



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 656 OF 2016

COUNTY GOVERNMENT OF KAKAMEGA.....APPLICANT

VERSUS

UFANISI FREIGHTERS (K) LTD

TRAWLERS LIMITED.....RESPONDENTS

R U L I N G

1. There is before this court for determination of an application by Notice of Motion dated 15/12/2016 seeking orders that:-

i) That this Application be certified as urgent and service thereof be dispensed with in the first instance.

ii) That pending the hearing and determination of this Application, this Honourable Court be pleased to stay the enforcement and execution of the Ruling and Order dated 18th November 2016 in Mombasa CMCC No. 373 of 2016 Ufanisi Freighters (K) Ltd vs the County Government of Kakamega and Mombasa CMCC No. 374 of 2016 Trawlers Ltd vs The County Government of Kakamega.

iii) That pending the hearing and determination of the intended Appeal, this Honourable Court be pleased to stay the enforcement and execution of the Ruling and Order dated 18th November 2016 in Mombasa CMCC No. 373 of 2016 Ufanisi Freighters (K) Ltd vs The County Government of Kakamega and Mombasa CMCC No. 374 of 2016 Trawlers Ltd vs The County Government of Kakamega.

iv) That the costs of this Application be provided for.

2. Only Prayer 3 remains pending for determination by the court because prayers 1 & 2 have been spent by the time the application was heard *inter partes* . Although the application is expressed to be brought pursuant to the provisions of Order 4 Rule 6 and draft memorandum of Appeal annexed as “DSSS” there is no evidence that any appeal had been filed. Infact from affidavit in support at paragraph 6, it is apparent that no appeal has been filed. That paragraph reads:-

“That the Applicant intends and has instructed us to appeal on its behalf against the said Ruling in terms of the hereto annexed draft Memorandum of Appeal marked ‘DSS-5’ from

which it is evident that the Applicant has an arguable Appeal with a high chance of success and unless enforcement and execution of the lower Court's Ruling of 18th November 2016 is stayed the said Appeal will be rendered nugatory and result to great loss and prejudice to the Applicant".

3. That application was opposed by the Replying affidavit sworn by JUSTICE KENANI whose gist is that as there is no basis to grant an order of stay as there is no basis to establish whether there is an arguable appeal or indeed if there are prospects of the same being rendered nugatory.

4. In this court's opinion the provisions of order 42 Rule 6 can only be properly invoked where there is an appeal filed as defined by the Rules. Where there is no appeal filed there is no jurisdiction on the court to grant stay pending nothing.

5. Order 42 Rule 6 is worded in the following words:-

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the 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, 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 order set aside.

(2). No order for stay of execution shall be made under subrule

(1) unless (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay;

(b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

6. There is no appeal filed and it being conceded that there is none filed as yet, I think to grant any orders purportedly under Order 42 Rule 6 would be to act whimsically and capriciously.

7. The application is most mis-concerned, ill-founded and may be a clear case of an attempt to abuse court process. It is dismissed with costs to the Respondent.

Dated and delivered at **Mombasa** this day **10th** day of **March 2017**.

HON. P.J.O. OTIENO

JUDGE