



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLI NO. 15 OF 2007 (UR. 13/2007)

REPUBLIC APPLICANT

AND

**THE MUNICIPAL COUNCIL OF
MOMBASA**

**THE MINISTER FOR LOCAL
GOVERNMENT**

UNIKEN MARKETING SERVICES LIMITED RESPONDENTS

EX – PARTE

ADOPT – A – LIGHT LIMITED

(Application for stay pending the determination of an intended appeal from part of the ruling of the High Court of Kenya

Mombasa (Maraga J) dated 5th January, 2007

in

H.C. MISC. C. APPLI. NO. 1015 OF 2006)

RULING OF THE COURT

This is an application by *M/s. Adopt – a – Light Limited* (Company) under *Rule 5 (2) (b)* of the Court of Appeal Rules for an order that:

“The nullification of the resolution of the first respondent dated 19th of June, 2006 and of the contract between the first respondent and the applicant entered on 26th June, 2006 be stayed pending the hearing and determination of the intended appeal”.

The applicant has filed *Civil Appeal No. 149 of 2007* against the decision of the superior court (Maraga J) dated 5th January, 2007 whereby the superior court on an application by *M/s. Uniken Marketing*

Services Ltd, (Uniken) granted an order of certiorari quashing the decision of the *Municipal Council of Mombasa* in the resolution of 19th June, 2006 and contract made pursuant thereto.

By the minutes of the meeting of the Municipal Council of Mombasa (Council), held on 19th June, 2006, the Council, approved the recommendations of its Tender Committee recommending five companies including the applicant company to assist the Council in street lighting. Subsequently, on 26th June, 2006 the company and the Council entered into a five year contract for the street lighting ahead of the hosting by the Council of the World Cross – Country Championships which were scheduled for 24th March, 2007.

By the said Agreement the company agreed to undertake the lighting of nine highways and streets and any other street or highway that might be agreed upon on the terms and conditions of the Agreement. By the terms of the Agreement, it was agreed that the company would recover its investment and other monies payable under the Agreement from advertising fees. The Company agreed to pay to the Council 50% of its advertising rate for the advertising products. It was further agreed that the Company would source for advertisers, negotiate and receive the advertising fees and thereafter pay to the Council the agreed fees of 50% of the Council's advertising rate.

On 9th November, 2006, Uniken filed a judicial review application seeking an order of certiorari to quash the entire decision of the Municipal Council of Mombasa made on 19th June, 2006 and the contract signed thereafter on 26th June, 2006 between the Council and the company to undertake street lighting and advertising on the grounds, *inter alia*, that the decision was *ultra vires* and in breach of **section 143** of the Local Government Act and **section 36** of the Exchequer and Audit Act requiring the invitation of tenders and competitive bidding for any goods and services procured by the Council. The Company and the other four companies whose applications had been approved by the Council in its minutes of 19th June, 2006 were joined in the application as interested parties. The application, as we have stated earlier, was allowed by Maraga J on 5th January, 2007.

Although the application for stay was served on all interested parties, it is only the advocates for the Council and Uniken who attended the hearing of the application.

The principles upon which this Court exercises its jurisdiction under **Rule 5 (2) (b)** of its rules are well known. It is original and discretionary. For the applicant to succeed, it must satisfy the two guiding principles that the intended appeal is not frivolous or is arguable, and that unless a stay is granted, the appeal or intended appeal, if successful would be rendered nugatory. Those principles will, of course, be considered against the facts and circumstances of each case – see *Githunguri vs. Jimba Credit Corporation Ltd (No. 2)* [1988] KLR 838 and *J. K. Industries Ltd. vs. Kenya Commercial Bank Ltd.* [1982 – 88] KAR 1088.

The application is supported by the lengthy affidavit of Esther Muthoni Passaris, the Managing Director of the Company and copious documents.

Having duly considered the supporting affidavit, the annexed documents, the submissions of Mr. Ongoya, learned counsel for the applicant and the draft memorandum of appeal and having regard to the fact that the appeal has already been lodged, we are satisfied that the appeal is indeed arguable.

However, Mr. Njoroge, learned counsel for Uniken raised the issue of the competence of the application and submitted that there is nothing to stay because the effect of the order of certiorari was to declare the contract null and void. He contended that what the court was being asked to do is to enforce an illegal contract which would be contrary to public policy.

This Court has only jurisdiction to grant the three interim orders specified in **Rule 5 (2) (b)** pending appeal, namely, a stay of execution, an injunction or stay of any further proceedings.

The applicant seeks a stay of the order of nullification of the resolution of the Council and the

nullification of the contract. The court has no such jurisdiction under **Rule 5 (2) (b)** to stay the nullification of the resolution and the contract. It can only stay the execution of the decree or orders of the superior court. The order of certiorari granted by the superior court is not capable of execution as the superior court did not order any party to do any thing or refrain from doing anything or to pay any sum other than costs. (See ***Western College of Arts and Applied Sciences vs. Oranga & Others*** [1976] KLR 63 at page 66 paragraph C – D). The applicant is not seeking stay of execution for costs.

Furthermore, the order of certiorari granted by the superior court quashing the resolutions of the Council and the Agreement is final and conclusive and took effect immediately. If the application is allowed the effect would be to reverse the decision of the superior court and legalise the resolution and the contract already nullified until the determination of the appeal. This Court has no jurisdiction at this stage to undo what the superior court has done. It can only reverse the order of certiorari upon the hearing of the appeal.

In the final analysis, we are satisfied that the application is incompetent. The application is accordingly, struck out with costs to the 1st respondent. We make no orders as to costs of the 3rd respondent as it was party to the impugned resolution and contract.

Dated and delivered at Nairobi this 8th day of February, 2008.

P. K. TUNOI

.....

JUDGE OF APPEAL

E. O. O’KUBASU

.....

JUDGE OF APPEAL

E. M. GITHINJI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR