



REPUBLIC OF KENYA

ENVIRONMENTAL AND LAND COURT

AT MALINDI

PETITION E11 OF 2020

**IN THE MATTER OF ARTICLES 3(1), 10, 19, 20, 23, 42, 69, AND 70 OF THE CONSTITUTION OF KENYA; AND
IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 42 OF THE CONSTITUTION OF KENYA; AND
IN THE MATTER OF SECTION 13 OF THE ENVIRONMENT AND LAND COURT ACT 2011; AND
IN THE MATTER OF SECTION 3 OF THE ENVIRONMENTAL MANAGEMENT AND COORDINATION ACT 1999; AND
IN THE MATTER OF: VIOLATION OF RIGHTS AND FUNDAMENTAL FREEDOMS**

BETWEEN

**OMAR SALIM MWAKWELI.....1ST PETITIONER/APPLICANT
DAVID PIA KATANA.....2ND PETITIONER/APPLICANT
KIBWANA MWIJUMA KIBWANA.....3RD PETITIONER/APPLICANT
MOHAMMED JUMA MGALA.....4TH PETITIONER/APPLICANT**

AND

**VIPINGO DEVELOPMENT LIMITED.....1ST RESPONDENT
NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....2ND RESPONDENT
KILIFI COUNTY GOVERNMENT.....3RD RESPONDENT**

RULING

This ruling is in respect of a Notice of Motion dated 31st August 2021 by the Petitioners/applicants seeking the following orders:

a) Spent.

b) The court be pleased to grant a stay of its decision issued on the 30th day of July 2021 pending the hearing and determination of an appeal to the Court of Appeal.

c) Spent.

d) The court be pleased to grant an injunction or an interim preservation order against the 1st Respondent herein, and its employees, agents, associates, officers of the company, and any other persons through which it may act, barring any dealings whatsoever including any modifications or construction of any kind on the suit land (Plot L.R. No. 4393/III/MN, Vipingo area, Kilifi County) pending the hearing and determination of an appeal to the Court of Appeal.

e) Consequent to the grant of the above orders, the court be pleased to grant such further orders or directions as may be

necessary to give effect to the foregoing orders as prayed.

f) Costs of the application be in the cause.

Counsel agreed to canvas the application by way of written submissions which were duly filed.

APPLICANTS' SUBMISSIONS

Counsel for the Applicants gave a brief background to the case and submitted that the Applicants filed a Notice of Appeal dated 30th July 2021 in respect of the ruling dated 30th July 2021. That which in effect if allowed then the Respondents would be restrained from dealing with the suit land pending the hearing and determination of the appeal.

Mr. Rosana further submitted that the Replying Affidavit filed by the 1st Respondent in response to the Application, is incorrect that the decision of the court on 30th July 2021 was in the negative hence no orders to enforce or to be stayed. It was counsel's submission that the determination of the court effectively extinguished the consent dated 15th February 2021 and filed in court on 16th February 2021 which terms were as follows: -

a) THAT the Application dated 26th January 2021 be and is hereby marked as settled and dispensed with. (spent)

b) THAT the status quo on the stay of any further action on the project by the 1st Respondent be maintained pending the hearing and determination of the petition.

c) THAT the petition do proceed to hearing as per the court's directions on 26th January 2021. (spent)

Counsel for the Applicant submitted that the Petition having been determined by the ruling dated 30th July 2021, clause 2 above of the consent effectively comes to an end thus allowing the 1st Respondent to deal with the property in any manner they wish because the filing of an appeal does not prevent them from doing so, hence the danger of environmental risk enumerated in the petition.

Counsel for the Applicant relied on the principles for grant of injunctions pending appeal and stated that the conditions for grant of injunction as enunciated in **Giella v Cassman Brown (1973) EA 358** would not be applicable herein due to difference of context- the circumstances herein show an appeal has been filed and therefore the prayers for stay and injunction pending appeal should be judged by the following two principles:

a) Whether the Applicant herein has an arguable appeal with good prospects of success.

b) Whether the Appeal will be rendered nugatory if the orders sought herein are not granted.

On the first issue, counsel submitted that the Applicant has filed a Notice of Appeal and relied on the case of **Kenya Tea Growers Association & another v Kenya Plantation and Agricultural Workers Union [2012] eKLR** where the court considered what an arguable appeal entails as:

"He (the applicants) need not show that such an appeal is likely to succeed. It is enough for him to show that there is at least one issue upon which the court should pronounce its decision."

Counsel submitted that the demonstration of even one arguable point is sufficient in favour of the Applicant as stated on ground 2 the *"the effect of the decision was that the Petitioners were in the wrong forum and should have pursued the alternative mechanisms, to wit, National Environment Tribunal, or the Complaints Committee."*

On the second issue on whether the appeal will be rendered nugatory if the orders sought are not granted, the applicant relied on the case of **Reliance Bank Limited vs Norlake Investments Limited (2002) 1 E. A. 227** where the court held that:

"What may render the success of an appeal nugatory must be considered within the circumstances of each particular case. The term 'nugatory' has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling."

Mr. Rosana also relied on the case of **Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR**, **Absalom Dora vs Jaibo Transporters [2013] eKLR** the court held that stay of execution pending appeal is discretionary but is designated to administer justice that the case deserves and not to introduce disadvantages of prejudice to a party.

Counsel therefore urged the court to allow the Application as prayed.

1ST RESPONDENT'S SUBMISSIONS

Counsel gave a brief background to the Petition that the petitioners claimed that the 1st Respondent failed to follow due process in procuring the Nema Approvals for its project on construction and operation of a bulk 22,000 MT liquefied petroleum gas (LPG) storage facility on its property land reference 4393/III/MN Vipingo Area, Kilifi County and claimed a breach of their right to a clean and healthy environment

contrary to the provisions of the Constitution.

The 1st Respondent filed its Preliminary Objection dated 18th January 2021 on the primary ground that the Court lacked the jurisdiction to hear and determine the Petition as the Environmental Management and Co-ordination (Amendment) Act, 2015 (hereinafter "EMCA ") provides that parties who are aggrieved by the decision of the 2nd Respondent to grant an EIA license seek redress from National Environment Tribunal (NET) or National Environmental Complaints Committee (NECC).

The Respondent averred in its Replying Affidavit sworn by Kenneth Mbae on 18th January 2021, the 1st Respondent provided proof that it followed all the steps required under EMCA and that the license was therefore issued procedurally. The court heard the Preliminary Objection and upheld the same striking out the petition which is the gist of this application before the court.

Counsel listed the following issues for determination by the court.

a) Is there a decision against which an order of stay can be made?

b) Have the Petitioners shown that it has an arguable appeal with reasonable prospects of success?

c) Will the Petitioners suffer substantial loss and will the appeal be rendered nugatory should the stay not be granted?

Counsel submitted that there is no order that was issued on the 30th day of July, 2021 against which an order of stay may be issued as the decision rendered by the court was that the Petition was dismissed in its entirety on the ground that the court lacked jurisdiction to hear and determine the petition. Further that the court informed the parties that the correct forum for the case is the National Environment Tribunal and the timelines for filing appeal when a party is aggrieved with the decision.

Mr. Musangi submitted on the question of whether or not there is a Judgment against which an order of stay and cited the case of **Western College of Arts and Applied Sciences vs. Oranga. [1976] KLR 63** as quoted in **Peter Anyang' Nyong'o & 2 others v. Minister for Finance & another [2007] eKLR**, where the Applicant (Weco) had sued the Respondent in the Superior Court to recover money lying in a bank account in the Respondents' name which Respondents claimed belonged to Sang'alo Institute of Science and Technology. The Court declined to grant an injunction or a stay of execution; Law V.P. said in that case at page 66 paragraph 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. Any 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 refrain 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.”

Counsel therefore urged the court to find that there are no orders to stay as the court dismissed the petition with no orders as to costs. Further that the court had not ordered the parties to do anything.

On the second issue as to whether the Petitioners have shown that they have an arguable appeal with reasonable prospects of success, counsel submitted that it has been over 120 days from the date of delivery of the Judgment and over 120 days from the date of filing the Notice of Appeal and the Petitioners are yet to file and serve their Memorandum of Appeal and that in the absence of a Memorandum of Appeal, the Petitioners have failed to meet this threshold.

Counsel relied on the case of Gideon Sitelu Konchella vs Daima Bank Ltd (2013) eKLR citing Mobil Kitale Service Station vs Mobil Oil (K) Ltd and Another (2004) eKLR as quoted in Victory Construction vs BM (a minor suing through next friend one PMM) (2019) eKLR where Kimaru J held that; -

“It is the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice by delay would be a thing of the past. Justice would be better served if we dispose of matters expeditiously. The overriding objectives of the Act and the Rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the Civil dispute governed by the Act.”

Mr. Musangi also submitted that the 1st Respondent has a right to enjoy the fruits of litigation as reiterated by Kuloba, J in Michira T/A Machira & Co. Advocates.

On whether the Petitioners will suffer substantial loss and whether the appeal will be rendered nugatory should stay not be granted, the 1st Respondent relied Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules and the case of Kenya Women Microfinance Ltd vs Martha Wangari Kamau (2020) eKLR where the court cited the case of Samvir Trustee Limited vs Guardian Bank Limited Nairobi HCCC 795 of 1997.

Counsel therefore urged the court to dismiss the application with costs as there is no order to be stayed and that the Applicant has not met the threshold for grant on injunction pending appeal.

ANALYSIS AND DETERMINATION

The issue for determination is whether there is any order to be stayed pending appeal and if so whether the Applicant has met the threshold for grant of injunction pending appeal. If the first question is answered in the negative, then there would be no need to proceed with the issue

whether the Applicant has met the threshold for grant of injunction pending appeal.

The background of this Petition has been elaborately stated that the Petitioners claimed that the 1st Respondent failed to follow due process in procuring the Nema Approvals for its project on construction and operation of a bulk 22,000 MT liquefied petroleum gas (LPG) storage facility on its property land reference 4393/III/MN Vipingo Area, Kilifi County and claimed a breach of their right to a clean and healthy environment contrary to the provisions of the Constitution.

The 1st Respondent filed its Preliminary Objection dated 18th January 2021 on the primary ground that the Court lacked the jurisdiction to hear and determine the Petition as the Environmental Management and Co-ordination (Amendment) Act, 2015 (hereinafter "EMCA ") provides that parties who are aggrieved by the decision of the 2nd Respondent to grant an EIA license seek redress from National Environment Tribunal (NET) or National Environmental Complaints Committee (NECC). This led to the filing of a Preliminary Objection by the 1st Respondent which was upheld by this court dismissing the Petition for lack of jurisdiction. This is what necessitated the filing of the current application for stay pending appeal and injunction.

It is trite law and procedure that where there is a negative order where the court has not ordered parties to do or not to anything or restrain them from doing anything, no stay of execution can issue as was held in the case of **Kenya Commercial Bank Limited v Tamarind Meadows Limited & 7 Ors [2016] eKLR**, where the Court of Appeal stated:

"16. In Kanwal Sarjit Singh Dhimažl v. Keshavji Juvraj Shah 20087 eKLR, the Court of Appeal, while dealing with a similar application for stay of a negative order, held as follows:

"The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18^h December, 2006 The order of 18/7 December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see Western College of Arts & Applied Sciences vs. Oranga & Others [19767 KLR 63 at page 66 paragraph C]. "

17. The same reasoning was applied in the case of Raymond M. Omboga v. Austine Pyan Maranga (supra), that a negative order is one that is incapable of execution, and thus, incapable of being stayed. This is what the Court had to say on the matter:

"The Order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise..."

It follows that a negative order is incapable of being stayed a part from a situation where an order of costs has been issued. In this case the court ordered that each party to bear their own costs therefore there is nothing that the Petitioner has lost.

Similarly, in the case of **Kaushik Panchamatia & 3 Other Vs Prime Bank Limited & Another [2020] eKLR**. the Court of Appeal stated that: -

"...that a negative order is incapable of being stayed because there is nothing to stay. It therefore, follows that in light of the above threshold we have no mandate to grant a stay order in the manner prayed for by applicants."

Having answered the first question whether a negative order can be stayed pending appeal in the negative, it follows that the matter ends there and there would be no need to delve into whether the Applicant has met the threshold for grant of injunctions or not. The Petitioners know where their remedy lies.

I find that the Application lacks merit and is therefore dismissed with each party bearing their own costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 23RD DAY OF FEBRUARY, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.