



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
JR. CASE NO. 246 OF 2012

REPUBLICAPPLICANT

VERSUS

KENYA NATIONAL HIGHWAY AUTHORITY.....1ST RESPONDENT

CITY COUNCIL OF NAIROBI.....2ND RESPONDENT

IKON PRINTS MEDIA COMPANY LIMITED.....3RD RESPONDENT

Ex-parte

AMICA BUSINESS SOLUTIONS

(AS CONSOLIDATED WITH)

JR CASE NO. 202 OF 2012

REPUBLICAPPLICANT

VERSUS

KENYA NATIONAL HIGHWAYS AUTHORITY.....RESPONDENT

ALLIANCE MEDIA KENYA LIMITED1ST INTERESTED PARTY

MAGNATE VENTURES LIMITED.....2ND INTERESTED PARTY

IKON PRINTS MEDIA COMPANY

LIMITED3RD INTERESTED PARTY

Ex-parte

REAL DEALS LIMITED

(AND ALSO CONSOLIDATED WITH)

PETITION NO. 245 OF 2012

LOOK MEDIA LIMITED1ST PETITIONER
STANDARD GROUP LIMITED2ND PETITIONER
WIDEREACH LIMITED3RD PETITIONER
SUPREME OUTDOOK.....4TH PETITIONER
LIVE AD LIMITED5TH PETITIONER
KREMM INVESTMENT LIMITED6TH PETITIONER
CONSUMERLINK COMMUNICATIONS LTD.....7TH PETITIONER
ADSITE LIMITED.....8TH PETITIONER

VERSUS

KENYA NATIONAL HIGHWAYS

AUTHORITY.....1ST RESPONDENT
ATTORNEY GENERAL2ND RESPONDENT
CITY COUNCIL OF NAIROBI.....1ST INTERESTED PARTY
IKON PRINTS MEDIA COMPANY.....2ND INTERESTED PARTY

RULING

The application for consideration by this court has been brought by the petitioners in Petition No. 245/2012 by way of a notice of motion dated 15th March, 2013. It is brought under sections 1A, 1B and 3A of the Civil Procedure Act (CPA) and Order 42 Rule 6 and Order 51 of the Civil Procedure Rules (CPR), 2010. Through the said application the applicants seek, among others, the following orders:-

- a. THAT there be a stay of the implementation of the agreements entered into between KENYA NATIONAL HIGHWAYS AUTHORITY (the 1st Respondent) and the interested parties pending the hearing and determination of an intended appeal against part of the judgment delivered by this court on 8th March, 2013.
- b. THAT in the alternative, conservatory orders do issue restraining the respondents and the interested parties whether by themselves, their servants and/or agents from authorizing, permitting or allowing the erection or construction of gantries or advertisement structures on road reserves by private individuals and companies or the displaying of advertisement signs constructed on road reserves pending the hearing and determination of an intended appeal against part of the judgment and decree of this court made on 8th March, 2013.

The application is supported by the grounds on its face and an affidavit sworn by Mr. James Rwambo.

A brief background will do. On 8th March, 2013 I delivered a judgment in which I held that the Kenya National Highways Authority (KeNHA) had, in issuing licenses for the construction of billboards and gantries on road reserves, breached articles 10 and 227 of the Constitution. I therefore ordered KeNHA to in future ensure compliance with the provisions of the Constitution when issuing such licenses. At the same time I observed that although the said practice had breached the provisions of the Constitution, the same had been in place up to the time of the judgement and any person that had benefited from the said practice should enjoy the benefits of the agreements entered into with KeNHA. The applicants being dissatisfied with the last part of my decision have filed a notice of appeal in the Court of Appeal. Meanwhile, they seek a suspension of the agreements between the interested parties and KeNHA pending the hearing and determination of the appeal.

Having gone through the application and supporting affidavit, I find that the applicants are saying that they have an arguable appeal with high chances of success and if the judgment is not stayed the appeal will be rendered nugatory. Secondly, the applicants argue that if the interested parties are allowed to complete the erection of the gantries and place advertisements on them, their appeal will be overtaken by events and they will as a result be denied protection of their property rights. It is also the applicants' case that the loss they will suffer will not be compensated in damages as the implementation of the agreements will remove the applicants from the affected sites. Thirdly, the applicants argue that the respondents will not be prejudiced by the grant of the orders sought. Fourthly, the applicants have submitted that they are ready to abide by any conditions given by the court including giving an undertaking as to damages.

At the hearing of the application on 26th March, 2013 the applicants in JR No.202 of 2012 and JR No. 246 of 2012 supported the application. The application was also supported by Magnate Ventures which is one of the three interested parties. The respondents (KeNHA and the City Council of Nairobi) and two of the interested parties (Alliance Media Kenya Limited and Ikon Prints Media Company Limited) opposed the application. They filed replying affidavits and grounds of opposition. They are therefore the respondents for the purposes of this application. In summary the respondents' case is that the orders sought should not be granted because:-

- a. The applicants have not demonstrated that they have an arguable appeal with high chances of success;
- b. The applicants have not shown the loss they will suffer if the decision of this court is not stayed;
- c. There is nothing to stay having regard to the nature of the orders the applicants intend to appeal against; and
- d. The interested parties have invested heavily in the advertisement industry, after the judgement of the court, and they will suffer irreparable loss if a stay order is granted in this matter.

There was an argument as to whether this is an application for stay pending appeal or an application for conservatory orders. In my view, the same is an application for stay pending appeal, with an alternative prayer for the grant of a conservatory order. The applicants referred this court to the decisions in the cases of **CELLULANT KENYA LTD VS. MUSIC COPYRIGHT SOCIETY OF KENYA LTD [2009] eKLR**, and **NAIROBI HIGH COURT CIVIL CASE NO. 339 OF 2011 JAMES JUMA MUCHEMI AND PARTNERS LIMITED VS BARCLAYS BANK OF KENYA LTD.**

In the **CELLULANT KENYA LTD CASE**, Kimaru, J held that:-

“The plaintiff cited the now notorious decision of Erinford Properties Ltd vs Cheshire County Council [1974] 2 All ER 448 where it was held that it would not be incompatible for a court which had dismissed an application for injunction to grant the unsuccessful applicant injunction pending the hearing of an appeal against the dismissal. This case was cited with approval by the Court of Appeal in Madhupaper International Ltd vs Kerr [1985] KLR 840 where it was held that a judge who dismisses an application for injunction has jurisdiction to grant the unsuccessful applicant an injunction pending the hearing of the intended appeal so as not to render the decision of the appellate court, should the appeal be successful, nugatory.

I, for one, do not subscribe to the principle that an unsuccessful applicant in an application for interlocutory injunction has an automatic right to invoke this court's discretion to be granted injunction pending the hearing of an appeal. I think there are plethora of decisions by the High Court which disapprove of the practice where unsuccessful parties crave exercise of discretion from the same court under the same applicable principles for grant of injunction, this time, on the grounds that such an applicant's intended appeal would be rendered nugatory if the injunction is not granted. I stand to be corrected, but I think the exercise of this court's discretion in granting injunction pending the hearing of an intended appeal should be invoked under exceptional circumstances where the facts of the case are such that it would be appropriate for the development of the law for the highest court in the land to render its opinion on the subject matter of the suit."

The same position was taken by Mabeya, J in the **JAMES JUMA MUCHEMI & PARTNERS LIMITED** case in which he also cited with approval the decision of Megarry, J in the **ERINFORD PROPERTIES LTD V CHESHIRE COUNTRY COUNCIL** [1974] 2 All ER 448 where Megarry, J stated that:-

"The questions that have to be decided on the two occasions are quite different. Putting it shortly, on a motion the question is whether the applicant has made out a sufficient case to have the Respondent restrained pending the trial. On the trial, the question is whether the Plaintiff has sufficiently proved his case. On the other hand, where the application is for an injunction pending an appeal, the question is whether the judgment that has been given is one on which the successful party ought to be freed to act despite the pendency of an appeal. One of the important factors in making such decision of course is the possibility that the judgement may be reversed or varied. Judges must decide cases even if they are hesitant in their conclusions; and at the other extreme a judge may be very clear in his conclusions and yet on appeal be held to be wrong. No human being is infallible and for none are there more public and authoritative explanations of their errors than for judges. A judge who feels no doubt in dismissing a claim to an interlocutory injunction may, perfectly consistently with his decision, recognize that his decision might be reversed, and that the comparative effects of granting or refusing an injunction pending an appeal are such that it would be right to preserve the status quo pending the appeal. I cannot see that a decision that no injunction should be granted pending the trial is inconsistent, either logically or otherwise with holding that an injunction should be granted pending an appeal against the decision not to grant the injunction, or that by refusing an injunction pending trial the judge becomes functus officio."

The case before me is not about a dismissal of an application for an order of injunction. This is an application that has been brought to stay the orders of this court after a full trial. Nevertheless, I did not find the respondents averse to the fact that this court can stay execution even after dismissing an application for injunction. Their argument is that there is nothing to stay in the order given by this court. In support of this argument the respondents cited the decisions in **ANDREW OUKO v KENYA COMMERCIAL BANK LTD & 3 OTHERS** [2005] eKLR, **JOEL KITANGO BUSIENEI & 2 OTHERS v RICHARD KIPKEMOI TUEI & ANOTHER** [2012] eKLR and **VENTURE CAPITAL & CREDIT LIMITED v CONSOLIDATED BANK OF KENYA**, CIVIL APPLICATION NO. NAI. 349 OF 2003 (UR). The thread running through the above cited decisions is that a negative order is incapable of execution and therefore stay cannot be granted. In the **ANDREW OUKO** case F. Azangalala, J (as he then was) put it as follows:-

"I agree with counsels for the Defendants that the order made on 30th May 2005 is not capable of being stayed. On that date I merely dismissed the Plaintiff's application for interlocutory injunction. I made no positive order in favour of either side that can be stayed."

He then went ahead and quoted the decision of the Court of Appeal in the case of **VENTURE CAPITAL & CREDIT LIMITED** thus:-

“As their Lordships said in the case of Venture Capital & Credit Limited-v-Consolidated Bank of Kenya, Civil Application No. Nai 349 of 2003 (UR) “the prayer for an order of stay of execution of the ruling is misconceived as the Learned Judge never made any positive order in favour of the Respondents which is capable of execution. Rather, the Learned Judge merely dismissed the Application for interlocutory injunction with the result that neither party was given any interlocutory relief.”

In the end the plaintiff’s application for stay.....is dismissed.”

I have looked at the above cited authorities and I hold the view that they are not applicable to the facts before me. After this court delivered its judgment and refused to quash the agreements entered into between KeNHA and the interested parties, two of the interested parties went ahead to complete the structures that had been put on hold due to a court order maintaining the status quo. The said construction will continue if an order staying the execution of this court’s judgment is not issued. In my view therefore this court exercising its inherent jurisdiction can issue a stay order in the circumstances of this case.

The question is whether the applicants are deserving of an order staying part of the decision of this court. In my view there are three conditions to be met before an order of stay of execution can issue. The first condition is that the court must satisfy itself that substantial loss may result to the applicant unless the order is made. Secondly, the application must be made without unreasonable delay. Thirdly, the order should be accompanied by an order for security for due performance of the decree or order by the applicant.

For stay to be granted, the applicant must demonstrate that there is an arguable appeal and that if the stay is not granted the appeal will be rendered nugatory. P.K. Tunoi, JA (as he then was) put it well in the case of **REPUBLIC VS KENYA ANTI CORRUPTION COMMISSION & 2 OTHERS [2009] eKLR** when he stated that:-

“The law as regards the principles that guide the Court in such an application brought pursuant to rule 5(2) (b) of the Rules are now well settled. The Court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the Court, first, that the appeal, or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the Court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds, the results or the success could be rendered nugatory. In order that the applicant may succeed, he must demonstrate both limbs and demonstrating only one limb would not avail him the order sought if he fails to demonstrate the other limb – See this Court’s decisions in the cases of Reliance Bank Ltd vs Norlake Investments Ltd. (2002) IEA 227 and Githunguri vs Jimba Credit Corporation Ltd. & Others (No.2) [1988] KLR 838.”

I think the starting point would be to determine whether the applicants have an arguable appeal. The applicants have not placed any material before this court as to the nature of the arguments they intend to advance before the Court of Appeal. I will, however, not elevate my judgment to the level of wisdom from the gods. The already cited words of caution by Meggery, J will suffice. I will therefore assume that the applicants have an arguable appeal.

The second issue to consider is whether were the appeal to succeed, the same would be rendered nugatory if stay is denied. The applicants have indicated that were they to succeed on appeal then their appeal will be rendered nugatory. It is noted that the applicants all along did not submit any quantifiable claim to the court. Their argument was that their billboards may be obstructed by those of the interested parties. There was no specific evidence presented to the court to show the particular billboards that would be obstructed by those of the interested parties. Their claim was from the beginning speculative in nature.

There is no evidence before the court to show that the applicants will indeed suffer any loss if the decision of this court is overturned by the Court of Appeal. On the other hand, the interested parties have demonstrated that they have invested massively in the outdoor advertisement industry. They have told the court that if the Court of Appeal will rule otherwise then they are ready to bear the losses that will follow such a decision. I do not know whether their decision to continue with their investment is a wise one. However, that is for them to decide. What is not in dispute is that when all factors are taken into account, it becomes clear that the applicants will not suffer any loss if the judgment of this court is not stayed.

The end result is that this application must fail. The same is dismissed with costs to the respondents already identified in the body of this judgement namely KeNHA, the City Council of Nairobi, Alliance Media Limited and Ikon Prints Media Company Limited.

Dated, signed and delivered at Nairobi this 16th day of April , 2013

W. K. KORIR,

JUDGE