



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC PETITION NO. 28 OF 2019

KENYA CIVIL AVIATION AUTHORITY.....PETITIONER

= VERSUS =

NATIONAL LAND COMMISSION.....1ST RESPONDENT

WESTON HOTEL LIMITED.....2ND RESPONDENT

PRIORITY LIMITED.....3RD RESPONDENT

MONENE INVESTMENTS LIMITED.....4TH RESPONDENT

=AND =

KENYA COMMERCIAL BANK LIMITED.....INTERESTED PARTY

RULING

1. The 2nd respondent in this petition, Weston Hotel Limited, brought a notice of motion dated 16/6/2020, seeking dismissal of the petition on two principal grounds: (i) that this court lacked jurisdiction to entertain the petition; and (ii) that the petition offended the doctrine of exhaustion of remedies. Upon hearing the parties on the said application, the court rendered a ruling dated 3/3/2021, in which it found that it had jurisdiction to entertain this petition. The court accordingly dismissed the 2nd respondent's application dated 16/6/2020 for lack of merit.
2. Dissatisfied with the findings of this court, the 2nd respondent filed a notice of appeal, intimating its intention to challenge the findings of this court in the Court of Appeal. Further, the 2nd respondent brought a notice of motion dated 29/4/2021, seeking an order of stay of further proceedings in this petition, pending the hearing and determination of their appeal against the ruling rendered on 3/3/2021. The said application is the subject of this ruling.
3. The application was premised on two broad grounds: (i) that the applicant had an arguable appeal; and (ii) that the appeal would be rendered nugatory if the proceedings in this petition were not stayed. Although the application was expressed to be supported by the affidavit of Michael Nzile, the said affidavit was not among the documents uploaded on the e-portal alongside the application.
4. The petitioner opposed the application through a replying affidavit sworn on 5/7/2021 by Captain Gilbert Kibe. He deposed that the application lacked merit and that the applicant was intent on delaying the hearing and determination of the petition herein. The 1st respondent in the petition opposed the application through grounds of opposition dated 6/7/2021. They contended that the appeal would not be rendered nugatory because the 2nd respondent would still have the opportunity to ventilate its case in an appeal against the final judgment of this court. They added that a stay order would offend the objective of expeditious disposal of cases.
5. The 3rd respondent supported the application through grounds in support of the application, dated 26/5/2021. They contended that the application was merited because further proceedings in this petition would render the appeal nugatory, hollow and in vain. They added that the application was merited because the decision of the Court of Appeal would inform how further proceedings in this petition would be conducted. Lastly, they contended that there was need for stay because the appeal was anchored on the question of jurisdiction of this court to entertain the present petition, hence it was reasonable, prudent, responsible, and resourceful to let the Court of Appeal determine the appeal before exercising further jurisdiction in this petition.
6. The application was orally canvassed in the virtual court on 12/7/2021. Mr Ahmednasir, SC, counsel for the applicant, submitted that the substantive appeal had been filed and served and the record of appeal had been lodged in the Court of Appeal and served. Counsel added that the applicant had an arguable appeal which this court should preserve. Counsel submitted that one of the key grounds of appeal was that the

findings of this court were anchored on an issue that was not before the court, hence the appeal was arguable. Reliance was placed on, among other decisions, the decision in **David Sironga Oletukai v Francis Arap Muge [2014]2 EA** and the decision in **Galaxy Paints Limited v Falcon Guards Limited (2000) 2 EA**.

7. Counsel for the applicant further submitted that if further proceedings were not stayed, the appeal would be rendered nugatory because there was a clear possibility that the appeal would become academic and useless. Counsel urged the court to give the applicant a chance to ventilate their grievances in the Court of Appeal. Lastly, counsel submitted that no prejudice would be suffered if further proceedings were stayed.

8. Mr. Katwa, counsel for the 3rd respondent, supported the application by submitting that the issue of jurisdiction of this court needed to be disposed by the Court of Appeal before further proceedings are taken in this petition. Counsel added that the time spent by this court would go to waste if the Court of Appeal were to ultimately find that this court did not have jurisdiction to entertain this petition.

9. Opposing the application, Mr Ligunya, counsel for the petitioner, submitted that the application was brought belatedly. He added that the applicant was inviting the court to review its ruling by telling the court that it dealt with issues that were not before it. Counsel added that the applicant had not demonstrated how the appeal would be rendered nugatory. He submitted that even if this court were to render a final judgment, nothing would prevent the applicant from lodging an appeal in the Court of Appeal for a review of the judgment of this court.

10. Mr. Gitonga, counsel for the 1st respondent, opposed the application and submitted that the appeal would not be rendered nugatory because the applicant would still have the opportunity to canvass an appeal against the final judgment of this court. The interested party did not take a position on the application.

11. I have considered the application, the responses to the application, and the parties' respective submissions. I have also considered the relevant legal framework and the applicable jurisprudential principles. The single question falling for determination in this application is whether the applicant has satisfied the criteria upon which our courts exercise jurisdiction to grant an order of stay of further proceedings pending the hearing and determination of an appeal.

12. The issue of the supporting affidavit which was not among the uploaded documents was not canvassed at the hearing of the application under consideration. Secondly, under **Order 51 rule 4** of the **Civil Procedure Rules**, a supporting affidavit is a mandatory requirement only where the motion is grounded on evidence, more so, where there are contested facts. There was no contestation about the facts surrounding the present motion. I will in the circumstances not rest my decision on the missing affidavit.

13. Jurisdiction of this court to grant an order of stay of further proceedings pending the hearing and determination of an appeal in the Court of Appeal is anchored on the framework in **Section 3A** of the **Civil Procedure Act** and **Order 42 (6) (1)** of the **Civil Procedure Rules**. The purposes of that jurisdiction are diverse. First, it serves to avoid wastage of valuable judicial time. Second, it serves to prevent duplication of judicial efforts. Third, it serves to prevent a situation where a successful appeal is rendered nugatory through disposal of a matter that is the subject of the appeal while the appeal is pending determination by the appellate court.

14. Our superior courts and courts in the Commonwealth jurisdictions have developed clear principles that guide the exercise of this jurisdiction. First, this jurisdiction is an exercise of discretion by the court, and the discretion is exercised judiciously in the interest of justice. Second, a party seeking an order of stay of proceedings pending an appeal must satisfy two requirements: (i) that he has an arguable appeal; and (ii) that unless the stay order is granted, the appeal would be rendered nugatory if it ultimately succeeded (*see the Court of Appeal decision in David Morton Silverstein v Atsango Chesoni [2002]eKLR*). Third, the application for an order of stay of further proceedings must be made without unreasonable delay. Fourth, the factors that guide the courts when exercising this jurisdiction vary depending on the facts of each case. The Court of Appeal observed in *David Morton Silverstein v Atsango Chesoni [2002]eKLR* that an arguable appeal is one that is predicated on a point that is not frivolous.

15. On whether or not an intended appeal would be rendered nugatory, the Court of Appeal held in **Kenya Commercial Bank Limited v Benjoh Amalgamated Limited & Another - Civil Application No Nairobi 50 of 2001 (29/2001 UR)** that the question is to be determined based on the facts of each case.

16. **Ringera J** (as he then was) pronounced himself on the jurisdiction to grant an order of stay of proceedings pending appeal in **Re Global Tours & Travel Ltd HCWC No. 43 of 2000** as follows:

“As I understand the law, 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 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. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of the case, 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.”

17. From the court record and from the submissions before me, the applicant brought an application challenging the jurisdiction of this court to entertain this petition. The court rendered itself on that application and found that it had jurisdiction to entertain the petition. Dissatisfied with the findings of this court, the applicant promptly lodged a notice of appeal, inviting the Court of Appeal to render itself on the question as to whether this court made an error in finding that it had jurisdiction to entertain this petition.

18. The applicant submitted, without contestation from any of the other parties to this petition, that the memorandum of appeal was duly lodged and served; the record of appeal was duly filed and served; and what is awaited are the directions of the Court of Appeal on the disposal of the pending appeal. The applicant contended that they had an arguable appeal which would be rendered nugatory if the petition

was disposed while the appeal was pending in the Court of Appeal. The ground advanced to buttress the contention that the applicant had an arguable case was that the court considered an issue that was not before it. Whether or not the applicant is right in contending so is a matter for the Court of Appeal. Suffice it to say, that the applicant has demonstrated that they have an arguable point to canvass in the Court of Appeal.

19. Secondly, parties to this petition agreed to dispose the petition through affidavit evidence, written submissions, and oral highlights of the written submissions. At the point the applicant raised the question of jurisdiction, parties had exchanged their affidavits and were in the process of filing and exchanging written submissions relating to the substantive suit. Once filing and exchange of written submissions is confirmed, oral highlights will follow. After that, the trial court will be invited to render a final judgment, wholly disposing the petition.

20. Given the above circumstances, it would not be an optimal utilization of judicial time to disregard the appeal which is pending disposal in the Court of Appeal, more so when the said appeal relates to the question of jurisdiction of this court to adjudicate this petition. I say so because, should the applicant's appeal succeed, all the judicial time and effort expended on disposing the petition would, in the long run, be a waste.

21. The totality of the foregoing is that the court is satisfied that the applicant has met the criteria upon which our courts exercise jurisdiction to grant orders of stay of further proceedings pending disposal of appeals. Consequently, the application dated 29/4/2021 is allowed and the applicant is granted an order of stay for a period of twelve (12) months during which they are expected to prosecute and procure a determination of their appeal. Costs of the application shall be in the cause.

22. Because I have since left Nairobi (Milimani) Environment and Land Court Station, this Petition will be mentioned before the Presiding Judge of the Court at Nairobi (Milimani) on a date to be set, for the purpose of allocating the File to a judge based at Nairobi (Milimani) Environment and Land Court Station.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 16TH DAY OF SEPTEMBER 2021

B M EBOSO

JUDGE

In the Presence of: -

Ms Mangla holding brief for Mr Ligunya for the Petitioner

Ms Wachira for the 1st Respondent

Ms Khadija holding brief for Mr Ahmednassir SC for the 2nd Respondent

Ms Waweru holding brief for Mr Katwa for the 3rd Respondent

Mr Kaunda holding brief for Mr Wetangula for the Interested Party

Court Assistant: Lucy Muthoni

NOTE:

The relevant application was heard and a ruling date fixed when I was stationed at Nairobi (Milimani) Environment and Land Court Station. Subsequent to that, I was transferred to Thika Environment and Land Court Station. This is why I have delivered the ruling virtually from Thika.

B M EBOSO

JUDGE