

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 116 OF 2008

THE NAIVASHA MUNICIPAL COUNCIL.....APPELLANT

VERSUS

BENSON MUTURI KAMANDE

(Suing as the legal representative of the Estate

of Kimani Kungu alias Kamande Kungu – deceased).....RESPONDENT

RULING

The notice of motion dated 17/5/2013 was filed by Naivasha Municipal Council against Benson Muturi Kamande, legal representative of the estate of Kungu alias Kamande Kungu (deceased). The applicant prays that the judgment entered against the appellant/applicant on 11/4/2013 and the subsequent orders be stayed. The application is based on the affidavits of Felix Olweru, the Town Clerk of the applicant dated 17/5/2013 and 16/7/2013. He depones that they filed a notice of appeal dated 22/4/2013, against the judgment entered against the applicant on 11/4/2013; that the applicant's appeal has high chances of success and that if stay is not granted the applicant stands to suffer substantial loss and the appeal will be rendered nugatory. Mr. Olweru further deponed that the appeal arose from the judgment and decree of the Senior Principal Magistrate's Court, Naivasha dated 22/6/07 and the appeal dismissed on 11/4/2013; that a conditional order of stay was given on 15/10/08 in which the applicant was ordered to deposit Kshs.425,000/- in court and that the applicant did comply with the order; the conditional order of stay stayed the execution of the lower court judgment the mandamus orders issued on 29/7/2013 and warrant of arrest order issued on 9/9/08 and that all are to await the outcome of the appeal; that the respondent is not entitled to Kshs.1,386,782/- because the notice of motion to show cause was extracted based on wrong calculations and lastly that the applicant has not demonstrated that he is able to refund the decretal sum in the event the appeal succeeds. The applicant contends that the appeal was filed within time and hence there was no need to seek the leave of the court to file it.

In opposing the application, Benson Mburu Kamande, the respondent deponed that the court dismissed the appeal arising from the judgment of Senior Principal Magistrate's court Naivasha on 22/6/2007; dismissal was on 11/3/2013; that on 29/7/2008, the respondent had obtained an order of mandamus against the applicant in HMISC. 1046/07 requiring the applicant to settle the decree in Senior Principal Magistrate's Court within 7 days but the applicant failed to comply; that a warrant of arrest was issued on 9/10/08 against the Town Clerk of the respondent (BMK4) which has never been stayed or set aside; that this court gave conditional stay order on 15/10/08, upon the appellant depositing Kshs.425,000/- in court (BMK5) but there is no evidence of compliance; that the respondent is a practicing advocate and able to refund the decretal sum of Kshs.1,386,782/-; that the application is incompetent because the notice of appeal was filed after 14 days of the judgment, without leave of the court contrary to **Rule 74(2) Court of Appeal Rules** and that no draft memorandum of appeal has been annexed to the application for the court to determine whether or not there is an arguable appeal.

I have considered the affidavits and submissions by both counsel, Mr. Mburu for the applicant and Mr. Muturi for the respondent. The judgment in CA 115/08 written by J Ouko was delivered by J Emukule on 11/3/2013, which was a Monday. In computing the 14 days within which the applicant should have filed notice of appeal, the first day falls on 12/3/2013, a Tuesday. The last day on which the notice of

appeal should have been filed was 25/3/2013 which was a Monday. The notice of appeal was lodged in court on 29/4/2013, a Friday, 4 days after the time for filing of the notice of appeal had lapsed. Under **Rule 75** of the **Court of Appeal Rules 2010**, any person who desires to appeal to the Court shall give notice in writing to the Registrar of the superior court. **Rule 75(2)** provides that such notice shall be lodged within 14 days of the date of the decision against which it is desired to appeal. The time within which the notice was to be lodged having lapsed. There is no evidence that the leave of the court was sought before the said notice was filed. As a result, there is no competent appeal before this court upon which this application can be predicated. The instant application is therefore incompetent and can not stand. For that reason alone, I find it unnecessary to consider the merits of the application. The notice of motion dated 17/5/2013 is hereby struck out with costs to the respondent. It is so ordered.

DATED and DELIVERED this 14th day of February, 2014.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Kimathi for the appellant

Mr. Kiplagat for the respondent

Kennedy – Court Assistant