



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

**Civil Appli 106 of 2005**

**KARIUKI AND GATHECHA RESOURCES LTD ..... APPLICANT**

**AND**

**LUCKY SUMMER ESTATES LTD ..... 1<sup>ST</sup> RESPONDENT**

**GITATHURO KARIOBANGI CO. LTD ..... 2<sup>ND</sup> RESPONDENT**

**HURUMA KUGA NA GWIKA CO. LTD ..... 3<sup>RD</sup> RESPONDENT**

**NGUNYUMU HOUSING CO. LTD ..... 4<sup>TH</sup> RESPONDENT**

**(Application to stay the Orders of the High Court of Kenya at Nairobi (Kuloba J.) given on  
18<sup>th</sup> March 2003**

**in**

**H.C.C.C. NO.2587 OF 1994)**

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**RULING OF THE COURT**

The application before us is for various reliefs, and is expressed to be brought under **Section 5(2)(b)** of the **Appellate Jurisdiction Act Cap 9** of the Laws of Kenya “and all other enabling provisions of the Law”. The application is peculiar as in some prayers it seeks orders which this Court lacks jurisdiction to grant at this stage.

**Section 5(2)(b)** aforesaid provides:

“without prejudice to the generality of sub-section (1) rules of court for the Court of Appeal may be made for the following purposes –

(b) for regulating the right of practicing before the Court and the representation of persons concerned in any proceedings in the Court.”

Clearly the above provision does not empower this Court to:

(a) Grant a stay of execution of the orders of the Superior Court, which is what the applicant wants

us to do in his prayer (1) of the application.

- (b) Commit any person to civil jail for any failure to comply with any court orders as the applicant wants us to do.
- (c) Declare any suit res judicata and to strike it out which is what the applicant wants us to do with regard to **Civil Suit No.443 of 2004(OS)** instituted by Lucky Summer Estate Ltd. (1<sup>st</sup> respondent).
- (d) Grant orders directing that a **Certificate of Delay** which forms part of the record of appeal in **Civil Appeal No.72 of 2005** is adequate for purposes of that appeal.

We think that the provisions of the law the applicant had in mind are **rule 5(2)(b)** of the **Court of Appeal Rules**, which provides that:

“**5(2)(b)** in any civil proceedings, where a notice of appeal has been lodged in accordance with **rule 74**, order

a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.”

A litigant is obliged to cite the correct provision of the law under which he seeks the Court’s assistance. It is by citing the relevant provision that he or it invokes the jurisdiction of the court to grant him the orders he or it seeks. That is the more so because this Court’s jurisdiction is conferred by statute. The Court would, therefore, take a serious view, and may well strike out an application which totally omits or erroneously cites the relevant provision under which it is brought, unless the provision is clearly discernable from the nature of the application and causes no prejudice to the opposite side.

We do not understand what the applicant’s appeal or intended appeal is all about. What we can glean from the scanty material before us is that the applicant is aggrieved by an order of the Superior Court dated 18<sup>th</sup> March 2003, setting aside a taxation of costs “and any consequential and subsequent steps,” and also directing that a fresh taxation be undertaken “in accordance with the law and procedure ...” which order was made in Nairobi High Court Civil Case No.2587 of 1994. However, it is also clear from this application that the applicant also seeks an order from this Court striking out another **Civil Suit No.443 of 2004(OS)**, allegedly instituted by the 1<sup>st</sup> respondent. Yet there is no notice of appeal on record for either the appeal or intended appeal against the order vacating the taxation or with regard to the prayer seeking to strike out **Civil Suit No.443 of 2004 (OS)**, as it would appear to us that those are separate and independent proceedings.

In the circumstances the application is incompetent, because assuming the application was intended to be brought under **rule 5(2)(b)**, above, under that rule the applicant could only come to this Court after filing a notice of appeal as required by **rule 74** of the **Rules**, which it has not shown to have done. The application is accordingly struck out with costs to the 1<sup>st</sup> 2<sup>nd</sup> and 4<sup>th</sup> respondents.

**Dated and delivered at Nairobi this 5th day of May, 2006.**

**R.S.C. OMOLO**

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**JUDGE OF APPEAL**

**S.E.O. BOSIRE**

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**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

**I certify that this is**

**a true copy of the original.**

**DEPUTY REGISTRAR**