**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: OMOLO, TUNOI & SHAH JJ.A)**

**CIVIL APPEAL NO. 163 OF 1996**

**BETWEEN**

**EUSTACE KAGAU KANGERWE.....APPELLANT**

**AND**

**WIYATHI EMBU SERVICES STATION (K) LTD.....RESPONDENT**

**AGIP (KENYA) LIMITED.....INTERESTED PARTY**

**(Being an appeal against the ruling and order of the High**

**Court of Kenya at Nairobi (Hon. Lady Justice**

**E. Owuor) dated 10th June, 1996**

**in**

**H.C.A. NO. 85 OF 1996)**

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**JUDGMENT OF THE COURT**

The litigation giving rise to this appeal commenced in the Senior Principal Magistrate's court at Embu on 22nd February, 1996. The suit at Embu was Civil Suit number 48 of 1996.F or ease of reference we will refer to the appellant before us as Mr. Kangerwe, the respondent, as Wiyathi and the interested party as Agip.

In the suit filed in Embu Wiyathi sought the following reliefs (inter alia):

1.That an injunction do issue restraining Agip from terminating the operators agreement between Wiyathi and Mr. Kangerwe and further that it be restrained from removing the equipments and or demolishing the buildings on plot No. 331/1112 Embu Municipality until further orders of the court.

2.That an injunction do issue restraining Mr. Kangerwe from leasing plot No. 331/1112 Embu Municipality to any other oil company apart from Agip and further be restrained (sic) from entering into an operators license agreement with either Agip or any other oil company without the approval and or consent of the directors of Wiyathi.

On 22nd day of February, 1996 M. Mutahi Esq. R.M. granted the reliefs ex-parte and ordered that the inter-partes hearing be on 8th March, 1996. It is clear that the strict requirements for grant of such reliefs ex-parte were not considered. Although this is now not in issue we would draw attention of the courts to the requirements of Order 39 rule 3(1) Oonf C1i5vtihl pArporcield,u re 19R9u6l es.t h e Magistrate, pursuant to a preliminary objection raised by Agip's advocate, ruled that he had no jurisdiction in the matter as the subject-matter in litigation was of value over the limit of jurisdiction. He then proceeded to set aside the ex-parte orders made on 22nd February, 1996. He dismissed the suit before him.

As soon as the Magistrate had delivered his ruling Mr. Kathurima for Wiyathi made an oral application "for preservation of orders of 22nd February, 1996" relying upon the case of Erinford Properties Ltd. vs. Cheshire County Council [1974] 2 All e.R. 448. The magistrate granted the application pending the hearing thereof "inter partes" on 19th April, 1996.

Whilst the application for "preservation of orders of 22nd February, 1996" was still pending for hearing on 19th April, 1996, Wiyathi filed an appeal int he superior court, against the ruling and orders of the magistrate on 17th April, 1996 and on the 18th day of April, 1996 obtained the following ex-parte orders from the superior.

1.That the present status quo be and is hereby maintained as far as the occupation and possession of the petrol station is concerned.

2.That this order is temporary and do remain in force until the 25th day of April, 1996.

3.That this application be served for mention inter partes on the 22nd April, 1996.

4.That the appellant be and is hereby granted leave to obtain photocopies of this order.

5.That costs be in this appeal.

On 19th April, 1996 when the said "preservation" application came up for hearing before the magistrate he washed his hands off the matter saying that he could not do anything as the High Court was already seized of the same and he dismissed the "suit" with costs.

The application in the appeal came up for inter-partes hearing before the superior court on 29th April, 1996 and the hearing thereof was concluded on 15th May, 1996. Wiyathi was the appellant in the superior court and Agip and Mr. Kangerwe were the respondents.

In a ruling delivered on 10th June, 1996 the superior court (Owuor, J.) ordered as follows:

"Therefore pending the determination of the appeal or other orders of the court the respondents or (sic) through their agents should not interfere with the suit property, buildings, fixtures or plant thereon or cause any disruption of the business carried thereupon. Both the respondents shall bear the costs of this appeal in equal shares. Orders accordingly."

These orders are the subject-matter of this appeal. The appeal has been ably argued by both counsel, that is Mr. Gatonye for the appellant and Mr. Kamau Kuria for the respondent. The grounds of appeal put in a nutshell amount to the following:

1.The superior court, in its appellate jurisdiction, could not grant an injunction, that court having held that it had no such jurisdiction.

2.There was no material evidence or circumstances which even or merits entitled Wiyathi to such orders.

3.No conditions were imposed on the injunction so granted.

The learned judge dealt with the issue of the powers of the superior court to grant injunctions in its

appellate jurisdiction admirably. Having considered cases like Western College of Arts & Applied Science vs. Oranga & Others [1976] Kenya LR 63 and Madhupaper International vs. Paddy Kerr & Others, Civil Appeal No. 116 of 1985 (unreported), the learned judge concluded that the superior court had no power to grant injunctions in its appellate (as opposed to original) jurisdiction.

The Western College case decided that an appellate court has no general inherent jurisdiction and that the High Court has no jurisdiction to grant injunctions pending the hearing and determination of an appeal to it from the subordinate courts. The Madhupaper International case decided (inter alia) that the High Court had power to grant a temporary injunction after dismissing an application or suit for injunction pending appeal to this court. The learned judge correctly directed herself and said:

"To my mind the principle does not confer jurisdiction as such to the High Court in its appellate jurisdiction."

Having properly held that she had no jurisdiction to grant such orders as sought in the appeal the learned judge proceeded to apply the principles which this court applies in granting or not granting a stay or an injunction under the court's jurisdiction conferred by rule 5(2) (b) of the Rules of the Court. The learned judge did so by applying the principles enunciated by this court in the case of Stanley Munga Githunguri vs. Jimba Credit Corporation Civil Appeal No. 161 of 1988, unreported, that is to say, that the appeal should not be frivolous and that if successful, that success would not be rendered nugatory.

The learned judge, after referring to the Githunguri case said:

"Considering the peculiar circumstances of this case and which I have gone into in a certain amount of details, I am of the view that the subject matter ought to be preserved pending the determination of the appeal....."

With respect the learned judge misdirected herself when she applied principles akin to those applied by this court under Rule 5(2)(b) of the rules of this court to the matter before her. In our view when she concluded that the superior court had no power to grant an injunction in its appellate jurisdiction she should have stopped there and dismissed the application.

The orders the learned judge made amounted to an injunction and not stay of execution and the learned judge was clearly wrong in making such orders.

Mr. Kamau Kuria for the respondent valiantly supported the ruling of the learned judge. After conceding that the word `injunction' does not appear in Order 41 rule 4 of the Civil Procedure Rules, Mr. Kuria argued that in view of the acceptance in Kenya of the ratio decidendi of Erinford Properties case there was no distinction between `stay' and `injunction', and that therefore the learned judge had jurisdiction to make the orders she did make. Mr. Kuria argued that the acceptance of Erinford Properties principle in Madhupaper International case amounted to an over-ruling of the decision in the Western College case. It is correct to say that the holding in Western College case insofar as it relates to the question of the High Court having no power to issue a temporary injunction after it has given judgment in a suit stands overruled in Madhupaper International case but the principle that the High Court has no power to issue an injunction in its appellate jurisdiction still stand good. Order 41 would have to be amended if the High Court was to have such powers.

Mr. Kamau Kuria's argument is attractive, that is to say, that the High Court in its appellate jurisdiction, can preserve the status quo pending appeal. Mr. Kuria was, to our minds, seen to be interchanging the word `injunction' with the word `stay' or the words "preserve the status quo". This cannot be correct. Mr. Kuria argued that the court was not dealing with a simple issue of language but broad jurisprudential issue and that the learned judge had recognized the jurisdiction to preserve the subject-matter of the appeal during its pendency.

But what did the learned judge do? After concluding that she had no jurisdiction to grant the injunction, she granted it by reference to preservation orders. So effectively she made orders which she herself had

stated she had no jurisdiction to make.

We allow the appeal on the first two grounds of appeal only, and; therefore, there is no need to consider other grounds of appeal. We set aside the ruling and orders of the superior court and substitute therefor the orders that the application dated 17th April, 1996 do stand dismissed with costs. The appellant will have costs of this appeal.

Dated and delivered at Nairobi this 21st day of November, 1996.

**R.S.C. OMOLO**

**.....**

**JUDGE OF APPEAL**

**P.K. TUNOI**

**.....**

**JUDGE OF APPEAL**

**A.B. SHAH**

**.....**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**