



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GICHERU, TUNOI & LAKHA, J.J.A.)

CIVIL APPLICATION NO. NAI. 181 OF 1998

BETWEEN

KENYA PORTS AUTHORITYAPPLICANT

AND

JAMES NDERITU GACHAGUA

T/AS "JAGAR CONSULTANTS"RESPONDENT

**(An Application in an intended Appeal from the Ruling of the
High Court of Kenya at Nairobi (Justice Mbogholi-Msagha)
dated 5th March, 1998**

in

H.C.C.C. NO. 2931 OF 1997)

RULING OF THE COURT

This is an application by the defendant for a stay of further proceedings in an intended appeal from an order of the superior court (**Mbogholi-Msagha, J.**) given on March 5, 1998 by which he dismissed the preliminary objection raised by the defendant and ordered the application for summary judgment filed by the plaintiff be argued.

By the action, the plaintiff claimed a sum of **K.Shs.97,283,585.85** against the defendant being the balance of Quantity surveying services rendered to the defendant by the plaintiff pursuant to his employment as a Quantity Surveyor in accordance with a letter of appointment dated September 6, 1994 from the defendant to the plaintiff which the plaintiff accepted by a letter dated September 17, 1994. Subsequent thereto, the plaintiff filed the Notice of Motion under **Order 35 rule (1)** of the Civil Procedure Rules for summary judgment in the sum claimed in the plaint. The defence raised and the learned judge determined as a preliminary issue the questions whether the action was properly constituted in view of the provisions of section 66 of the Kenya Ports Authority Act(**CAP. 391**) in that the plaintiff did not give due notice to the defendants before the institution of the suit and,secondly, whether the suit was not statute barred under the same Act. The learned judge dismissed the preliminary points of law. Being dissatisfied, the defendant duly filed a notice of appeal within the time prescribed by the Rules of this Court and moved this Court for a stay of proceedings pending the hearing of an intended appeal from the said decision.

The principles on which this Court grants a stay under **rule 5(2)(b)** of the Rules of this Court are now well settled. The Court has to be satisfied that the intended appeal is an arguable one and that the same will be rendered nugatory if a stay is not granted. Mr. Lumatete for the applicant was constrained to

concede, and, in our view rightly, that a Notice under **section 66** of the said Act had been properly given and the only point on which he sought to persuade us was that the learned judge erred in holding that the claim was not statute barred. In doing so, the learned judge held that the project for which the plaintiff had been appointed had neither been abandoned nor terminated. The Bills of Quantities that had been submitted by the plaintiff to the defendant were interim and part-payment thereof had been made. More importantly, the learned judge had relied on the admission made in the affidavit in reply sworn on behalf of the defendant that under the terms of the plaintiff's appointment there was a clear stipulation that fees shall only be paid at the construction stage which had not been reached and the defendant was further not liable to pay the plaintiff any fees as such fees were not payable under the terms of appointment. This is a clear admission that the project was still open and the time had not started to run against the plaintiff. The learned judge was not expected to ignore it. Nor can we.

It was sought to persuade us that the express statutory provisions of **section 66** of the said Act cannot be departed from. But where a party admits, as in the instant case, that fees have not become due, then, in our judgment, limitation cannot start to run.

In these circumstances, we are clearly satisfied that the judge may have been right in ruling as he did that the action was not time barred. The question is covered by the undisputed facts and admission on record and any appeal may be frivolous. The intended appeal cannot be said to be arguable. It is, therefore, unnecessary to decide the further condition that the success of the intended appeal would be rendered nugatory if stay is not granted.

We have had full arguments on this issue. The point is a short one and can be easily disposed of, and it would only be a waste of time and cause further expense to grant this application for a stay.

Accordingly, it follows that this application fails and is dismissed with costs.

Dated and delivered at Nairobi this 13th day of November,

1998

J.E. GICHERU

JUDGE OF APPEAL

P.K. TUNOI

JUDGE OF APPEAL

A.A. LAKHA

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR