IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, GATEMBU & KANTAI, JJ.A)

CIVIL APPLICATION NO. 72 OF 2020

BETWEEN

UNITED MILLERS COMPANY LIMITED.....APPLICANT

AND

THE COUNTY GOVERNMENT OF KISII & 91 OTHERS.....RESPONDENTS

AND

THE COUNTY GOVERNMENT OF KISUMU & 3 OTHERS...INTERESTED PARTIES

(An application for injunction pending the hearing and determination of the intended appeal from the judgment of the High Court of Kenya at Kisumu (**F.A. Ochieng, J.)** dated 15th *April, 2020* in **HC Petition No. 6 of 2018**)

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RULING OF THE COURT

Before us is a notice of motion application dated 14th July, 2020 in which the applicant prays for a temporary injunction against the respondents and their authorized agents restraining them from impounding any motor vehicles belonging to the applicant and levying of distribution and or single business permit fees, stay of proceedings in Kisii CMCC No. 448 of 2017, Migori CMCC No. 441 of 2016 and Homabay PMCC No. 69 of 2016 pending hearing and determination of the intended appeal. The applicant further prays for substituted service of the application and the intended appeal upon the respondents and interested parties in any of the newspapers with wide circulation.

The application is brought under Rule 5(2) (b) of the Court of Appeal Rules and Sections 3A & 3B of the Appellate Jurisdiction Act and Article 159(2) (d) of the Constitution. It is premised on the grounds that: the impugned judgment has exposed the applicant to payment of multiple licence fees and charges to the respondents for the sale of its products in their counties thereby placing a high cost of doing business; the orders were made in total disregard of and contrary to Article 209(5) of the Constitution; the respondents and interested parties were imposing tax levies upon the applicant as a precondition of allowing its motor vehicles within their respective jurisdictions; that the fees legislated and charged by the respondents and interested parties amounted to double taxation; their actions were violating the applicant's constitutional rights to own and enjoy its economic activities and properties; was in

breach of the Constitution, the County Governments Act, the Statutory Instruments Act and detrimental to the national economic interest; they do not provide any services to the applicant to warrant imposition of taxes hence their actions amount to an abuse of law, power and unfair administrative action; the applicant's intended appeal has high chances of success and if the orders sought are not granted the intended appeal will be rendered nugatory; and finally, that the issues raised in the application and intended appeal concern public interest and having the same advertised will enable other interested parties who would want to participate in the proceedings be enjoined. The application was further supported by the affidavit of Kamal Narshi Punja Shah, the director of the applicant, in which he reiterated and expounded on the contents of grounds on the face of the application and argued passionately on the merits of the intended appeal.

We are not certain that the applicant served the application on the respondents and interested parties save perhaps the 21st respondent. The applicant from the face of the application seeks an ex-parte injunction as well as service of the application and record of appeal by advertisement. This would obviously suggest that the application has yet to be served on all the respondents and interested parties.

But for the 21st respondent it maintained that the application was incompetent, failed to meet the threshold for the grant of the orders sought under rule 5 (2) (b), of this court's rules and that the principles set down in the oft cited case of **Giella vs Cassman Brown (1973) EA 358** relied on by the applicant was inapplicable in an application of this nature in this court.

Rule 5(2) (b) under which this motion has been brought does not envision the grant of *exparte* orders, more so an exparte injunction and or stay of proceedings. It envisages that before such an orders are made, such an application be served and be canvassed inter partes before a determination is made either way.

We are satisfied that the applicant has not met the first requirement. Even if it had the applicant if successful in the intended appeal would easily be reimbursed the amounts it would have expended in the extra charges levied by the respondents and interested parties. In any event, even if the application was to be heard on merit, a prayer for injunction under Rule 5(2) (b) of this Court's rules does not follow the principles laid out in **Giella v Cassman Brown [1973] EA 358.** Yet this is the basis upon which the applicant has hinged its application. In **Ramco Investment Limited v Uni-Drive Theatre Limited [2014] eKLR** this Court stated thus:

"…we emphasize that whether the application is for a stay of execution, stay of further proceedings or injunction under rule 5 (2) (b), the principles and consideration set out earlier apply. An injunction under rule 5 (2) (b) does not follow the traditional consideration enunciated in the celebrated Giella V. Cassman Brown EA [1973] 358 even though it remains an invocation of the equitable jurisdiction of the Court".

Here the applicant has only to satisfy the twin principles as explained in the case of **Stanley Kang'ethe Kinyanjui v Tony Ketter & 2 Others [2013] eKLR** that the intended appeal is arguable; and if successful, it shall be rendered nugatory unless the orders sought are granted. It matters not that the application is at the exparte stage. By relying on the principles laid down in **Giella vs Cassman Brown** (supra), the applicant is way off the mark.

On stay of proceedings, such an order cannot be made exparte in our view. The effect of such an order will impact on the parties to those suits without having been given an opportunity to be heard. The applicant only served the 21st respondent but failed to serve the application upon the other respondents. The applicant has not explained why service was not effected on the said respondents or the effort made towards serving them before it could seek substituted service. See **Ephraim Njugu Njeru v Justin Bedan Njoka Muturi & 2 others [2006] eKLR** where the court stated that: "*Substituted service is resorted to after all reasonable and proper*

efforts have been made to trace the respondent but in vain."

It follows that the applicant ought first to approach this Court with an application for substituted service under Rule 17 of this Court's Rules. The applicant cannot purport to seek the said prayer under Rule 5(2) (b), sections 3A and 3B of the Appellate Jurisdiction Act or Article 159 (2) (d) of the constitution. In any event under Rule 53 of the Court of Appeal rules, an application for substituted service is heard by single judge of the Court. Being a jurisdictional question, we again entertain no doubt at all that we have no jurisdiction as a three judge bench to order for substituted service.

From the circumstances of the application before us, the applicant has not satisfied us to grant any of the orders sought in the application. The application therefore fails and is dismissed with costs.

Dated and delivered at Nairobi this 29th day of January, 2021.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. GATEMBU KAIRU FCIArb.

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR