



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

Civ Appli 120 of 2005

KUTIMA INVESTMENTS LIMITED.....APPLICANT

AND

**MUTHONI KIHARA.....1ST RESPONDENT
COMMISSIONER FOR MINES & GEOLOGY..2ND RESPONDENT**

(Application for injunction pending the lodging and determination of an intended appeal from the Ruling and decree of the High Court of Kenya at Nairobi (Kihara Kariuki, J) dated 26th day of April, 2005

In

H.C.C.C. NO. 990 OF 1999)

RULING OF THE COURT

When this application under **rule 5(2)(b)** of the Court of Appeal Rules (the Rules), came before us for hearing, *Mr. Kibe Mungai* for **Muthoni Kihara** (1st respondent), raised, in *limine*, the question whether this Court should hear this motion when the orders prayed for had been granted by the superior court on the application of the applicant herein. He was supported on this by Mr. Rotich for the 2nd respondent.

It was common ground that after it filed this motion on 5th May, 2005, seeking principally an injunction under **rule 5(2)(b)**, above, **KUTIMA INVESTMENTS LIMITED** (the applicant) filed a similar application in the superior court on 9th May, 2005. *Mr. Raiji* who with *Mr. Rachuonyo*, appeared for the applicant explained from the bar that the applicant did this when it found that this Court could not hear this motion on a priority basis. The superior court heard the applicant's motion and on 19th September, 2005, granted the applicant the injunction it had sought in its application. Subsequently a hearing date for this application was fixed.

Mr. Kibe Mungai argued that proceeding with this application will be an abuse of the process of the court arguing that the applicant having got what it wanted both the motion in the superior court and this one became spent and this Court has nothing to hear. Mr. Rotich, agreed and himself submitted that, in his view, this motion is *re-judicata*.

Mr. Raiji did not agree. His view was that the applicant had a right to approach both the superior court and this Court, as it did, for orders of injunction. He cited this Court's decision in **MADHUPAPER INTERNATIONAL LIMITED V. KEN [1985] KLR 840**, in support. In our view, however, that case does not say that a party may concurrently proceed with two similar applications, one before the High Court, and the other before this Court. The court there, said:

“It is preferable for the High Court to deal with such an application, in any event, not so much as to protect this Court from a sudden inconvenient dislocation of its lists but more because this Court would

have the distinct advantage of what the Judge made of it. The learned Judges of the High Court should take note of this concurrent jurisdiction which the two courts have and exercise theirs”

In OTIENO V. OUGO AND ANOTHER (NO2)[1987] KLR 400 this Court held that the object of granting an injunction pending an appeal is to safeguard the rights of the appellant and to prevent the appeal if successful from being nugatory. The applicant got such an order from the superior court on the principle which Megarry, J propounded in ERINFORD PROPERTIES LTD VS. CHESHIRE COUNTY COUNCIL [1974] 2 ALL ER 443, which was cited with approval in MADHUPAPER INTERNATIONAL LTD case (supra). Megarry J. there said:

“When a party is appealing, exercising his undoubted right of appeal, the court ought to see that the appeal if successful is not nugatory”

The applicant having obtained an order of injunction in the superior court its rights were thus safeguarded. Those orders are still in place. Those rights are safeguarded whether or not this Court adds further orders for the same purpose. The general principle of law is that courts should not act in futility. An order of this Court in favour of the applicant will not add anything. But Mr. Raiji submitted that the order the applicant obtained, though made after an *inter partes* hearing of an application for it, has been challenged by the respondents and therefore, there is the possibility of it being set aside. Whether or not that order will be set aside is not at the moment for us to say. What we are competent to say is that as the position is at the moment, the superior court has exercised the jurisdiction, which it was perfectly entitled to exercise, of granting the applicant an order.

Although ordinarily, that motion having been filed after this one, should have been stayed to await a decision in this one, the decision is not rendered invalid for that reason alone, considering what we have said that the superior court had power to make the order. We agree that it will indeed be an abuse of the process of the Court to insist on proceeding with this application. The court must protect its processes from abuse. It has the jurisdiction to do so. The object underlying the principle of concurrent proceedings is to avoid recording or issuing conflicting decisions or findings on the same issues. There is no guarantee that this Court will come to the same conclusion as the superior Court did in the application before it.

In the circumstances, we do not think that this motion should be heard. The order made by the superior court is not interim. We were told that the court specifically stated that the order will remain in force until the final determination of the applicant’s intended appeal. That being the case no purpose will be served not only by hearing this motion but also in leaving it pending. It should therefore be and it is hereby ordered struck out. We, however, make no order as to costs, the respondents having not formally applied to have the motion struck out.

DATED and DELIVERED at NAIROBI this 8th day of December, 2006.

P.K. TUNOI

.....
JUDGE OF APPEAL

S.E.O. BOSIRE

.....
JUDGE OF APPEAL

W.S. DEVERELL

.....
JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR