



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

**Civil Appli 115 of 2009 (UR 74/2009)**

**TEA BOARD OF KENYA ..... APPLICANT**

**AND**

**GIDEON ASIRIGWA MBAGAYA ..... RESPONDENT**

*(Application for stay of execution pending the hearing and determination of Civil Appeal*

*No. 138 of 2007 against the Ruling of the High Court of Kenya at Nairobi (Nambuye, J)*

*dated 25<sup>th</sup> May, 2007*

**In**

**H.C.C. Suit No. 1292 of 2004)**

\*\*\*\*\*

**RULING OF THE COURT**

This being an application under **Rule 5 (2) (b)** of the Court’s Rules, the applicant, the Tea Board of Kenya, was obliged to satisfy the Court on two points, namely,

- (i) that it has an arguable appeal, i.e. one that is not frivolous;
- (ii) that if we do not grant to it the order of stay of the orders made by Nambuye, J on 25<sup>th</sup> April, 2007, the applicant’s Civil Appeal No. 138 of 2007, were it to succeed in the end, would have been rendered nugatory by the Court’s refusal to grant an order of stay.

By her order made on 25<sup>th</sup> April, 2007, Nambuye, J ordered the applicant to pay to Gideon Asirigwa Mbagaya, the respondent herein, a total of Kshs.941,708/- which the learned Judge found to have been admitted by the applicant as being due to the respondent. The respondent had sued the applicant for a total of Kshs.1,684,400/-, apparently on the basis that the money was due to the respondent as sitting allowance, lunch allowance, accommodation and traveling allowances. The respondent had been a member of the applicant’s board and he had complained that though he was a lawful member of the board, he had been wrongfully prevented from attending the meetings of the board and was not able to earn the allowances. The applicant filed a defence to this claim. The applicant denied that it owed the respondent the money claimed in the plaint. However, in an affidavit dated 6<sup>th</sup> March, 2006, one Phrasia

Wambui Mwangi who is the applicant's finance director stated as follows in paragraphs 8 and 10 of the said affidavit:-

***“8 THAT between 23<sup>rd</sup> April, 2004 and 31<sup>st</sup> December, 2004 the defendant held 3 (three) Board Meetings and 2 (two) Tender Committee Meetings which if the plaintiff had attended his total allowances would have been Kshs.245,000/- while in 2005, there were 8 (eight) Board meetings and 4 (four) Tender Committee Meetings which if he had attended he would have collected Kshs.696,708/-. Annexed hereto is my tabulation of the same, showing that the total amount of allowances he missed was Kshs.941,708/- and not the judgment sum of kshs.1,684,400/- ANNEXTURE E.***

***10. THAT I am advised by the Defendant's advocates on record and I verily believe the same to be true that although the plaintiff had a duty to tell the Court truth on oath he misled the Court into believing that:-***

- (i) he had suffered such loss as to entitle him to a declaratory order;***
- (ii) he had suffered such loss as to entitle him to an order of injunction;***
- (iii) he had suffered a loss as to entitle him to award of damages amounting to Kshs.1,684,400/- when the maximum amount he could have earned would be Kshs.941,708/-“***

The respondent and his counsel, Mr. Keyonzo, understood what was contained in these two paragraphs to mean that the applicant was admitting that it owed the respondent a total of Kshs.941,708/-. The applicant and its counsel, Mr. Omuga, contended that there was no such admission in the two paragraphs. Nambuye, J took it that the two paragraphs amounted to an admission and ordered the applicant to immediately pay to the respondent the sum of Kshs.941,708/- while the balance of the sum claimed in the plaint would go to trial. Mr. Omuga submitted before us that the issue of whether there was or there was no admission is an arguable one. In our respectful view, that issue is certainly arguable. We do not put it higher than that; it is to be remembered that an arguable point is not necessarily one that must succeed when the appeal is eventually heard and determined.

On the second point of whether the appeal will be rendered nugatory unless we grant a stay, we are satisfied that if we do not grant the stay sought, the respondent might not be in a position to refund to the applicant the sum of Kshs.941,708/- were he to be required to do so. It is true he retired from the civil service as a senior officer and though in paragraph 7 of his replying affidavit he says he owns several properties in Vihiga District and Kakamega town, he does not state what the properties are and their approximate valuation(s).

The applicant, on the other hand, has already offered security in the superior court and weighing one thing against the other we have come to the conclusion that we must grant to the applicant the order of stay as sought in paragraph 1 of the notice of motion. The bank guarantee already offered in the superior court by the applicant shall continue to be in force until the appeal is heard and determined or until further order of the Court. The order of stay is granted on those terms and the costs of the motion shall be in the appeal.

Dated and delivered at Nairobi this 5<sup>th</sup> day of June, 2009.

**R.S.C. OMOLO**

.....

**JUDGE OF APPEAL**

**E.M. GITHINJI**

.....

**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**