



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CIVIL APPEAL NO. 75 OF 2010

LAKE VICTORIA NORTH WATER SERVICES BOARD.....	1ST
APPELLANT/APPLICANT	
WESTERN WATER SERVICES COMPANY LTD.....	2ND
APPELLANT/APPLICANT	
VERSUS	
NASHORO	
AMIS	1ST
RESPONDENT	
LAWRENCE	
OMARIBA.....	2ND
RESPONDENT	
WYCLIFFE	
OLUMASAI.....	3RD
RESPONDENT	
ESAU	
OMUNG'ALA.....	4TH
RESPONDENT	
MARABA-LWATINGU RESIDENTS	
ASSOCIATION.....	5TH RESPONDENT

RULING

1. The Application dated 15.7.2010 is premised on the provisions of S.1A and B and S.79 of the Civil Procedure Rules, Order XVI Rules as read with S.130 of the Environment Management and Co-ordination Act, No. 8 of 1999. The Applicants seek the following orders;

”1.

2. Pending hearing inter-partes and or determination of this application, further proceedings before the National Environment

Tribunal in Appeal Case No. Net 50/January/2010 be stayed.

3. An order for the expeditious hearing and or disposal of the appeal filed herein be recorded.

4. The Appeal be admitted for hearing and the same be heard before Kakamega High Court before a single Judge for a single day.

5. Directions be given that the forty seven (47) page typed ruling of the tribunal delivered on the 28th June 2010, the original copy of which is filed together with this application be admitted as the true record of the tribunal proceedings and as the ruling and as the decree of the said tribunal for purposes of the appeal herein or as the Honourable Court shall direct.

6. Further, directions be given as to when, the manner and by whom the exhibits or documents produced at the tribunal consisting of several and bulky documents shall be presented before this Honourable Court.

7. The costs of this application do abide the outcome.”

The grounds in support are the following;

(a) The appellant filed the appeal herein against the decision of the tribunal which is pending determination.

(b) The Tribunal is set for further proceedings by hearing parties on the issue of costs on the 20th July 2010 at Nairobi.

(c) The Provisions of section 130 of the EMCA Act No.8 of 1999 may not be sufficient to stay the proceedings before the tribunal.

(d) It will serve the ends of justice to save the applicants further costs of attending before the tribunal when the issue of entire costs will be decided by this Honourable Court.

(e) The subject matter involved in this appeal and in the appeal which was before the tribunal are several developments projects being undertaken by the applicants under EIA Licence No.0001835 by NEMA at a cost of over Kshs.3 billion funded as loan by external donors and which have been stopped and hence the necessity for speedy hearing of the appeal by this Honourable Court to determine the final fate.

(f) If the appeal takes the normal course, the attendant delay will occasion substantial loss.

(g) The appeal raises serious legal issues and is not time wasting or frivolous.

(h) The proceedings before the tribunal involved numerous and bulky documents and or exhibits produced by the parties and hence the requirement for directions on their presentation before this Honourable Court.

(i) The orders sought are not outside the jurisdiction of this Honourable Court.

2. I have read the Affidavit in support sworn by one Eng. Diru Magomere on 15.7.2010 and I have also taken into account the elaborate submissions by Mr. Musiega appearing for the Applicants and their case is as follows;

3. On 30.6.2010, the National Environmental Tribunal delivered its Ruling in Tribunal Appeal No. NET/50/2010 and the orders issued were as follows;

“For the reasons explained, the Tribunal, unanimously:

(i) stops all works for the construction of sewage treatment ponds and the laying of sewage pipes in Maraba- Lwatingu area in Kakamega; and

(ii) directs the 2nd Respondent to conduct a full and comprehensive environmental impact assessment for construction of sewage treatment ponds and excavation and laying of pipes in Maraba-Lwatingu area in Kakamega in compliance with EMCA and the applicable EIA and Audit Regulations and all other applicable laws and Regulations and submit the same to NEMA for its proper consideration in accordance with the applicable laws, taking into consideration the Tribunals’ findings as expressed in the foregoing paragraphs 114 – 157.

All parties asked the Tribunal to award them costs of the appeal. The Tribunal hereby invites parties to address it on the issue of costs on a date to be agreed by the parties and the Tribunal. Attention of parties is drawn to section 130 of EMCA.”

4. Subsequent to the above orders being issued, the Applicants filed an appeal before this court on 7.7.2010 and on 15.7.2010 they filed the Application before me.

5. The Tribunal meanwhile proceeded to fix arguments on costs for 20.8.2010, an order I stayed pending this Ruling.

6. It is the Applicant’s argument that the Tribunal should adjudicate on costs until the Appeal is heard and determined so that they are not unduly prejudiced by the execution to follow the award of costs.

7. In a Replying Affidavit sworn on an unclear date by one, Esau Omung’ala (the 4th Respondent on behalf of himself and the 1st, 2nd, 3rd and 5th Respondents) it is the case for the Respondents that the Application is incompetent and an abuse of court process. That no sufficient reason has been given why the orders sought should be granted and that infact the intended appeal has no real likelihood of success and the same was filed to frustrate the efforts of the residents of Maraba-Lwatingu area to realize a clean and healthy environment.

8. In submissions, Mr. Makoloo for the Respondents stated that his clients had no objection to prayers 3 and 4 elsewhere set out above being granted but only generally as relates to appeals but they were opposed to the other prayers. Further, that without the whole record of the Tribunal's proceedings being placed before it, the court cannot be in a position to admit or reject the Appeal and a Ruling cannot be the basis for doing so. That the Application should therefore be dismissed in its entirety.

9. I should begin by addressing prayer 2 of the Application; the order for stay of proceedings before the Tribunal. It is agreed that the only matter left to be determined by the Tribunal is the issue of award of costs to a deserving party. I have elsewhere above set out the specific order in that regard; that parties shall address the Tribunal on the issue of costs. The Tribunal in effect never awarded costs to any party and in fact the Tribunal merely stated that because each party had sought costs, it would only determine the matter upon full arguments by the parties. What prejudice would a hearing in that regard cause any party? The Tribunal may choose not to award costs to any party and the Appeal being a matter of public interest, each party may be ordered to bear its own costs. In that event, no prejudice would be caused, especially to the Applicants.

10. It is also my view that S.78 (2) and S.79 of the Civil Procedure Act do not confer on this court power to stay proceedings on flimsy and wholly speculative grounds and I am certain that once the Applicants did not wait for a specific order on costs to be made, then they are prematurely before this court.

11. Prayer 2 must be dismissed for the above reasons.

12. Regarding prayer 3, since the same is not objected to, then it is granted.

13. On prayer 4, I am unable to admit an appeal to hearing on the basis of a Ruling only. S.79B of the Civil Procedure Act must be read with Order XLI Rule 8B (4) of the Civil Procedure Rules. Without pleadings, notes of the trial or matter under appeal, etc, an appellate court can hardly determine whether an appeal is frivolous or not. I will decline to grant prayer 4 for these reasons.

14. Prayer 5 must suffer the same fate because the record of appeal can never be the judgment or decree alone but the documents set out in Order XLI Rule 8B (4) of the Rules.

15. Prayer 6 is premature as directions in that regard can only be taken when the record of appeal is properly before the court. None has been filed to-date.

16. Whether the Affidavit in opposition was properly before the court because the first page had no date is insignificant at this point because either way, I would not have been inclined to grant the prayers sought, save the one in which there is a consent.

17. In the event, prayers 2, 4, 5 and 6 of the Application dated 15.7.2010 are dismissed while prayer 3 is granted.

18. Costs shall abide the Appeal.

Delivered, dated and signed at Kakamega this 30th day of September, 2010

ISAAC LENAOLA
J U D G E