REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Appli 66 of 2009 (UR 39/2009)

GIBSON NGIGI ………………………………………….. 1ST APPLICANT
ISSAC MAKAU ………………………………………….. 2ND APPLICANT

AND

TURF DEVELOPMENT ……………………………….. RESPONDENT

(Application for a stay of execution of the order of committal of the applicants to civil jail in an intended appeal from the Ruling and Order of the High Court of Kenya at Mombasa (Sergon, J.) dated 26th February, 2009

in

H.C.C.C. 485 OF 2000)
****

RULING OF THE COURT

Before us is a motion expressed to be brought under ***rule 5(2)(b)*** of the Court of Appeal Rules in which the applicants, ***Gibson Ngigi*** *(1st Applicant)* and ***Isaac Makau*** *(2nd Applicant),* seek orders that this Court do stay the orders of arrest and committal and/or sentence issued against them by the Hon. Justice Sergon on *26th March, 2009* in ***Civil Suit No. 485 of 2000*** pending the filing and determination of an intended appeal against that order. The applicants have also asked for the costs of this motion. This application is brought on the following grounds:-

> "***a. That the applicants being desirous of preferring an appeal have already filed a notice of appeal against the whole of the ruling and order of the court.***
>
> ***b. That the applicants have an arguable appeal and that the execution of the said order will render the appeal nugatory.***
>
> ***c. That the 1st applicant was not ever an Officer Commanding the Changamwe Police station at the time of the alleged contempt and there is great peril that the wrong person may be jailed to his irreversible detriment.***
>
> ***d. That the applicants are serving public servants employed by the Government of Kenya and providing valuable service to the public and their service delivery is bound to be gravely affected by the execution of the said order of committal."***

When the application was argued before us on *31st March, 2009* Mr. M. Njoroge appeared for both applicants, Mr. U. Khanna for 1st respondent and Mr. E.K. Wangila for the interested parties.

In his submissions, Mr. Njoroge contended that the applicants who are civil servants were strangers to the suit and that they did not deliberately disobey the orders. It was further submitted that the 1st applicant had already been transferred from ***Changamwe Police Station***. Mr. Njoroge further submitted that had the Attorney General been notified he would have appeared for both applicants in the superior court. We were told that the 1st applicant was not the ***Officer Commanding Station (O.C.S.)*** and hence that will be one of the grounds to be argued in the intended appeal. Mr. Njoroge pointed out that if this application is refused, then the applicants will have served the sentence imposed by the time the intended appeal is heard and determined.

On his part Mr. Khanna submitted that the dignity of the court was paramount and that his interest was that the court order be complied with. In Mr. Khanna's view, there can be no arguable appeal. However, Mr. Khanna asked us to grant the stay orders but make other directions. He, in fact, conceded that there was no way the 1st applicant could comply with the orders of the superior court.

The order that the applicants seek to stay was made by Sergon, J. on *26th February, 2009*. In concluding his ruling, the learned Judge said:-

> "***In the final analysis I am convinced the Respondents are in contempt of the Court orders. They are convicted and sentenced to serve 30 days in civil jail."***

What led to the foregoing was an earlier order made by Khaminwa, J. which order was couched in the following terms:-

> "*Upon reading the application presented to this Honourable Court on 13th May 2003 by the Counsel for the plaintiff under* ***section 3A*** *of the Civil Procedure Act, under* ***Order L, Rule 1*** *of the Civil Procedure Rules and upon reading the affidavit in support thereof sworn by Ashok Labshanker Doshi on* ***13th May, 2003*** *and the annexures thereto and upon hearing Mr. Ushwin Khanna of Kapila Anjarwalla & Khanna, Advocates for the plaintiff and Mr. Kalama, Advocate holding brief for Gikandi & Company Advocates for the 1st defendant* ***IT IS HEREBY ORDERED:***
>
> 1. ***That the plaintiff be and is hereby at liberty to demolish the wall which is erected along the boundary of the plaintiff's plot L.R.N.MN/V13458;***
> 2. ***that the officer commanding the police station at Changamwe do provide security to the plaintiff during the demolition exercise;***
> 3. ***That the costs of the demolition incurred by the plaintiff be assessed by the Taxing Master of this Honourable court and in any event be paid by the 1st Defendant together with the costs of the suit;***
> 4. ***That the 1st defendant do pay for the costs of this application."***

As can be seen from the above order, it was the ***Officer Commanding the Police Station*** at Changamwe who was to provide security to the plaintiff during the demolition exercise. The 1st applicant was **not** the ***Officer Commanding Police Station*** at Changamwe. The *2nd applicant* was the Chief of the area and he was not cited in the order of Khaminwa, J.

It is now an old hat that for the applicant to succeed in an application for a stay of orders or injunction under ***rule 5(2)(b)*** of this Court's Rules, he must satisfy the twin guiding principles that the intended appeal is arguable, that is that it is not frivolous and that unless a stay or injunction is granted the appeal or intended appeal, if successful, would be rendered nugatory – see ***GITHUNGURI V. JIMBA CREDIT CORPORATION LTD.*** *(No. 2) [1988] KLR838.* ***J.K. INDUSTRIES LTD. V. KENYA COMMERCIAL BANK LTD.*** *(1982-88) 1 KAR 1088 and* ***RELIANCE BANK (IN LIQUIDATION) V. NORLAKE INVESTMENTS LIMITED*** – Civil Application No. 98 of 2002 (unreported).

In this application, Mr. Njoroge raised one or two grounds which he contended would be raised in the intended appeal. It was contended that the applicants herein are civil servants who were not parties to the suit in the superior court. Indeed the 1st applicant was not

the ***Officer Commanding Station*** at Changamwe while the 2nd applicant was the Chief of the area.

We have carefully considered the history of this matter, the submissions made by counsel appearing and have come to the conclusion that while we are not dealing with the merits of the intended appeal, it can be fairly stated that it may be arguable whether the orders issued were directed to the applicants. It has been stated again and again that even one single arguable point would suffice the test of an appeal being arguable. But let it be known that an appeal being arguable does not mean the appeal that shall succeed.

On the nugatory aspect of this matter all we can say is that the applicants were ordered to serve ***30 days*** in civil jail. This means that by the time their intended appeal is heard and determined they will have served the ***30 days*** in civil jail if we refused to grant a stay. Consequently, if the applicants were to succeed in their intended appeal such success would be of no consequence to them as they will have completed their jail terms.

We reiterate that we are not hearing the intended appeal, but in view of our observations, can it be seriously argued that the intended appeal is frivolous and that the applicants would suffer no irreparable loss or injury if we refused to grant the orders sought? We do not think so.

For the foregoing reasons we allow this application and grant a stay of the orders made by Sergon, J. on *26th February, 2009* until the filing and final determination of the intended appeal.

Costs of this motion shall be in the appeal.

Dated and delivered at NAIROBI this 8th day of May, 2009.

P.K. TUNOI

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.O. O'KUBASU

....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR