



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civ Appli 7 of 2007

THE KENYA AFRICAN NATIONAL UNION APPLICANT

AND

THE ATTORNEY GENERAL 1ST RESPONDENT

THE MINISTER FOR TOURISM AND INFORMATION 2ND RESPONDENT

THE COMMISSIONER OF LANDS 3RD RESPONDENT

THE REGISTRAR OF TITLES 4TH RESPONDENT

THE COMMISSIONER OF POLICE 5TH RESPONDENT

(An Application for stay of proceedings pending hearing and determination of an intended appeal from the Ruling of the High Court of Kenya at Nairobi Constitutional Court (Nyamu, Ibrahim & Emukule, JJ) dated 29th November, 2005 In H. C. Misc. Application No. 128 of 2003)

RULING OF THE COURT

Miscellaneous Civil Application No. 128 of 2003 involving Kenya African National Union (KANU), the Applicant herein, and five named Respondents is still pending for hearing in the High Court. Miss Kilonzo, learned counsel for the Applicant, informed us that the matter pending in the High Court is listed for hearing on 9th February, 2007. By their Ruling dated and delivered on 29th November, 2006, three Judges of the superior court (Nyamu, Mohamed Ibrahim and Emukule, JJ) refused the Applicant leave to file and rely on a supplementary affidavit and to amend its statement of facts in support of the application pending for hearing in the superior court. By its present motion brought before us under Rule 5(2)(b) of the Court's Rules, the Applicant is asking us to stay any further proceedings in respect of the application in the superior court until its proposed appeal to this Court against the Ruling of 29th November, 2006 shall have been heard and determined. The Applicant filed its notice of appeal on 13th November, 2006 and for the purposes of an application under Rule 5(2)(b) of the Court's Rules, it is the notice of appeal which gives the Court the jurisdiction to hear and determine an application under the Rule. It is irrelevant whether or not an applicant has or has not obtained leave to appeal for Rule 74(4) of the Rules specifically provides that:-

“When an appeal lies only with leave it shall not be necessary to obtain such leave or certificate before lodging the notice of appeal.”

Accordingly, in the motion before us, we are not called upon to determine the issue of whether or not leave to appeal has or has not been obtained.

We assume in favour of the Applicant that it has an arguable appeal. It must always be remembered that an arguable appeal does not and cannot mean an appeal that is bound to succeed. If that were to be the position rarely would orders for stay, injunction and so on issuable under Rule 5(2)(b) would ever be issued. But the fact that an appeal or intended appeal is arguable does not, by itself, entitle a party to an order of stay such as is sought herein. Such a party must go further and show that apart from its appeal being an arguable one, unless an order of stay or an injunction is granted pending the determination of the appeal, if the appeal were to succeed, that success would have been rendered nugatory by the earlier refusal to grant the stay.

The Applicant is seeking a stay of proceedings in the superior court. The established legal position to be gleaned from a line of authorities such as KENYA COMMERCIAL BANK LTD. Vs. BENJOH AMALGAMATED LTD., Civil Application no. NAI 50 of 2001 (unreported) and SILVERSTEIN vs. CHESONI [2002] KLR 867. In the CHESONI case, the Court proceeded as follows:-

“----- . What will happen if we do not grant the stay sought is that the appeal in the High Court will be heard and may well be determined. But when the appeal already lodged is heard, determined and if it succeeded, what would automatically follow is that the proceedings in the High Court would have been rendered unnecessary, but an appropriate order for costs can be made to remedy that. However, the appeal in this Court would not have been rendered nugatory.”

We know that each case must depend on its own facts but in the present application before us, Miss Kilonzo did not point out to us any special factors which would distinguish the application from those in the previous decisions of the Court. The subject matter in dispute must of course, be some of the factors to be taken into account, but having done so, we think our decision must follow the principles already laid down by the Court and that being our view of the matter we order that the notice of motion dated 16th January, 2007 and lodged in the Court on 18th January, 2007 must fail and we order that it be and is hereby dismissed. The costs of the dismissed motion shall be costs in the intended appeal.

Dated and delivered at Nairobi this 8th day of February, 2007.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR