



**IN THE COURT OF APPEAL
AT KISUMU**

(CORAM: OMOLO, BOSIRE & NYAMU, JJA)

CIVIL APPLICATION NO. NAI. 85 OF 2011

BETWEEN

THE KISII MUNICIPAL COUNCIL..... APPLICANT

AND

MASOSA CONSTRUCTION COMPANY LIMITED..... RESPONDENT

(Being an application for stay of execution of the judgment and decree pending the lodging, hearing and determination of an intended appeal, against the decision of the High Court of Kenya at Kisii (Muchelule, J)

dated 23rd March, 2010

In

H. C. C. C. No. 67 of 2007)

RULING OF THE COURT

Kisii Municipal Council, the applicant herein, comes before this Court under Rule 5 (2) (b) praying for an order:-

“THAT pending the lodging, hearing and determination of the Applicant’s intended appeal, the execution of the judgment and decree made in Kisii H.C.C.C. No. 67 of 2007 dated 23rd March, 2010 be stayed.”

The judgment and decree referred to in the prayer was made by Muchelule, J in favour of Masosa Construction Company Ltd., the respondent herein. By that judgment the applicant had been ordered to pay to the respondent the sum of **Shs.15,556,986.70/-**, with interest thereon at court rates with effect from **26th November, 2002**, plus of course the costs of the suit. The respondent had claimed the money on the foot of two contracts entered into by the parties for the purpose of grading, widening and gravelling selected priority roads within the applicant’s jurisdiction. The first contract was completed and was virtually paid for except for some small amount which the respondent claimed was still outstanding at the time the suit was filed. The main dispute was over the second contract which the applicant now complains was illegal in some way.

After the decree was given, the applicant made an application for stay in the superior court and by its order of **16th September, 2010**, Makhandia, J directed as follows:-

“(a) The Defendant/Respondent (sic) shall pay directly to the Plaintiff/Respondent half of the Decretal sum of Shs.7,778,493.35 only within 30 days from the date of the delivery of this Ruling.

(b) The remaining balance of the decretal sum shall be paid and/or deposited into an interest earning account to be opened and operated in the joint names of the Advocates of both parties, within the next 30 days from the date of this Ruling.

(c) Upon compliance with this order, there shall be an Order of Stay of Execution of the judgment and Decree herein dated 23rd March, 2010 until the intended Appeal is heard and determined.

(d) Costs of this Application be borne by the Defendant/Applicant.”

So that the applicant has infact got an order of stay on certain conditions. As we have seen, that order was made on the **16th September, 2010**. Apparently the applicant has not complied with that order. It (i.e. the applicant) waited until the **21st March, 2011** when it drew up the present motion which was then lodged in the Court on **28th March, 2011**. That was a delay of some six months.

The motion is supported by the affidavit of one Jim Maina Chira, who describes himself as the Chief Executive Officer of the applicant. In that affidavit, he does not say why the applicant has not complied with the order of stay given by the superior court, and why there was a delay of some six months before coming to this Court after the conditional order of stay was granted.

Mr. Ogutu Mboya, the learned counsel for the respondent, conceded that the intended appeal is arguable at least on the issue of limitation. We see no reason to disagree on that point.

On the question of the appeal being rendered nugatory, the applicant has obtained an order of stay on certain terms. They have not complied with that order and in their application to this Court they are behaving as if the superior court’s order does not exist at all. The applicant cannot be allowed to do that, particularly after taking some six months before even attempting to comply with the order. In our view, the applicant has obtained an order of stay in the superior court and there is no reason for us to impose different orders. That being the view we take of the matter, the applicant’s notice of motion dated the **21st March, 2011** and lodged in the Court on the **28th March, 2011**, fails and we order that it be and is hereby dismissed with the costs thereof to the respondent.

Dated and delivered at Kisumu this 29th day of July, 2011.

R.S.C. OMOLO

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JUDGE OF APPEAL

S.E.O. BOSIRE

.....
JUDGE OF APPEAL

J. G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR