



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 199 OF 2010

ANTHONY JOHN DICKSON & 9 OTHERSAPPELLANTS

VERSUS

DIRECTOR GENERAL N.E.M.A.....1ST RESPONDENT

DIANI HOMES DEVELOPMENT LTD2ND RESPONDENT

R U L I N G

This is an application by the appellant under the provisions of inter alia order 41, Rule 4 of the Civil Procedure rules and Sections 63 (a) and (e) of the Civil Procedure Act for the following orders:

“ 1. _____

2. THAT there be a stay of the ruling of the tribunal dated 18.08.201 pending the hearing and determination of the appeal here.

3. THAT the Honourable court issues an order stopping the 1ST Respondent from lifting the STOP ORDER dated 19.05.2010 issued against the development herein standing on PLOT L.R.No. MN/1/7664 TUDOR CREEK, MOMBASA pending the hearing and determination of the appeal herein.

4. THAT costs of this application be in the course”.

The appellant lodged an appeal on 15th September 2010 against the ruling of the National environment Tribunal sitting in Nairobi, NET/55/2010 and delivered on 18th August, 2010 in which the Tribunal struck out the Appellant’s appeal before the Tribunal on the ground that it had been filed 60 days from the date the license was issued and was therefore in contravention of the provision of section 129 of the Environmental Management and Coordination Act (EMCA) and the Rules 4(2) of the National procedure Rules, 2003.

The appellant in the Memorandum of Appeal seeks the following orders:-

a) The court provides an interpretation to rule 4 (2) of the National Environmental tribunal procedure rules (2003) and finds that an Appeal should be filed within (60) days from the date when the decision being appealed against was given to or served upon the Appellant (s) and not within sixty days from the date when the decision was made.

b) The court sets aside the ruling of the Tribunal dated 18/08/2010 striking out the Appellants' appeal.

c) The court remits the proceedings back to the tribunal for determination on the merits.

Under order 41, rule 4(1), the Appellant is required to show sufficient cause to justify the grant of an order of stay of execution pending an appeal. It has been said at times that the Appellant must demonstrate that the appeal raises substantial questions or issues and that he has an arguable case that ought to be heard on merit.

In the appeal lodged herein the main grounds of the appeal in the appeal are :-

That the learned Chairman and members erred in law and fact and misinterpreted the law in rule 4 (2) of the National Environment Tribunal Procedure rules (2003) by upholding that the appeal was filed outside the sixty (60) days within which it was supposed to be filed while disregarding the fact that the appellants were never given or served with the decision they are appealing against in the Tribunal as required by the said Rule (4) (20 of the National environmental tribunal procedure Rules (2003).

That the learned Chairman and members erred in law and in fact in striking out the Appellants' appeal under a section of the law (section 129 (2)) that the 2nd Respondent's preliminary Objection was not based on without inviting the Appellants to make submission therein, thus violating the rules of natural justice and condemning the appellants unheard and granting a prayer that was not sought by the 2nd Respondent.

It is the courts finding that both the two grounds are based on the allegations that the tribunal violated the principles of natural justice thereby denying the Appellant the right to a fair and just hearing before the Tribunal. The issue of fair hearing and application of the principles of natural justice are fundamental and substantive issues in this appeal.

At this stage, the court is not entitled to consider the merits of the appeal and the chances of success. It is sufficient cause to show that the appeal raises fundamental and or substantive questions that are serious and require determination on the merits.

In the Civil Appeal no 176 of 1995 AGA WANJIRU MWANIKI –V- JANE WANJURU MWANIKI (unreported), the Court of Appeal held as follows:-

“ in the present case the issue of revocation of the grant was neither raised nor canvassed by any party. Nor was it amongst the issues before the court. With respect, it was not open to the learned judge in this case to deal with this issue. If this issue had to be dealt with he should have invited the advocates for the parties to make submission on it. This was not done. A principle of natural justice that parties should be heard before hearing condemned was ignored and a decision reached in defiance thereof such a verdict cannot be sustained.”

This shows the importance of ensuring that the principles of natural justice are strictly upheld and applied in legal proceedings. I do hold that the appeal raises an important and serious issue for determination and the appeal is not frivolous or vexatious. It should be heard on its merit.

Having said so, the provisions of Order 41, Rule 4(2) come into play. The said provisions states:-

“ (2) No order for stay of execution shall be made under sub-rule (1) unless

a) The court is satisfied that substantial loss may result to the appellant unless the order is made and that application has been made without unreasonable delay; and

b) Such security as the court order for the due performance of such decree and order as may

ultimately be binding on him has been given by the applicant”

What comes out from the proceedings before this court is that if the Appeal before the tribunal having been struck out, the developers for the proposed construction of the Carnival Village Apartments on L.R. No. MN/1/7664, along Tudor creek, Mombasa District will proceed and developments completed. This means that if stay is not granted then the project will be completed and the developments erected. These are permanent buildings and once built the appeal will really be rendered nugatory. It will be substantially if not absolutely, irreversible.

In the Stop Order initially issued by the National Environmental Management Authority on 19th may, 2010 which is the subject of the appeal before the Tribunal inter alia stated :-

“

The excavations already carried out poses a serious environmental threat to marine life and proper functioning of the shoreline area which could not be foreseen during the earlier review as there was no information given in the study report. Based on the above and the fact that if allowed to continue in the current state, the project will adversely affect the environmental quality of the shoreline area, you are thereby directed to;

I. STOP any further excavation or construction activity until you resubmit a fresh impact assessment report and await the Authority ‘s decision”

The appellants are resident in the neighborhood of the site where the development project is situated. From the foregoing material, I am persuaded that substantial loss may result to the applicants unless the order is made. The likely loss is the loss of opportunity to be heard on appeal in respect of the claims of serious adverse environmental impact at the Tudor Creek and its environs. I take into account the provisions of section 64 (1) of the Environmental Management Act, 1999 which gives the authority power and discretion to direct the holder of a license to submit a fresh environmental impact assessment study, evaluation or review report even after the grant of a license to proceed with development.

With regard to the question or allegations that the application for stay was not made without unreasonably delay, I am of the view that in the circumstances there was no unreasonable delay in the circumstances. The time period of 27 or thereabout cannot be said to amount to unreasonable delay within the context. The appeal was filed within the 30 days allowed by law and the application brought within the same period.

The court is obligated to order for security for as a consideration for the grant of the order of stay of execution. The Respondent did not provide any evidence or material of the likely losses which may result from any grant of the stay of execution order by the court. There was an alleged value of the cost of the project stated from the bar by counsel but which is not admissible in evidence. However it is a fact that any delay in the construction and completion thereof of the Apartments will lead to substantial costs to the Developer including loss of commitment from intended purchasers.

In order to ensure that the Applicants are committed to prosecute the Appeal herein and to secure some security for costs, in exercise of this court’s discretion and considering that there is no decree or order for performance as traditionally envisaged but they Developers, Respondent being stopped from construction, I do therefore grant prayer 2 and 3 of the Notice of Motion dated 14th September, 2010 on condition that the applicants shall deposit into this court a sum of **ksh. 2,000,000/- (Kenya shillings two million) within the NEXT 30 DAYS**. In default of the said payment into court the said deposit for security for costs within the said period, the order of stay granted herein shall stand revoked automatically and the Respondents may proceed as they deem fit with the project. Also the appeal shall be heard and determined within 3 (three) months from today’s date unless the court for good cause extends the period.

Costs shall be in appeal.

Orders accordingly.

Dated and delivered this 7th day of March 2011

M. K. IBRAHIM
JUDGE