



**REPUBLIC OF KENYA**

**COURT OF APPEAL OF KENYA**

**AT NAIROBI**

**Civ Appli 242 of 2006 (UR.135/2006)**

**MOMBASA SEAPORT DUTY FREE LIMITED ..... APPLICANT**

**AND**

**KENYA PORTS AUTHORITY ..... RESPONDENT**

**(Application for stay of execution from the ruling and order of the High Court of Kenya at Nairobi  
(Ibrahim J) dated 21<sup>st</sup> August, 2006**

**in**

**H.C.MISC.APPL. NO. 759 OF 2004)**

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**RULING OF THE COURT**

This is an application under **Rule 5 (2) (b)** of the Court of Appeal Rules (Rules) for two orders that:

***“(a) That the orders made by the superior court on 21<sup>st</sup> August, 2006 dismissing the applicant’s suit in the superior court be stayed.***

***(b) That an order of stay be issued to prohibit the respondent from terminating the applicant’s lease in respect to part of the premises known as Old Buggage Hall erected on L.R. Mombasa Block 1/491 forfeiting the applicant’s lease to the said premises and/or interfering in any manner with the applicant’s possession of the premises”.***

The application is supported by the affidavit of Sanjay K. Vaya, a Director of the applicant company to which he has annexed the relevant copies of proceedings, ruling of the superior court and copies of the relevant documents.

The dispute between the parties relates to the termination of a lease of business premises granted by the respondent, Kenya Ports Authority (KPA), to the applicant for alleged breach of the lease agreement by failing to pay the rent as agreed. The brief background of the dispute is as follows.

By a Lease Agreement dated 27<sup>th</sup> July, 1998, KPA leased part of a building in L.R. No. Mombasa Block 1/492 to the applicant to be used as duty free facilities for a period of six (6) years and one month from 1<sup>st</sup> November, 1998 at a monthly rent of Shs.290,600/= escalating at the rate of 10% after initial 2

years period. The lease contained an option to renew for a further 6 years on mutually agreed rates and rent. The lease also contained a termination clause authorizing KPA to terminate the lease upon giving 30 days notice, if, among other things, the applicant defaulted in the payment of rent. By a Notice dated 31<sup>st</sup> December, 2003 KPA notified the applicant that the arrears of rent had accumulated to Shs.8,689,420/= and required the applicant to pay the arrears within 30 days and in default the lease would be treated as terminated. By a letter dated 12<sup>th</sup> January, 2004, the applicant disputed the rent arrears claimed but admitted owing Shs.4,687,132/= in rent arrears and the applicant requested KPA to withdraw the termination notice to enable the parties to settle the matter amicably. By a letter dated 27<sup>th</sup> May, 2004 the applicant informed KPA that the outstanding rent had been agreed between the applicant and KPA's Revenue Accountant at Shs.6,515,258/= for the period up to 30<sup>th</sup> June, 2004 after reconciliation and forwarded a cheque for Shs.1,000,000/= proposing to pay the balance of Kshs.5,515,258/= by six equal monthly instalments.

It seems that the proposal was not accepted and by a letter dated 31<sup>st</sup> May, 2004, KPA rejected the applicant's application to renew the lease and informed the applicant that the lease would expire by effluxion of time on 27<sup>th</sup> August, 2004 and further asked the applicant to hand over the premises on that date. On 16<sup>th</sup> June, 2004, the applicant filed *Miscellaneous Civil Application No. 759 of 2004* in the superior court seeking leave under **Order LIII** of *Civil Procedure Rules* to apply for judicial review and an order that the grant of leave do operate as a stay of all decisions made by KPA. The superior court granted leave to apply for judicial review and further ordered that the grant of leave do operate as a stay upon condition that the applicant pays the admitted arrears of rent of Shs.4,687,132/= on or before 30<sup>th</sup> June, 2004. Subsequently on 25<sup>th</sup> June, 2004, the applicant filed an application for judicial review seeking:

- (a) An order of certiorari to bring to the court and quash the decision made by KPA by letter dated 31<sup>st</sup> December, 2003 seeking to terminate the lease.
- (b) An order of prohibition to prohibit KPA from enforcing the notice of termination of the lease,
- (c) An order of prohibition to prohibit KPA from making further decisions to terminate the lease, and
- (d) An order of mandamus directed to KPA to issue a renewal of the lease in accordance with the option to renew.

At the hearing of the application KPA raised a preliminary objection to the application on the main ground that:

***“(1) THAT these proceedings are wholly misconceived as the matters with respect to which prerogative relief is sought i.e. the enforcement of alleged private contractual obligations cannot be the subject matter of a judicial review application”.***

On 21<sup>st</sup> August, 2006, the superior court upheld the preliminary objection with costs, holding that it had no jurisdiction to entertain the application or to grant the remedies of certiorari, prohibition and mandamus. As a consequence the application for judicial review was struck out with costs and the order of stay discharged.

In upholding the preliminary objection, the superior court said in part:

***“Even though the respondent is a public body, the matter in dispute herein can only be resolved in civil proceedings. The applicant has private law remedies and it was wholly unnecessary to invoke the court's judicial review jurisdiction. Strictly speaking disputes under the lease herein are not justiciable or amenable to judicial reviews (sic)”.***

The applicant has filed a Notice of Appeal.

The respondent, KPA, has revealed in the replying affidavit to the application before us, that subsequent to the filing of the judicial review application in the superior court the applicant has also filed a civil suit against KPA being *H.C.C.C. No. 1206 of 2004* in November, 2004 together with an application for interlocutory injunction which proceedings are still pending in court. A copy of the plaint and the application in the suit are annexed to the replying affidavit showing that in the suit the applicant seeks substantially the same reliefs as in the judicial review application.

Mr. Kalove, learned counsel for the applicant, submitted that the intended appeal raises serious legal issues including whether a preliminary objection is applicable to judicial review applications. He further contended that the lease granted the applicant exclusive rights, and that if stay is not granted and the intended appeal succeeds the applicant will lose that exclusivity.

Mr. Amoko, learned counsel for KPA, on the other hand, opposed the application on three grounds, namely, that this Court lacks jurisdiction to grant orders sought; that the application is a gross abuse of the process of the court and that the intended appeal is unmeritorious.

We will deal first with the issue of jurisdiction raised by Mr. Amoko. Mr. Amoko submitted without the aid of any authority that the order of stay of execution cannot be granted because the order dismissing the suit is a negative order which is not capable of execution. According to Mr. Kalove, the order of the superior court has a positive effect – the eviction of the applicant.

The issue whether a dismissal of a suit, results in an order which is capable of execution or which can be restrained by an order of injunction pending appeal, was considered by the predecessor of this Court in ***Western College of Arts and Applied Sciences v Oranga & Others*** [1976] KLR 63. In that case, there was a dispute between the parties about money lying in a bank account contributed by members of the public for construction of a college of technology. The appellant (WECO) filed a suit in the superior court claiming, inter alia, a declaration that the money in dispute “belong” to WECO and that WECO was entitled to operate the bank account. The superior court dismissed the suit with costs. WECO, thereafter, filed a notice of intention to appeal and subsequently applied in the appellate court under the then **Rule 5 (1)** of the Rules, for temporary injunction restraining the respondents from operating the bank account and a stay of execution until the determination of the appeal. A preliminary objection to the application was raised by the respondent’s counsel, inter alia, that the court had no jurisdiction to grant an order for temporary injunction pending appeal. The court agreed and held that it had no jurisdiction in its appellate capacity to order a temporary injunction pending appeal. Regarding the application for stay of execution, the court held that there was nothing in the judgment of the High Court other than an order for costs that could be enforced. The decision regarding the application for temporary injunction in that case is not relevant as it was made at the time when the Rules did not give this Court specific jurisdiction to grant an injunction pending appeal. Now **Rule 5 (2) (b)** gives jurisdiction to this Court to grant an injunction pending appeal. But the decision on the application for stay of execution is relevant. Law V.P. with whom the other members of the Court concurred said at page 66 paragraphs c, d:

***“But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit with costs. An execution can only be in respect of costs .....***

***In the instant case, the High Court has not ordered any of the parties to do anything, or to restrain from doing anything or to pay any sum. There is nothing arising out of the High Court judgment for this Court in an application for stay to enforce or to restrain by injunction”.***

The application was dismissed.

In ***Devani and 4 Others vs. Joseph Ngindari & 3 Others***, Civil application No. Nai. 136 of 2004, (unreported) an application was made in this Court under **Rule 5 (2) (b)** of the Rules for interim stay of execution of an order/decreed of the superior court dismissing an application for Judicial Review made

under **order LIII Civil Procedure Rules**. This Court found the application grossly incompetent saying:

***“By dismissing the judicial review application the superior court did not thereby grant any positive order in favour of the respondents which is capable of execution. If the order sought is granted it will have the indirect effect of reviving the dismissed application. This court cannot undo at this stage what the superior court has done.***

***It can only do so after hearing the appeal. It seems to us that the application for stay of execution of the dismissal order was not brought in error. It was designed to achieve that result which regrettably is impracticable”.***

That case was followed in ***William Wambugu Wahome and The Registrar of Trade Unions & Others***, Civil Application No. Nai. 308 of 2005 (unreported). The application under **Rule 5 (2) (b)** for stay of execution of the ruling of the superior court setting aside the grant of leave to apply for judicial review and order for leave to operate as a stay of the impugned decision was found incompetent for similar reasons.

In the latter case, this Court considered the characteristics of “execution” as envisaged by **Rule 5 (2) (b)** and said:

***“The order of 19.9.2005 did not grant the respondents any relief other than costs which can be enforced through execution. On the contrary the order in fact denied the applicant a relief in the sense that it struck out the application for leave and for an order of stay and set aside the leave and stay granted earlier. There is no judgment in favour of the respondents which is capable of enforcement by execution save for costs”.***

Those three decisions apply with equal force to the present application.

In this case, the superior court merely upheld the preliminary objection and as a consequence struck out the application for judicial review with costs. The order striking out the application is not capable of execution against the applicant. The applicant does not seek the stay of execution in respect of the order of costs.

Moreover, the order of stay sought in prayer (b) of the Notice of Motion is neither an order of stay of execution or stay of proceedings nor an order of injunction of the species envisaged by **Rule 5 (2) (b)**. We believe that we have no jurisdiction to grant such an order.

The orders sought do not relate to what the superior court decided and we are of the view that we have no jurisdiction to entertain the application.

That being our view, of the matter, it is not necessary to consider the application on the merits.

In the result, the application is dismissed with costs to the respondent.

**Dated and delivered at Nairobi this 17<sup>th</sup> day of November, 2006.**

**P. K. TUNOI**

.....

**JUDGE OF APPEAL**

**E. M. GITHINJI**

.....

**JUDGE OF APPEAL**

**J. W. ONYANGO OTIENO**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**