IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M. KARIUKI, MWILU & J. MOHAMMED, JJA)

CIVIL APPLICATION NO. NAI. 36 OF 2013

COAST WATER SERVICES BOARD ……..…..APPLICANT

AND

ENGINEER IDDI ALI MWASINA ……...…..RESPONDENT

(An Application for stay of execution pending lodging, hearing and determination of an intended appeal and for leave to lodge an appeal herein out of time from the Judgment and decree of the Industrial Court of Kenya, at Nairobi by the Hon. Lady Justice Wasilwa dated and delivered on the 23rd October, 2012

in

Industrial Cause 1332 of 2011)

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RULING OF THE COURT

1. **COAST WATER SERVICE BOARD**, the applicant herein comes to this Court vide the notice of motion dated 12th February, 2013 and filed herein on 15th February, 2013. It is an application seeking stay of execution pending lodging, hearing and determination of an intended appeal and for leave to lodge an appeal out of time from the judgment and decree of Wasilwa J delivered on 23rd October, 2012.

2. The motion is grounded on the basis that delay in proceeding appropriately was caused by inadvertence on the part of the applicant in not placing before the applicant?s chief executive officer a letter communicating the contents of the judgment, and that by the time the Chief Executive Officer of the respondent was made aware of the judgment, time for lodging the notice of appeal had long lapsed. The further ground is that the respondent would not suffer any prejudice by a grant of stay of execution and further that the intended appeal has „overwhelming chances of success?.

3. The supporting affidavit sworn by the chief executive officer merely reiterates and emphasizes the grounds in paragraph 2 above, only adding that a refusal of the orders sought would result in the applicant "*suffering irreparable loss and damage.*"

4. The respondent did not file any document in reply to the motion and similarly did not appear before us at the hearing of the same.

5. Learned counsel Mr. Stephen Okello appeared for the applicant and told us that his firm communicated the contents of the judgment to the applicant timeously but the applicant did not promptly act on the same thereby causing the delay. He described that delay as inadvertent and excusable. He described the intended appeal as not frivolous as they intend to show, at the hearing of the same, that the respondent having been recalled by the mother ministry, the applicant was not liable to him. Counsel added that unless stay of execution was granted, the applicant would suffer irreparable loss as the employment status of the respondent was unknown.

6. On the onset we wish to state that applications for extension of time to enable a party take a necessary step which it had failed to take is provided for under **Rule 4** of this Court?s **Rules** which the applicant has invoked. Further, applications under **Rule 4** are made before a single judge in chambers in the first instance. That is clear from the provisions of **Rule 53**

(1) of our Rules which we find expedient to reproduce hereunder:-

"53 (1) Every application other than an application included in sub-rule (2), shall be heard by a single judge:

Provided that any such application may be adjourned by the judge for determination by the court

(2) This rule shall not apply to –

(a) an application for leave to appeal;

(b) an application for a stay of execution, injunction, or stay of further proceedings;

(c) an application to strike out a notice of appeal or an appeal; or

(d) an application made as ancillary to an application under paragraph (a) or (b) or made informally in the course of a hearing (emphasis provided***)*** to show that it is mandatory to go before a single judge first who may adjourn the same to the court.

7. The reasons for that are easy to see, as under Rule 55 of the Rules then an applicant is given a second bite at the cherry for a reference, as an appeal of sorts. Rule 55 whose side note is titled "Reference from decision of a single judge" provides:

"55 (1) where under the proviso of section 5 of the Act, any person being dissatisfied with the decision of a single judge –

(a) –

(b) in any civil matter wishes to have any order, direction or decision of a single judge varied discharged or reversed by the court, he may apply therefor informally to the judge at the time when the decision is given or by writing to the Registrar within seven days thereafter

(2) At the hearing by the court of an application previously decided by a single judge, no additional evidence shall be adduced."

It then is clear that the application under Rule 4 for extension of time is prematurely before us and we may not lawfully consider the same, the same not having been considered by a single judge as required, or that judge having adjourned the same for determination by the court.

8. The preliquisite under **rule 5(2)(b)** is the filing of a Notice of Appeal. **Rule 5(2)(b)** explicitly provides:

"5(2)(b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, see **Oraro and Rachier Advocates v Co-operative Bank of Kenya Limited [1999] LLR**

1118 or Clarkson Notcutt (Insurance Broker) Ltd. v South Coast Fitness Center Civil Application No. Nai. 204 of 1995 or Trust Bank Ltd. and Anr v Investech Bank Ltd. and Others [1999] LLR 1124.

9. It is admitted that no Notice of Appeal was ever filed herein, consequently the notice of motion now before us is unprocedurally brought and no orders as sought may be granted. The motion is a non-starter on the two accounts stated in paragraphs 5, 6 and 7 herein above.

10. And there is more, although this is purely a matter of conjecture and immateriality. An applicant under **rule 5(2)(b)** of the **Rules** of court must simultaneously establish the twin preliquisites to benefit from the orders sought, which are that the intended appeal is arguable and not frivolous and that unless a stay or injunction is granted, the appeal or the intended appeal, if successful, would be rendered nugatory, see **Githunguri v Jimba Credit, Corporation Ltd (no. 2) (1988) KLR 838** and also **J. K. Industries Ltd. vs Kenya Commercial Bank Ltd [1982 – 88] IKAR 1088.** We heard submissions that were clearly premised on the principles of the grant of temporary injunctions as enunciated in **Giella v Cassman Brown (1973) EA 358** as to suffering irreparable loss, and not rendering the extended appeal nugatory which is what is relevant in this Court.

11. The application is evidently without merit and is for all the above reasons dismissed with costs.

12. The delay in rendering this Ruling was occasioned by an unfortunate mix-up where all the three judges files were inexplicably filed away in the archives before delivery. We most sincerely regret it.

Dated and delivered at Nairobi this 8th day of April, 2016.

G. B. M. KARIUKI

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

J. MOHAMMED

……

JUDGE OF APPEAL

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

REGISTRAR