



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 81 OF 2003

BETWEEN

THE MUNICIPAL COUNCIL OF THIKA

**THE TOWN CLERK, MUNICIPAL COUNCIL OF
THIKAAPPELLANTS**

AND

**THE KENYA LOCAL GOVERNMENT WORKERS UNION, THIKA
BRANCH.....RESPONDENT**

**(Being an appeal from the ruling and order of the High Court of Kenya at Nairobi (Sheikh Amin,
J) dated 24th January, 2001**

in

NBI H.C.C.C. NO. 668 OF 2001)

JUDGMENT OF TUNOI, J.A.

I have had the advantage of reading in draft the judgment of Onyango Otieno, J.A. I agree with the reasoning and the conclusions reached by him and I have nothing useful to add.

Consequently, the order of the court shall be that the appeal lodged in this Court on 24th April, 2003, be and is hereby struck out with costs to the respondent.

Dated and delivered at Nairobi this 16th day of July, 2010.

P. K. TUNOI

JUDGE OF APPEAL

I certify that this is a
true copy of the original

DEPUTY REGISTRAR

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**(Appeal from the ruling and order of the High Court of Kenya at Nairobi (Sheikh Amin, J.) dated
24th January, 2001**

in

H.C.C.C. NO. 668 OF 2001)

JUDGMENT OF GITHINJI, J.A.

This is an appeal against an interlocutory order of the High Court (Amin, J.) granted on 24th January, 2001 in *High Court Civil Appeal No. 668 of 2000* allowing a chamber application dated 8th January, 2001.

The dispute between the parties relates to a resolution of **Municipal Council of Thika** (1st appellant) (Council) dated 29th August, 2000 to the effect that the employees of the Council who had participated in a previous strike sometime in September, 2009 be disciplined. The respondent **The Kenya Local Government Workers Union** (Union) filed *Civil Suit No. 864 of 2000* in the Chief Magistrate's Court, Thika (Suit) seeking two reliefs viz, firstly, a declaration that the resolution of 29th August, 2000 was a nullity, and, secondly, a permanent injunction to restrain the Council from implementing the resolution or sacking or victimizing the Council employees involved. Subsequently, the Union filed an interlocutory application dated 7th November, 2000 which resulted in an order dated 13th November, 2000 given by Mrs. Wamae, a Resident Magistrate. Although a copy of the chamber application has not been incorporated in the record of appeal, the extracted order, given on 15th November, 2000 has been filed. According to the extracted orders the union sought an order that:

“(a) The defendants, their agents, servants and workmen be restrained from implementing,

effecting, and or acting on the full Council resolution of 29th August, 2000 and or, any way suspending the plaintiff's workers and or withholding their wages till this suit is heard and determined and or until further orders of the court".

The application was allowed by consent on 15th November, 2000 to the extend and "in so far as it relates to taking disciplinary action against the Thika Municipal Council workers".

However, on 20th November, 2000 Betty Rashid, a Principal Magistrate gave an exparte order staying the consent order pending the hearing and determination of the application dated 28th November, 2000. Again, the copy of the latter application is not included in the record of appeal. On 6th December, 2000 the exparte stay order was vacated by P. N. Mugo, the Chief Magistrate pending the hearing of the application inter partes, the effect being that, the consent order of 15th November, could remain in force. The Council subsequently filed *Civil Appeal No. 668 of 2000* against the decision of the Chief Magistrate and on 27th December, 2000 obtained an order from the Resident Magistrate (Mrs. Wamae) staying execution of the order of 6th December, 2000 pending the hearing of the Civil Appeal. On 9th January, 2001 the Union filed an interlocutory application in the appeal under **Order XLI Rule 4 (1)** seeking an order that:

"(b) The orders of stay granted by the Resident Magistrate, Thika Law Courts CMCC No. 864 of 2000 on 27th December, 2000 be set aside and the consent orders of 15th November, 2000 remain in force".

The application was heard inter partes by Amin, J. who made an order on 24th January, 2001, thus:

Order: Application is well maintained. It is granted as prayed. The consent judgment is in place".

The Council has appeal with leave of this Court against that order. Although there are ten grounds of appeal, the Council in essence impugns the decision of the superior court on grounds of jurisdiction and competence of the application. Grounds 4 aptly reflect the nature of the appellant's main complaint, thus:

"4. The learned trial judge erred in not appreciating that he had no jurisdiction to hear the application before him when no appeal had been instituted in the superior court by the respondent against the decision of the Resident Magistrate dated 27.12.2000 ordering a stay of execution of the order of 06.12.2000"

Mr. Kahonge, learned counsel for the appellant submitted, among other things, that the application was incompetent as **Order 41 Rule 4 (1) Civil Procedure Rules (CPR)** does not allow a party to seek a stay of execution of an order on which it has not preferred an appeal, that the order which the superior court stayed was not the subject matter of the appeal and that in granting the order, the judge exercised original jurisdiction.

On the other hand, Mrs. Ngugi, learned counsel for the respondent contended that the judge had jurisdiction to make the order and that the appeal has no merit.

Order XLI Rule 4 (1) under which the application for stay of execution was made, and, on which the impugned order was made provides:

"No appeal or second appeal shall over as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made to consider such

application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside”.

It is clear from **Order 41 Rule 4 (1)** that the appellate court had both the jurisdiction to entertain an application to set aside an order of stay of execution of the order made by Wamae on 27th December, 2000 and also jurisdiction to set aside such an order.

Nonetheless the superior court had no jurisdiction to determine the entire appeal ostensibly through an application to set aside the order of the subordinate court. In addition to seeking an order for setting aside the order of stay, the Union also sought an order that “*the consent orders of 15th November, 2000 remain in force*”. The application omitted to state that the second order was sought pending the determination of the appeal. The result is that the order as granted by the superior court pre-emptorily determined the appeal. There was nothing else to be heard in the appeal after the superior court could order that the consent orders do remain in force without qualifying the duration of their efficacy. To that extent the superior court in my view exceeded its jurisdiction.

Moreover, the superior court did not deliver a ruling on the contested application containing at least the reasons for the decision. The one line order which the superior court made after hearing the application inter partes does not, with respect, amount to a judicial determination of the application.

Furthermore, the overriding objective of the *Appellate Jurisdiction Act* (Act) as stipulated in **Section 3A** of the Act as it relates to this appeal is a relevant consideration. By **Section 3B (1)** of the Act, the Court has a duty for purpose of furthering the overriding objective to handle the appeal for purpose of attaining, among other things, the just determination of the proceedings and the efficient use of the available judicial and administrative resources. The purpose of the suit instituted in the subordinate court almost 10 years ago was to pre-empt the sacking of the employees of the Council involved in a strike. The consent order of 15th November, 2000 which has given rise to several interlocutory applications and, which was reinstated by the superior court, was an interlocutory order intended to preserve the status quo pending the determination of the suit. In the Defence filed by the Union sometime in March, 2000, the Union averred, among other things, that the suit was incompetent as the Union had no power under the CPR to institute a suit on behalf of unnamed employees of the Council; that the jurisdiction to entertain a trade dispute was conferred on the Industrial Court; that the court had no jurisdiction to entertain the dispute, and, that the suit was overtaken by events as the resolution had been put into effect before the suit was filed. It is apparent that the parties have been litigating on interlocutory orders for the last 10 years and that the Union has taken no steps to prosecute the suit. Indeed, learned counsel for the appellant intimated at the hearing that after the services of the Council employees were terminated the Union filed proceedings in the Industrial Court; that the Industrial Court ultimately made an Award reinstating the Council employees; that the Council thereafter filed a Judicial Review application in the High Court to quash the Award and that the High Court has stayed the Award pending the determination of Judicial Review application.

The respondent’s counsel agrees that the current state of the dispute is as described and added that the Thika suit has apparently been overtaken by events.

It is clear that the Union has, for all intents and purposes, abandoned the suit in the subordinate court and has instead invoked the jurisdiction of the Industrial Court and has in addition obtained a favourable Award. The suit having been abandoned and another jurisdiction invoked, the interlocutory orders granted in the suit including the one under appeal are not longer valid as the substratum on which they were based is no longer there. The interlocutory orders cannot hang in the air. Furthermore, it is my respectful view that to allow the impugned order to remain in force when the Union has invoked another jurisdiction and obtained appropriate remedy is to allow a party to abuse the process of the court by litigating in two fora over same subject matter. This will also defeat both the overriding objective of the Act and the policy of the law that the court should not make orders in vain. It is just in the circumstances that the orders made by the superior court should be set aside with the result that there would be no positive order in favour of either party in the suit.

For the foregoing reasons, I would allow the appeal, set aside the order of the superior court with no orders as to costs.

Dated and delivered at Nairobi this 16th day of July, 2010.

E. M. GITHINJI

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JUDGE OF APPEAL

**IN THE COURT OF APPEAL
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(Appeal from the ruling and order of the High Court of Kenya at Nairobi (Sheikh Amin, J.) dated 24th day of January, 2001

in

H.C.C.C. NO. 668 OF 2001)

JUDGMENT OF ONYANGO OTIENO, J.A.

The appeal before us is challenging the order made by Amin J. on 24th January 2001. That order, which was very short, stated:-

“Application is well maintained (sic). It is granted as prayed. The consent judgment is in place.”

It was made upon an application dated 8th January 2001 and presented to the superior court on 9th January 2001 in Civil Appeal No. 668 of 2000. That appeal was against the decision of the learned Resident Magistrate at Thika in Chamber Summons apparently dated 7th November 2000 in which an order was entered on 15th November 2000 by consent of both parties as follows:-

“By Consent

Application dated 7th November 2000 be allowed in terms of prayer (c) in so far as it relates to taking disciplinary action against the Thika Municipal Council Workers. Costs be in the cause.”

Later on 27th December 2000, another order was made by the subordinate court. The application dated 7th November 2000 which is the genesis of the appeal was not included in the record of appeal. The Court brought this to the attention of Mr. Kahonge, the learned counsel for the appellant who conceded that it was not in the record of appeal but submitted that it was not a primary document. In my view, without that chamber summons, one would not be able to appreciate what prayer (c) sought and the limits of the order that was being sought in that prayer. As far as the matter that was before Amin J. was concerned, that application was of extreme importance as that chamber summons dated 8th January 2001 that was before him sought only one main order to wit:-

“That the orders of stay granted by the Resident Magistrate Thika Law Court in CMCC No.864 of 2000 on 27th December 2000 be set aside and the consent orders of 15th November 2000 remain in force.”

It was for all intents and purposes a pleading as far as the decision challenged in this appeal is concerned and would be a primary document for it would not be easy to make any informed decision without a sight of it. In my view, its omission from the record is fatal and cannot be cured. I would *suo moto* strike out the appeal.

In any event, the appeal, as I have stated, emanates from an interlocutory appeal to the superior court. We have been informed by both counsel from the bar, that since the decision complained of was made, the original case in Thika Resident Magistrate’s Court has not proceeded to hearing. Instead parties moved to Industrial Court which ordered reinstatement of the affected employees and the council then moved to the superior court and sought orders of review of the Industrial Court decision. That review application has not been heard and determined.

In that scenario, the matters in the subordinate court at Thika have since been overtaken by events and any decision this Court may make may very well be in vain. This, however is only an observation and is not to be treated as a reason for striking out the appeal.

The appeal dated 23rd April 2003 and filed on 24th April 2003 is struck out with costs to the respondent.

Dated and delivered at Nairobi this 16th day of July, 2010.

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL