 28th day of October 2005.**

**J. K. SERGON**

**JUDGE**

In the presence of Mr. Masinde for the Respondent.  
N/A for the applicant.