



REPUBLIC OF KENYA

Court of Appeal at Nairobi

Civil Application 137 of 2012

MUNICIPAL COUNCIL OF MACHAKOS.....APPLICANT

AND

FRANCIS ALEXANDER KIMANGI MUINDI.....RESPONDENT

(Application for stay pending lodging, hearing and determination of an intended appeal from the ruling of the High Court of Kenya at Machakos (Makhandia, J.) dated 25th April, 2012

in

H.C.C.C. No. 23 of 2012)

RULING OF THE COURT

The applicant herein, namely Municipal Council of Machakos filed a notice of motion application dated 21st May, 2012 seeking orders of stay of the orders of mandamus issued on 25th April, 2012 by **Makhandia J.** (as he then was). The order of mandamus directed the Town Clerk of the applicant council to satisfy the decree in **H.C.C.C. No. 2630 of 1981**. The applicant further sought stay of the decree issued on 23rd December, 2012.

When the matter came up for hearing, **Mr. Wambua**, learned counsel for the applicant urged the Court to grant an order for stay on the reasoning that payment of the decretal sum would adversely affect the operations of the applicant and this would lead to its inability to render public service. He further argued that unless the order for stay was made, the appeal would be rendered nugatory.

Learned counsel for the respondent, **F. M. Mulwa** opposed the application on the ground that there was no arguable appeal.

Briefly, the facts of this case are that the respondent filed **H.C.C.C. No. 2630 of 1981** against the applicant. The suit was subsequently referred to arbitration by consent of both parties in 1987. An award in favour of the respondent was delivered on 20th March, 2008. The applicant sought to set aside the

award which application was dismissed on 29th June, 2011. Consequently, the award was adopted as judgment of the court.

Thereafter the respondent sought an order of mandamus to enforce the award. An order of mandamus was made on 25th April, 2012 by *Makhandia, J. (as he then was)*. The applicant was aggrieved by the order and proceeded to file a notice of appeal on 8th May, 2012, and has meanwhile brought the instant application.

The principles applicable to the determination of applications under **rule 5(2)(b)** of the Court of Appeal Rules are well settled as was observed by this Court in ***Ishmael Kagunyi Thande vs Housing Finance Kenya Ltd – Civil Application No. Nai. 157 of 2006*** (unreported)

'The jurisdiction of the Court under rule 5(2)(b) is not only original but also discretionary. Two principles guide the court in exercise of that jurisdiction. These principles are well settled. For an applicant to succeed he must not only show that his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of that appeal will be rendered nugatory.' (See ***Githunguri vs Jimba Credit Corporation Ltd. No.2*** [1988] KLR 838 & ***J. K. Industries Ltd vs Kenya Commercial Bank Ltd*** [1982-88].')

As to the issues of whether the appellant had an arguable appeal, we are constrained to determine the issue as the ruling of the superior court was not in the record of appeal. Mr. Wambua, learned counsel for the applicant explained that they had been unable to get the ruling as the file had been missing at Machakos court. It is noteworthy that learned counsel did not have a single letter addressed to the court over the unavailability of the file. Indeed, when asked if he had written to the court of the unavailability of the file, he indicated that he had done so but that the copies of such letters were in his office! As stated above, we are unable to determine arguability (or not) in the absence of the ruling. As to the issue of the matter being rendered nugatory, no reasons were given for this proposition. We were not told for example that the respondent is a man of straw and may not be able to refund the decretal sum in the event that the appeal is successful.

We accordingly dismiss the notice of motion dated 21st May, 2012 with costs to the respondent.

Dated and delivered at Nairobi this 1st day of March 2013

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

W. OUKO

.....
JUDGE OF APPEAL

F. SICHALE

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR