REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, O'KUBASU & DEVERELL, JJ.A.)

CIVIL APPLICATION NAI 166 OF 2005 (100/2005 UR)

BETWEEN

COUNTY COUNCIL OF NAROK..... APPLICANT

AND

PALYASOI FARMERS CO-OPERATIVE SOCIETY.....1ST RESPONDENT

SAMWEL KIPKEMOI LANGAT.....2ND RESPONDENT

JONATHAN KIPKOROR BORE.....3RD RESPONDENT

NICHOLAS K. KIMETO.....4TH RESPONDENT

FRANCIS KIMUTAI MARITIM.....5TH RESPONDENT

STANLEY KIBET KIRINYET.....6TH REPONDENT

JOSEPH KIPKOSKE KILELE.....7TH RESPONDET

(Application for stay of the Orders made on the 14th June, 2002 in the High Court of Kenya at Nairobi (Justice Ojwang) pending determination of the appeal

in

H.C.C.C. NO. 664 OF 2005)
****

REASONS FOR THE RULING

The applicant, County Council of Narok, filed an application by way of notice of motion under rule 5(2)(b) of the Court of Appeal Rules (the Rules) seeking one main relief, viz:

"(a) That all further proceedings in Nairobi High Court CivilCase No. 664 of 2004 and the Orders made therein on 14th June, 2005 be stayed pending determination of the intended appeal."

hat application, which was under Certificate of Urgency, was filed in this Court on *17th June, 2005* and the same came up for hearing before us at Kisumu on 22nd June, 2005. We considered the rival arguments by counsel appearing for the parties, and dismissed the application. We now give reasons for the dismissal of that application.

The background to this matter is that on 2nd June, 2005 the respondents herein filed a plaint in the High Court in which they named the applicant herein as the defendant. On the same day that the plaint was filed, the respondents filed a chamber summons application stated to be brought

> ***"Under section 3A of the Civil Procedure Act Cap. 21 Laws of Kenya and Order XXXIX Rules 2(1) and (2) 3 and 9 of the Civil Procedure Rules; Section 70 and 75 of the Constitution of Kenya; Section 27 and 28 of the Registered Land Act Cap. 300 Laws of Kenya and all other enabling provisions of law."***

In that chamber summons application, the respondents sought the following orders from the superior court:-

> ***1. <u>THAT</u> service of this application be dispensed with in the first instance and the same be certified urgent and heard ex parte in the first instance;***
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> ***2. <u>THAT</u> the defendant/respondent, by themselves, their servants, agents including the District Commissioner Narok and the OCPD Narok or otherwise howsoever be restrained from harassing, intimidating, threatening, provoking, inciting, detaining, arresting, trespassing into, demolishing and burning the plaintiffs properties in Narok South, Narok formerly known as Enkaroni and Enekishomi Group Ranches or in any other manner whatsoever interfering with the plaintiffs/applicants, their agents or servants pending the hearing and determination of this application;***
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> ***3. <u>THAT</u> the defendant/respondent, by themselves, their servants, agents otherwise howsoever be restrained from interfering with the plaintiffs/applicants quiet and peaceable enjoyment of their property situated in Narok South Narok formerly known as Enkaroni and Enekishoni Group Ranches and interfering with the Plaintiffs/applicants quiet and peaceable enjoyment of the property including free and unhindered use and access of the said property pending the hearing and determination of this suit;***
>
> ***4. <u>THAT</u> directions be given regarding service of this application and summons on the defendant/respondent.***
>
> ***5. <u>THAT</u> this application be heard inter partes on such date and at such time as this Honourable Court may direct and in any event within 14 days.***
>
> ***6. <u>THAT</u> the costs of this application be awarded to theplaintiffs/applicants. "***

As the application was under certificate of urgency, it was placed before Ransley, *J. on 2 d June, 2005* who granted prayer 2 and directed that the application be heard inter partes on the *14th June, 2005.* It should be pointed out that the ex parte order granted by Ransley, J on 2nd June, 2005 was directed at County Council of Narok, the applicant herein.

On *13`h June, 2005* the matter was placed before Ransley, J who was informed that the respondent, (County Council of Narok), had failed to obey the court orders of 2^{n}d County Council of Narok v Palyasoi Farmers Co-operative Society & 6 others [20051 eKLR June, 2005 despite the order having been served on them on 3rd June, 2005. The learned

Judge directed that the application be heard on 14h June, 2005. Come the *14th June, 2005* and the matter was placed before Ojwang, J. On that day, the application of 2nd June, 2005 was to be heard inter partes but there was yet another application dated 10th June, 2005, also listed for hearing. This second

application (*dated 10th June, 2005)* sought the following orders from the superior court:-

> ***"3. THAT this Honourable Court be pleased to issue an Order that the actions of the Defendant, the County Council of Narok, from the 3rd of June, 2005 to date to forcefully invade, burn destroy and violently remain on the plaintiffs properties comprised in Title Number CIS-MA RA/OLOL UL UNGA/10463; CISMARA/OL OL UL UNGA/111831; CISMARA/ILMOTIOK/3747; CIS- MARA/OLOL UL UNGA/10130; CIS- MARA/OL OL UL UNGA/6942 and CIS- MARA/OLOL UL UNGA/6940 respectively situate at***
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> ***Narok South, Narok within the Republic of Kenya ("the suit Properties') are in contempt of the Order of the High Court made by Honourable Mr. Justice Philip Ransley on the 2nd of June, 2005 made herein and are therefore null and void.***
>
> ***4. THAT this Honourable Court be pleased to make any order it may deem fit to restore its authority against the County Council of Narok for being in contempt of this Honourable Court's orders of 2nd June, 2005."***

Mr. Kemboi, for the respondents herein, (the plaintiffs in the superior court) pointed out to the superior court that what was before the court was the chamber summons of 2nd June, 2005 which was coming up for inter partes hearing and the notice of motion dated *10th June, 2005* which was in respect of contempt proceedings.

Mr. Ngatia, for the applicant, (as the defendant) informed the court that he had a preliminary objection to raise as regards jurisdiction. He wanted the ex parte order issue County Council of Narok v Palyasoi Farmers Co-operative Society & 6 others [20051 eKLR on *2nd June, 2005* to be vacated. The learned Judge (Ojwang J), was then faced with two competing applications that afternoon. These were:-

> ***(a) the plaintiffs Notice of Motion which sought to invoke the court's contempt jurisdiction and***
>
> ***(b) the defendant's Notice of Preliminary objection, which sought to terminate the plaintiffs' application on the ground of jurisdiction.***

The learned Judge considered the rival arguments advanced by counsel appearing for the parties and came to the conclusion that the first application to be heard was the notice of motion dated *10`h June, 2005.* The record of the superior court states:-

> ***"COURT***
>
> ***1. This matter i.e. the Plaintiff's notice of motion of 10th June, 2005 be listed as the single item on the Cause List for the afternoon of 22"d June, 2005 (Wednesday).***
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> ***2. Defendant granted leave to file any necessary papers in response to the application by 20th June, 2005 with corresponding leave to the plaintiffs to reply appropriately, in time for the hearing.***
>
> ***3. Orders of 2nd June, 2005 extended until further orders of the Court (Next hearing date)':***

It was the foregoing orders that precipated the application for stay of proceedings which application we dismissed in Kisumu on 22"d June, 2005. The applicant filed a notice of appeal demonstrating its desire to appeal against that ruling of the learned judge of the superior court. It was the submission of Mr. Macharia, learned Counsel for the applicant, that the issue of jurisdiction ought to have been dealt with before the contempt proceedings. Mr. Macharia referred us to a number of authorities in support of his submission.

Mr. Katwa, for the respondents, opposed the application on the ground that the notice of preliminary objection was yet to be argued by the time the application was filed. It was Mr. Katwa's submission that the applicant came to this Court in anticipation that Ojwang, J. was likely to rule in a particular way in that the officers of the applicant would be committed to civil jail.

The way we see this matter is that the order of Ojwang, J. directed that the application for contempt would be heard before the issue of jurisdiction. There may be merit in the submission that the issue of jurisdiction should always be determined before any other matter since jurisdiction is crucial to any subsequent orders that a court may issue. But each case must be considered on its own peculiar circumstances. What had happened in the present case was that certain orders were made against the applicant and it would appear that the applicant, either deliberately or through inadvertence, failed to comply with the said orders. When the learned Judge directed that he would deal with the contempt application before the preliminary objection as regards the jurisdiction of the court, the applicant was dissatisfied with that decision and hence rushed to this Court with an application for stay of proceedings. The truth of the matter is that the applicant rushed to this Court because it was apprehensive that the superior court might order its officers to be committed to civil jail for contempt of the court order. We would however, point out that the learned Judge had not issued any order to commit anybody to civil jail. The application which was to be heard was intended to give the applicant the right to be heard and give an explanation as to what had led to the failure to comply with the court order. Here, it was the dignity and authority of the court which was in question. It is trite law that court orders must be obeyed even if they are to be challenged thereafter.

Taking into account the foregoing, we are of the view that it was necessary for the applicant to go back to the learned Judge of the superior court and explain what had led to what appeared to be disobedience of the court order or purge the contempt. Although the applicant acted under fear of its officers being committed to civil jail, perhaps after acceptable explanation to the learned Judge the issue of anybody being committed to civil jail might not arise so that even the intended appeal could as well be abandoned. We do not know. We leave all that to the superior court. In ***Judicial Commission of Inquiry into the Goldenberg Affairs & 3 Others v. Kilach*** [2003] KLR 249 this Court held that:

> ***"8. The court could not envisage a situation where a party would be allowed to go to the Court of Appeal before going to the judge who made the exparte order for an injunction with a view to persuading him to set aside the order.***
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> ***9. A party who asks the Court of Appeal for an order of stay of execution, or for an injunction, or a stay of any further proceedings must satisfy the court that:-***
>
> ***(a) the appeal or intended appeal is an arguable one not frivolous; and***
>
> ***(b) unless the court grants the stay or injunction the appeal or intended appeal would be rendered nugatory if successful."***

In the present application, assuming that the applicant has an arguable appeal would its intended appeal be rendered nugatory? We do not think so.

In ***Silverstein v. Chesoni*** [2002] 1 KLR 867 at pp.873-4 this Court in dealing with an application for stay of proceedings had the following to say:-

> **"On the second limb regarding whether the applicant's intended appeal would be rendered nugatory if it succeeded and we refused to grant a stay, we must point out that the appeal whose success would be rendered nugatory if we do not grant a stay is the appeal already filed in this Court, not the appeal pending in the High Court. On this aspect of the matter we think we must follow the decision of this Court in the case of Kenya Commercial Bank Ltd v Benjoh Amalgamated Ltd & Another Civil Application No. NAL50 of 2001 (29/2001 UR). That was also an application to stay the proceedings in the High Court pending the hearing and determination of an intended appeal to this**

Court. In its ruling regarding whether the intended appeal's success would be rendered nugatory if a stay was not granted, the Court stated as follows:

The onus of satisfying us on thesecond condition, that unless stay is granted, the intended appeal would be rendered nugatory, is also upon the applicant. In our view, it has unfortunately failed to discharge this onus. We remind ourselves that each case depends on its own facts and we find it difficult to be persuaded that the appeal on the facts of the present case would be rendered nugatory if a stay is not granted. The appeal may be heard and, ifsuccessful, the proceedings in the superior court would be determined in accordance therewith. The hearing in the superior court might have been unnecessary for which appropriate costs can be ordered but the appeal will not have been worthless. "

These remarks aptly apply to the application before us. 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.

The Court is not laying down any principle that no order for stay of proceedings will ever be made; that would be contrary to the provisions of rule 5(2)(b) of the Court's

own rules. But as the court pointed out in the case we have already cited, each case must depend on its own facts and the facts of this particular case before us, aswere the facts in the earlier case, do not show that the appeal will be rendered nugatory if we do not grant a stay. "

We are of the view that the application before us should be considered in terms of what we said in the **Silverstein** case (supra). Given the special facts of this case we considered that a refusal of a stay of all proceedings in the suit will not render nugatory the intended preliminary objection on the jurisdiction issue which can be taken if the applicants are dissatisfied with any decision of the superior Court on the contempt hearing.

It was for the reasons given herein that we dismissed the applicant's application.

Dated and delivered at Nairobi this 14`h day of October, 2005.

R.S.C. OMOLO

JUDGE OF APPEAL

E.O. O'KUBASU

JUDGE OF APPEAL

W.S. DEVERELL

JUDGE OF APPEAL

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

DEPUTY REGISTRAR