REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Appeal 616 of 2005

Nakumatt Holdings Ltd *v* National Environmenta and Management Authority

High Court, at Nairobi November 16, 2005

Mutungi J

Civil Appeal No 616 of 2005

Environmental law *– practice and procedure - injunction or stay of execution against decision of the National Environmental Tribunal – whether the High Court has jurisdiction to issue such orders – section 130(1) & (2) of Environmental Management and Co-ordination Act, 1999*

Environmental law *– practice and procedure - appeals – from the National Environmental Tribunal – procedure for an appeal – Order 41 of the Civil Procedure Rules – whether invoking the inherent jurisdiction of the court suffices - practice and procedure.*

Nakumatt Holdings Ltd filed an application seeking a temporary stay of execution of the ruling, order and/or directions of the National Environmental Tribunal specifically stopping the 2nd respondent from commencing or continuing with construction works. The applicant averred that the decision dismissing the appellant’s appeal by the Tribunal paved way for the 2nd respondents to commence development works which was in flagrant breach of section 130 of Environmental Management and Coordination Act, 1999 and it was in the interest justice and the principles of sustainable development that the orders be granted.

The respondents opposed the application by stating that section 130(1) of the Environmental Management and Co-ordination Act, 1999 did not grant the court jurisdiction to issue the orders sought an application for stay could only be made under the provisions of Orders 41 of the Civil Procedure Rules.

Held:

1. The jurisdiction of a court or a tribunal to hear a matter is everything and must be determined at the earliest possible opportunity.

2. The High Court is not granted power, under section 130(1) & (2) of the Environmental Management and Co-ordination Act, 1999, to issue injunctions or stay of execution of the ruling, orders and/or directions of the National Environmental Tribunal even upon hearing of an appeal.

3. The procedure to move the court is clearly stated and laid out under Order 41 of the Civil Procedure Rules with respect to appeal.

4. Section 3A of the Civil Procedure Act deals with inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process and it is invoked wherer there are no specific provisions. Section 3A does not permit a litigant to drag his opponent to the court without summons or notice or giving the other party an opportunity to defend himself.

Application dismissed.

Cases

Giella v Cassman Brown & Co Ltd [1973] EA 358

Statutes

1. Environmental Management and Co-ordination Act (No 8 of 1999) sections 130, 130 (1) (2) (4)

2. Civil Procedure Rules (cap 21 Sub Leg) order XLI rule 4

3. Civil Procedure Act (cap 21) sections 3, 3A

Advocates

Mr Odera for the Appellant.

Mr Kwach for the Respondent.

November 16, 2005, **Mutungi J** delivered the following Ruling of the Court.

By a Notice of Motion filed in this court on 5/9/05 under Section 130(1) and (2) of the Environmental Management and Coordination Act, 199, the appellant herein, Nakumatt Holdings Limited, sought the following orders from this court.

1. Already spent

2. Temporary stay of execution of the ruling, orders and/directions of the National Environmental Tribunal delivered on 12/8/05 specifically stopping the 2nd respondent from commencing or continuing with construction works on the proposed project, pending the hearing *interpartes* of this application.

3. Pending the hearing and determination of the appeal filed herein, the court do issue an order to stay the execution of the Ruling orders and/or directions issued by the National Environmental Tribunal on 12/8/05, specially as to the commencement of construction works on the project or continuing therewith.

4. Costs of this application.

The application is supported by an affidavit, by Atul Shah, filed on 5/9/05 and on the grounds, *inter alia*, that:

(a) On 12/8/05 the National Environmental Tribunal (the Tribunal) delivered its decision by which it

dismissed the appellant's appeal filed before it on 16/
2/2005

(b) In dismissing the said appeal, the Tribunal *inter alia* directed that the stop order it had initially issued restraining the 2nd respondent from carrying on the disputed project be lifted forthwith thereby paving way for the 2nd respondent to commence development works.

(c) The said lifting of the stop order is clearly in flagrant breach and/or violation of Section 130 of the Environmental Management and Coordination Act as the 30 days provided for appeal has not expired, neither has the appellant's appeal filed herein been heard nor determined.

(d) Should the 2nd respondent commence construction works, which is the thrust of the appeal filed herein the appeal shall be rendered nugatory.

(e) It is in the interest of justice and the principles of sustainable development that the orders sought herein, be granted.

In its grounds of opposition the 2nd respondent, the Great Properties Limited aver, *inter alia* that:

1. There is no jurisdiction under section 130(1) and (2) of the Environmental Management and Co-ordination Act (EMCA) 1999 to grant the orders sought in the notice of motion herein, dated 5/9/05.

2. The only powers given to the High Court are those set out in section 130(4) of EMCA which are all to be exercised upon hearing the appeal and not before.

3. No order can be made under EMCA to stop the construction. If any order for stay or injunction can be made then this can only be pursuant to the Civil Procedure Rules under Order 41 Rule 4.

4. The appellant has not met the criteria for the grant of stay under the provisions of Order 41 of the Civil Procedure Rules. The applicant has not demonstrated:

(a) sufficient case for the grant of an order of stay;

(b) Substantial loss

(c) Not offered security for the orders it is seeking.

5. The applicant is not seeking an injunction and cant meet the criteria as set out in *Giella v Cassman Brown & Co Ltd* [1973] EA 358.

6. There is nothing to stay.

7. The 2nd respondent's project had been approved by the 1st respondent is merely complying with the 1st respondent's order authorizing it to construct.

8. The 1st respondent has already issued the Environmental Impact Assessment (EIA) Licence.

9. The applicant is guilty of inordinate delay in making this application.

10. The 2nd respondent will be prejudiced if the application's allowed; has to date incurred huge expenditure in the project and stands to suffer substantial loss if the project is not continued.

11. The affidavit of Odera and Atul Shah sworn on 5/9/05 are incurably defective and should be struck out

At the commencement of the *interpartes* hearing of this application, on 4/

10/05, learned counsel for the applicant, Mr. Odera applied, orally to include in his application, section 3 of the Civil Procedure Act, cap 21, Laws of Kenya, which was granted.

Upon perusal of the application herein, the first issue to be dealt with is one of jurisdiction of this court to hear the application herein, and grant the reliefs sought, in light of the manner the applicant has chosen to move this court.

The jurisdiction of a court or tribunal to hear a matter is everything and must be determined at the earliest possible opportunity. For as soon as the court determines that it lacks jurisdiction it should down its tools and utter not even a word more, for what the court does thereafter is a nullity.

Learned Counsel for the appellant/applicant, Mr Odera referred me to section 130(1) of the Environmental Management and Co-ordination Act, 1999 which gives any aggrieved person by a decision or order of the Tribunal, the right to appeal to this court, within 30 days of such decision or order.

Subsection (2) of the same section states that no decision or order of the Tribunal shall be enforced until the time for lodging an appeal has expired or until the appeal has been determined. Then follows subsection (4) of the same section which states what this court may do upon the hearing of an appeal and at this juncture it must be clearly stated that nowhere is the High Court granted the power to issue injunctions or stay of execution as prayed in prayer No 2 and 3 of the application herein even upon hearing of an appeal, which has not been done.

Going back to the basic issue, the application and the appeal are brought under unusual provisions. Granted, the applicant/appellant has the right to appeal to this Court. But under what procedure? In my humble view, the procedures to move this court are clearly stated and laid out under

order 41 of the Civil Procedure Rules with respect to appeals. The procedure for other matters such as suits; Chamber Summons; Originating Summons; Notices of Motion etc are all clearly provided for in the Civil Procedure Rules pursuant to the provision of the Civil Procedure Act, cap 21, Laws of Kenya.

The applicant herein, and the appeal on which such an application hinges do not at all appear to have been brought under any of the procedures above. To reiterate, the right of any person or litigant to access the court, and this is a constitutional right for every person – natural or corporate – in Kenya, does not mean that one is not bound by the procedures through which such a person may move the court. The procedure for appeals is as per order 41 of the Civil Procedure Rules and therein are stipulated. What the appellant must do to lodge an appeal. That has not been done in the appeal herein, and the application based on that appeal.

The submission that the appeal does not fall under order 41 of the Civil Procedure Rules, and that the application herein for stay of the execution, does not tell me how else this court can be moved to grant the reliefs and orders prayed.

The submissions and attempt to rely on sections 3 and 3A of the Civil Procedure Act, cap 21, Laws of Kenya, are of no assistance to the applicant. Section 3 applies where there are no specific provisions. Here, the provisions exist. Section 3A deals with the inherent power of this court to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process. This does not mean that the procedures to move the court are thrown out of the window. Section 3A does not permit a litigant to drag his opponent to this court, without summons or notice or giving that other party opportunity to defend himself.

All in all, I find that the applicant has not properly moved this court and

accordingly, under the purported provisions relied upon by the applicant, this court has no jurisdiction to grant the reliefs prayed.

I totally agree with the learned counsel for the appellant/applicant that order 41 rule 4 of the Civil Procedure Rules has not been complied with. And that is the main opposition to the application herein, by counsel for the respondent, Mr Kwach. But this begs the question. If the application is outside the Civil Procedure Rules, it makes no sense to say that it should comply with the provisions of those Rules of Procedure. And that is the undoing of the application.

The above reasons are sufficient to dispose of this application. But for the sake of argument, if it were to be assumed, for sake of agreement, that this court has jurisdiction to grant the orders prayed, what would I say?

The application is for stay of the ruling and the orders of the Tribunal, dated 12/8/05.

My perusal of what happened is that the Tribunal issued no orders or ruling. The tribunal had suspended the operations of the respondent herein pending the outcome of the appeal lodged by the respondent. Upon receipt of the reports by the 1st respondent, and upon certification that all the regulations had been complied with, all the Tribunal did was to lift its own stop orders of suspension. There were no orders issued by the Tribunal. Upon lifting of the suspension of the construction, the 2nd respondent simply resumed its construction and project, and went ahead and obtained the EIA Licence on 31/8/05 from the 1st respondent, not from the Tribunal.

Two points flow from the above findings and conclusions. First this court does not issue orders in vain, even where it has jurisdiction to issue the prayed orders. The prayer for stay comes too late after the event. Secondly, it was submitted by counsel for the appellant that there was violation of section 130(2), of the Act of 1999 in that the Licence was issued before

the expiration of the time for appeal or before the appeal has been determined. To the above submissions, it must be recalled that the Tribunal made no order nor decision as such. And hence the question of enforcement does not arise. The tribunal only lifted its order of suspension of the project by the 2nd defendant pending the outcome of the appeal to the Tribunal by the 2nd respondent. Upon being satisfied that the regulation had been complied with, by the experts and the reports by the 1st respondent, there was nothing to wait for but to lift the suspension.

Most importantly, there is no evidence on record, or before me that the applicant/appellant herein had indicated intention to appeal to this court immediately or soon after the 12/8/05. Without such ain indication the argument by the applicant about non-compliance with section 130(2) does not hold any water. For the 30 days starting when the lifting of the suspension assuming it was an order or decision, took place. Without that lifting the period does not start to run.

All in all, and for the reasons above, the application herein is dismissed with costs against the applicant and in favour of the 2nd respondent.