REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA AT NAIROBI

CIVIL APPLI 324 & 325 OF 2005

COUNTY COUNCIL OF NAROK) STANISLAS NYAGAKA ONDIMU) …….. APPLICANTS

AND

KALYASOI FARMERS CO-OPERATIVE SOCIETY LIMITED ……1ST RESPONDENT

SAMWEL KIPKEMOI LANGAT …… 2ND RESPONDENT

JONATHAN KIPKORIRI BORE …… 3RD RESPONDENT

NICHOLAS KIMETO …… 4TH RESPONDENT

FRANCIS KIMUTAI MARITIM …… 5TH RESPONDENT

STANLEY KIBET KIRINYET …… 6TH RESPONDENT

JOSEPH KIPKOSKE KILELE …… 7TH RESPONDENT

(Application for stay of the ruling and order of the High Court of Kenya at Nairobi (Hon. Justice Ojwang) delivered on 2nd December, 2005

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

RULING OF THE COURT

This ruling relates to the two applications (Civil Application No. NAI. 324 of 2005 and Civil Application No. NAI. 325 of 2005) heard on 9th December, 2005. The two applications were brought under rule 5(2)(b) of the Court of Appeal Rules under which the applicants, (Narok County Council and Stanislus Nyagaka Ondimu) were seeking a stay of proceedings and orders of the superior court. We must point out that there was an earlier application by Narok County Council, being Civil Application NO. NAI. 166 of 2005 in which the said County Council sought similar orders. That application for a stay of proceedings was refused and the reasons for that ruling of refusal were given on 14th October, 2005.

The background to what was before us on 9th December, 2005 was clearly set out in the Reasons For the Ruling delivered on 14th October, 2005. We need not repeat here what was said in that ruling except to highlight the following observations of this Court:-

“The truth of the matter is that the applicant rushed to this Court before it was apprehensive that the

superior court might order its officer 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 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."

We have considered the submissions by counsel and the various authorities cited to us and we are grateful for their industry in that regard. As regards the issue of stay of proceedings we can do no better than quote what was said in Silverstein v. Chesoni [2002] 1 KLR 867 at pp. 873-4 when this Court said:-

"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. NAI.50 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 the second 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, if successful, 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, as were the facts in the earlier case, do not show that the appeal will be rendered nugatory if we do not grant a stay."

We have carefully considered the matters raised in these two applications and taking into account the genesis of the matter we have come to the conclusion that the applications are for dismissing. We

accordingly order that the two applications be and are hereby dismissed with costs to the respondents.

Dated and delivered at Nairobi this 16th day of December, 2005.

P.K. TUNOI

……..……..

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