Njoroge v Kenya Electricity Transmission Company Limited (Environment and Land Constitutional Petition 2 of 2022) [2023] KEELC 501 (KLR) (2 February 2023) (Ruling)

Neutral citation: [2023] KEELC 501 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT AND LAND CONSTITUTIONAL PETITION 2 OF 2022

FM NJOROGE, J

FEBRUARY 2, 2023

BETWEEN

ROSE EMMA MUTHONI NJOROGE ..... PETITIONER

AND

KENYA ELECTRICITY TRANSMISSION COMPANY LIMITED ..... RESPONDENT

RULING

1. This is a ruling is in respect of the respondent's notice of motion application dated July 14, 2022. It has been brought under sections 1A, 1B, 3 & 3A of the *Civil Procedure Act*, order 42 rule 6 of the *Civil Procedure Rules* and sections 3, 19(1) & (2) of the *Environment & Land Court Act 2011*.

2. The respondent seeks the following orders:

   a. spent

   b. spent

   c. There be a stay of proceedings and all consequential orders issued by this honorable court *vide* ruling dated June 15, 2022 pending the hearing and determination of the respondent's appeal.

   d. The honorable court do issue any other orders it deems fit and just to meet the ends of justice.

   e. Costs of this application be provided for or borne by the petitioner.

3. The application was supported by the affidavit of Samwel Rambo, the respondent's acting company secretary & general manager legal services sworn on July 14, 2022. The grounds on the face of the application and the supporting affidavit are that the petitioner, having filed the petition dated April 12, 2022, seeking inter alia orders loss of future profits, and compensation of Kshs 68,296,000.00/=, lodged a notice of motion application of even date which sought that the respondent be compelled

to deposit the sum of Kshs 13,583,581.20 in a joint interest earning account pending hearing and determination of the petition; that in opposition, the respondent filed its replying affidavit, preliminary objection, written submissions together with its list of authorities and the court rendered its ruling on June 16, 2022 directing the respondent to deposit the sum of Kshs 13,583,581.20 into a joint interest earning account pending hearing and determination of the petition; that in the said ruling, the court did not consider the respondent's preliminary objection and submissions on jurisdiction as required by order 21 rule 5 of the *Civil Procedure Rules* and it therefore lodged a notice of appeal together with its letter requesting for proceedings on June 29, 2022; that the petitioner is in the process of extracting the order and is likely to commence and subject the respondent or its officers to contempt proceedings; that the respondent has an arguable appeal with high prospects of success and that the respondent will suffer grave prejudice if the orders sought are not granted.

4. In response to the application, the petitioner filed a replying affidavit sworn on September 9, 2022 and filed on September 14, 2022. She deposed that the application lacks merit and fails to satisfy the legal and evidential threshold for reliefs sought; that the respondent has not demonstrated any loss that it will suffer if it complies with the said order; that the respondent obtained possession of her property for wayleave in December 2020 after it constructed and completed its Olkaria-Lessos-Kisumu 400/220/132KV transmission line thereon in February 2021 having offered way leave compensation of Kshs 13,583,581.00 on December 18, 2020 with a promise to negotiate fair compensation but to date it has not done so; that it has been twenty two months since the respondent took over the petitioner's property and it is yet to pay the full compensation; that the court in its order did not direct any payment to her but instead directed that the same be deposited in a joint interest earning account in the names of the parties' advocates on record; that the respondent has not complied with the said order of June 14, 2022 or shown any willingness to comply with the said order; that the respondent's allegations that it will suffer prejudice if the money is deposited and that the petitioner will not suffer any prejudice if the order of June 15, 2022 is stayed are not only false but also vexatious and scandalous; that the petitioner stands to suffer great prejudice and substantial loss if the application is allowed as sought; that it is just and fair if the respondent deposits the ordered amount as security pending its appeal against the order; that the basis of the petition is that the respondent has defaulted in payments of the wayleave compensation; that she is advised her advocates on record that the respondent was served with the petition and the application; that upon the respondent filing its response and submissions on May 20, 2022, she filed a supplementary affidavit on May 30, 2022 together with supplementary submissions; that she is advised by her advocates that upon filing the replying affidavit, the respondent did not have the right of reply and therefore the argument that the supplementary affidavit was not served upon it is an afterthought; that the respondent's intended appeal is frivolous and raises no arguable grounds of appeal and sought that the application be dismissed with costs or in the alternative it be allowed on the terms that the security amount of Kshs 13, 583, 581/= or such reasonable amount be deposited as security for a stay order given within reasonable time.

5. The application was canvassed by way of written submissions. The respondent filed its submissions dated October 24, 2022 on the same date while the petitioner filed her submissions dated November 11, 2022 on November 15, 2022. The respondent filed supplementary submissions dated November 21, 2022 on the same date.

6. The respondent submitted on whether it has an arguable appeal and whether the appeal would be rendered nugatory if the orders sought are not granted. The respondent relied on rule 32 of *The Constitution of Kenya (Protection of rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* and the case of *Mundia Njeru Geteria v Embu County Government & 4 others* [2014] eKLR and submitted that it had an arguable appeal with chances of success as per its draft memorandum of appeal.

7. The respondent restated its grounds of appeal and submitted that it would suffer grave prejudice if the orders sought are not granted as it seeks to challenge the jurisdiction of the court to issue the orders of June 15, 2022 and it cannot therefore be asked to comply with the order before the issue of jurisdiction is determined by the appellate court.

8. The respondent relied on the case of *Ezekiel Mule Musembi v H Young & Company (EA) Limited* [2019] eKLR and concluded its submissions by stating that it has met the threshold to warrant the court to exercise its discretion and grant stay of proceedings and execution of the order of June 15, 2022 pending the hearing and determination of its appeal.

9. The petitioner in her submissions submitted on the issues as to whether the respondent should be ordered to deposit security, whether the respondent has an arguable appeal, whether the appeal will be rendered nugatory if the orders sought are not granted and whether the respondent is deserving of the orders sought.

10. On the first issue, the petitioner admitted that the applicable law is set out under rule 32 of *The Constitution of Kenya (Protection of rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* and also relied on the case of *Mundia Njeru Geteria v Embu County Government & 4 others* (supra) where the court dealt with the issue of which provisions of the law lay the basis of stay of proceedings.

11. The petitioner also relied on the case of *Kitty Njiru v Nature & Style Fun Day Events & another; Rebecca Muriuki t/a Kahari (Proposed third party)* [2020] eKLR where the court held that the provisions of the civil procedure rules are applicable in constitutional petitions in instances where there was a lacuna in the "Mutunga Rules" for the ends of justice to be met.

12. The petitioner submitted that it has been over twenty-two (22) months since the respondent took possession and obtained wayleave over the suit property and that the court did not order that the amount be paid to her but that the same be deposited into an interest earning account whereby the money will not be spent or wasted pending the hearing and determination of the suit.

13. The petitioner went on to submit that that the respondent has not demonstrated what prejudice it will suffer if the amount is deposited in the joint interest account and it is therefore just that the court orders that the respondent deposits the amount as security in a joint interest earning account.

14. On whether the respondent has an arguable appeal, the petitioner submitted that the respondent's appeal does not raise any arguable grounds of appeal and that the same is frivolous with no chances of success. She relied on the case of *Winfred Nkuene Kirimi v Jecinta Gakii* [2020] in support of her arguments.

15. On whether the appeal will be rendered nugatory if the orders sought are not granted, the petitioner submitted that the respondent seeks to stay a decision that if the appeal is successful, the money having been deposited not into her personal account but in a joint interest earning account, that deposit would be reversible. She relied on the case of *Mbarak Said Ali & another v Sultan Palace Development Limited* [2021] eKLR in support of her arguments.

16. On whether the respondent is deserving of the orders sought, the petitioner relied on the case of *Kyangaro v Kenya Commercial Bank Limited 7 another* [2004] 1 KLR 126 among other cases and submitted that the court should not exercise its discretion in favor of the respondent. The petitioner concluded her submissions by seeking that the court dismisses the respondent's application with costs.

17. In its supplementary submissions the respondent relied on the cases of *Winfred Nkuene Kirimi v Jecinta Gakii* [2020], *NIC Bank Limited & 2 others v Mombasa Water Products Limited* among other cases and reiterated its earlier submissions and sought that the court allows it to pursue its appeal.

Analysis And Determination

18. After considering the application, replying affidavit and the submissions, this court finds that the only issue that arises for determination is whether the court should grant stay of proceedings and all orders consequential to the ruling delivered on June 15, 2022 pending the hearing and determination of the respondent's appeal.

19. The court in the case of *Lucy Waithera Kimanga & 2 others v John Waiganjo Gichuri* [2015] eKLR held as follows:

    (2) The legal considerations in an application for stay of proceedings have been enunciated in a host of judicial decisions which I need not multiply. Except I can cite some few, say, Daniel Walter Rasugu Nbi Hccc No 15 of 2006 ; Global Tours & Travel Limited; Nairobi HC Winding Up Cause No.43 of 2000; and Kenya Power & Lighting Company Limited vs. Esther Wanjiru Wokabi [2014] eKLR. The guiding legal principles gathered from these cases may be summarized as follows: -

        1. The decision whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice.

        2. The sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted.

        3. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order.

        4. In considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.

20. The court has to consider whether the respondent has met the above threshold. The question of whether or not to grant orders of stay of proceedings is a discretionary one. This discretion must be exercised judiciously. The court has to consider if it will be in the interest of justice to grant orders of stay.

21. In this matter, the grounds upon which the respondent is seeking for stay of proceedings are that in its ruling delivered on June 15, 2022 the court directed it to deposit a sum of Kshs 13,583,581.20 into a joint interest earning account in the parties advocates names pending the hearing and determination of the petition; that being dissatisfied with the said ruling, the respondent filed its notice of appeal dated June 24, 2022 on June 29, 2022 at the court of appeal and states that it has an arguable appeal with chances of success and will suffer prejudice if the orders sought are not granted. The main ground in the proposed appeal is that the court never considered the objection as to jurisdiction which the applicant had raised.

22. In the preliminary objection filed on May 25, 2022 by the present applicant, grounds are given for the proposition that the court lacks jurisdiction. However, it is clear from the record that by the time this

court gave directions on the hearing of the motion dated April 12, 2022 on April 13, 2022 the notice of preliminary objection had not been filed and it was filed much later on May 23, 2022 while the ruling date on the said application had already been set for June 15, 2022. It is clear that the applicant herein never complied with the orders to file its response to the application dated April 12, 2022 in that it never filed the response within time. Instead it filed both the replying affidavit and the preliminary objection on May 25, 2022 while it had been served on April 14, 2022 as per the affidavit of service filed in court on April 18, 2022. It would appear that only the replying affidavit was brought to the attention of the court, for it was analyzed in the ruling that is being impugned now. I think it was incumbent on the present applicant to draw to the notice of the court that it had filed a notice of preliminary objection alongside the affidavit and that it had done so late but it never alerted the court to that fact and it is not surprising that the preliminary objection appears not to have been considered in the impugned ruling.

23. This court is of the opinion that the documents of the applicant having been filed out of time in response to the motion dated April 12, 2022, and the issue of jurisdiction having not been addressed in the ruling, the applicant ought to have counted his losses and applied to have the issue addressed in a motion for review or in a fresh substantive motion for striking out for want of jurisdiction since it was guilty of lateness. Having one pleading considered in the impugned ruling and the next one not so considered may give rise to an arguable appeal; however, to this court, the consideration given to the applicant's replying affidavit filed late and which did not address the matters raised in the preliminary objection does not render the late filing of the notice of the preliminary objection a non-issue; the notice filed late is still not properly before the court unless the court favours it with some attention; the fact remains that it was filed late and without leave of court and the court ought not to have referred to any of them unless the applicant made an application to regularize their filing out of time which it did not. Notwithstanding the foregoing omission on the part of the applicant, the principal question at hand is whether the proceedings and the ruling should be stayed.

24. In response, the petitioner stated that the respondent obtained a wayleave over her property and failed to pay compensation for the same and that the amount ordered by the court to be deposited will not go to her personal account but is to be deposited in a joint interest earning account in both their advocates names. The petitioner also argued that the respondent failed to deposit the said amount and will not suffer any prejudice if the orders sought are not granted.

25. The court in the case of *Bai Lin (K) Ltd & 2 others v Zingo Investments Limited & another* [2014] eKLR cited with approval the decision in *Machira v East African Standard (No 2)* (2002) 2 KLR 63 where the court held as follows:

> " 2. In handling applications for stay of further proceedings or execution, one of the fundamental procedural values is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him a success at any stage.....
>
> 4. In order for an unsuccessful party to obtain a suspension of further proceedings or execution, he must satisfy the court on affidavits or other evidential material that substantial loss may result.
>
> 5. In this kind of application for stay, it is not enough for the applicant merely to state that substantial loss will result. He must provide specific details and particulars.
>
> 6. Where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay.....

8. In granting a stay of proceedings the court may consider the delay in making the application and the requirement of security for the due performance."

26. As pointed out by both parties, the court in its ruling delivered on June 15, 2022 ordered the respondent to deposit the sum of Kshs 13,583,581.20 for wayleave through the properties known as LR No 425/87 in a joint fixed interest earning account to be opened and operated in the names of the parties advocates firms.

27. The respondent argues that it will suffer prejudice if the orders sought are not granted as its appeal will be rendered nugatory and that the petitioner is likely to commence contempt proceedings on account of non-compliance and further that it cannot be compensated by way of damages or the petitioner's actions reversed if it's taken through contempt proceedings. It is important to point out that no contempt proceedings have been commenced by the petitioner at the time of the writing of this ruling which makes the grounds upon which the respondent is making this application as merely speculative.

28. Despite having fulfilled the requirements of filing a notice of appeal and lodging the present application timelily, the respondent has not in my view demonstrated any loss that it is likely to suffer if the orders sought are not granted. There is no sufficient cause given for the court to grant stay of proceedings as having an arguable appeal is not adequate for stay of proceedings to be granted as was stated by the court in the case of *Lucy Waithera Kimanga & 2 others v John Waiganjo Gichuri* (supra) as follows:

> " ... As a general rule, stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue. The mere fact that an appeal is arguable alone does not fit the constitutional yardstick used to gauge whether a stay of proceedings should or not be imposed..."

29. In conclusion therefore, the respondent's application dated July 14, 2022 lacks merit and it is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 2ND DAY OF FEBRUARY, 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU