



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 23 OF 2019

GODFREY OKOTH OLUOCH.....APPELLANT

-VERSUS-

BOARD OF REGISTRATION OF ARCHITECTS

AND QUANTITY SURVEYORS.....RESPONDENT

RULING

The applicant herein has moved this court by way of notice of motion dated the 22nd day of January, 2019 seeking for an order to stay the decision of the Board of Registration of Architects and Quantity Surveyors dated the 14th day of January, 2019; in the matter of suspension from the Register of Architects; of Architect Oluoch Godfrey Okoth (Ref; BORAQS.E& P/A1592/119) and all consequential orders issued and/or emanating from the decision, pending the hearing and determination of the appeal.

He has also sought an order against the respondent to provide him with a complete transcript of proceedings, and all evidence and documents presented and relied upon by the Board in rendering the impugned decision to suspend him from the register of architects.

The application is premised on the grounds set out on the body of the same and it's supported by the affidavit sworn by Godfrey Okoth Oluoch the appellant herein, on the 22nd day of January, 2020.

The application is made on the grounds that;

The appellant has preferred an appeal against the decision of the Board made on 14th January, 2019; that the appellant has an arguable appeal with a high probability of success; that the appellant is ready and willing to comply with any terms and/or conditions that the court may deem necessary and that if the orders are not granted, the appellant will suffer irreparable harm as he is likely to lose his employment and source of livelihood.

In his affidavit, he avers that sometime in the year 2017, Trident Architects International Limited to which he is affiliated, was contracted as a lead consultant to M/S Harriet Chiggai acting for and on behalf of Alyas Living Limited (Developer) to undertake a construction project involving designing and building of 36 homes along the old Namanga road at Isinya.

He deposes that, sometime in December, 2017, a dispute arose between the developer and the lead consultant leading to the termination of the contract by the developer as a consequence of which, the Developer complained to the respondent. That he was notified of the complaint vide a letter dated the 22nd January, 2018 and he was required to file a response on his involvement or on explanation.

He asserted that the said letter dated 22nd January, 2018 did not provide any particulars of the nature of the complaint lodged against him and/or the grounds upon which the complaint was lodged. That despite failure by the respondent to provide him with the particulars of the complaint, he responded to the complaint vide his letter dated 5th February, 2018. That on the 26th September, 2018, he appeared before the respondent and despite raising his reservations on the continuation of the process while the dispute resolution was being pursued via mediation, he was overruled with the respondent electing to proceed on grounds that there was no correlation between the two processes.

He further deposed that on the 14th January, 2019, without notice or fore-warning, he received a letter from the respondent indicating that the inquiry had found him guilty of gross negligence and professional misconduct and that a decision had been made to suspend him. That the letter of suspension contained no explanation for the decision, the evidence relied on or notice of a right to a review or internal appeal.

He asserted that on 15th January, 2019, the respondent caused to be prominently published in the Nation Newspaper a public notice of his suspension from practice for a period of 3 years with effect from 10th December, 2018 which was contrary to what was stated in the suspension letter in which the effective date was stated as the 14th January, 2019. That following the publication, he received a letter from his

employer on the same day of the publication of the notice requiring him to give an explanation not later than 21st January, 2019 to which he responded and explained that he was in the process of filing an appeal against the decision of the respondent.

He avers that the decision rendered by the respondent was made in total disregard of the evidence submitted before it and that his right to a fair administrative action was infringed on. That on the 21st January, 2019, he wrote to the respondent requesting for information necessary to enable him file a record of appeal but due to the flaws leading to his suspension, he is apprehensive that the same may not be supplied to him which would be prejudicial to him.

The respondent filed two affidavits both of which were sworn by George Charles Omondi, who is the registrar of the Board of the Respondent.

The two affidavits were filed on 12th February, 2019 and on 26th February, 2019 and since they raise similar facts, I propose to consider them together.

The deponent depones that the application is an abuse of court process as the same has not met the threshold for the grant of orders sought and that if the orders sought are granted at this stage, the same are conclusive in nature. He stated that the decision by the respondent was made in public interest among other reasons and in doing so, the respondent complied with all procedures in the law as laid down in the Architects and Quantity Surveyors Act (Cap 525) Laws of Kenya, being the Act that aids the Kenyan Government in regulating the conduct of all practitioners in architecture and quantity surveying in Kenya.

He further deponed that the applicant being an architect, registered and regulated by the respondent herein was suspended for a period of three (3) years with effect from 14th January, 2019 after being found guilty of gross negligence and professional misconduct after a complaint was lodged with it, regarding the applicant's involvement in a project at Queenspark Residential Development Isinya, Kajiado where the applicant was both the Architect and a contractor.

He averred that the applicant was notified of the complaint and was invited for the hearing during which, he was requested for some documents but which he declined to provide to the respondent and since the law allows the respondent to proceed with an inquiry and to make a determination without any reference to any party if he fails to appear and or provide the documents, the respondent proceeded to consider the complaint but they afforded the applicant a fair hearing before arriving at the decision to suspend him.

He averred that the applicant has not disclosed any reasonable ground to stay the decision of the respondent and that the allegation that the applicant will suffer irreparable harm does not arise because he has not disclosed the harm that he will suffer if the orders are not granted. That, to the contrary, the respondent will suffer prejudice if stay is granted since the decision made by the respondent is for the public good owing to the threat posed by collapsing buildings where many Kenyans have lost their lives and property due to gross negligent and professional misconduct by such professionals.

He contended that the applicant's appeal has no likelihood of success and that the balance of probability tilts in favour of the public and not to the applicant as a person.

The applicant in turn filed a further affidavit on 22nd march, 2019 which to a large extent reiterates his affidavit in support of the application. In addition, he depones that the application is not an abuse of the court process and that the respondent has not demonstrated how the granting of orders sought herein are against public interest. He added that the impugned decision was rendered in contravention of constitutional right to a fair administrative action and that the respondent infringed on his rights and that due process was not followed in arriving at the decision of the Board.

The deponent asserted that section 13A of the Architects and Quantity Surveyors Act vests appellate jurisdiction for the decisions of the respondent to the High Court and as such, the court has a statutory mandate to consider the appeal. He states that his current employment remains in jeopardy unless the orders sought herein are granted pending the hearing and determination of the appeal.

Further, he stated that the respondent has not demonstrated any prejudice it would suffer if the orders sought are granted as the nature of the complaint was not on the competence of the applicant as an architect.

The application was canvassed by way of written submissions which this court has duly considered.

Let me start by stating that the application before me seeks to stay execution of the decision made by the respondent, on the 14th day of January, 2019 and an order against the respondent to provide the appellant with transcript of proceedings and all evidence and documents presented and relied on by the respondent in rendering its decision.

Looking at the detailed affidavits filed by the parties herein and the submissions, counsel went beyond the application and ventured into the main appeal. At this juncture, my duty is limited to considering the merits of the application and not the appeal and therefore I will only restrict myself to the materials that address the application and the orders sought therein.

The application has mainly been brought under order 42 Rule 6,(1), Order 51 of the Civil Procedure Rules and Sections 1A, 1B and 3A and Section 75 of the Civil Procedure Act.

Under Order 42 Rule 6 (1) supra, an applicant who is seeking stay of execution pending hearing of an appeal must demonstrate the following;

- a) That the application has been made without unreasonable delay.
- b) Security for the due performance of the decree has been given; and;
- c) That substantial loss may result to the applicant unless the order for stay is made.

What constitutes unreasonable delay varies from the circumstances of each case. In this case, the decision of the Board was given on the 14th day of January 2019 and the application was filed on the 23rd January, 2019 which was about 10 days thereafter. The same was filed timeously.

As stated hereinabove, the applicant has to establish what substantial loss he stands to suffer if the orders are not granted. Substantial loss is the cornerstone in an application for stay of execution as discussed in the case of **Jason Ngumba Kagu & 2 others vs. Intras Africa Assurance Company Limited (2014) eKLR** where the court held;

“The probability that substantial loss will occur if an order of stay of execution is not granted is the cornerstone of the jurisdiction of court in granting stay of execution pending appeal under order 42 Rule 6 of the Civil Procedure Rules. The court arrives at a decision that substantial loss is likely to occur if stay is not made by performing a delicate balancing act between the right of the respondent to the fruits of his judgment and the right of the applicant on the prospects of this appeal. Even though many say that the test in the High Court is not that of “the appeal will be rendered nugatory”, the prospects of the Appellant to his appeal invariably entails that his appeal should not be rendered nugatory. The substantial loss therefore will occur, if there is a possibility of the appeal being rendered nugatory. Here, it is not really a question of measuring the prospects of the appeal itself, but rather, whether by asking the applicant to do what the judgment requires, he will become a pious explorer in the judicial process. That is why I stated in BUNGOMA HCC MISC APPLICATION NO. 42 OF 2011 JAMES WANGALWA & ANOTHER VS AGNES NALIKA CHESETO that;

“The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail.....”

The applicant herein contends that his appeal has good chances of success and that unless the orders herein are granted, he is likely to lose his job. He annexed a copy of the letter dated 15th January, 2019 from his employer, the Kenya Airports Authority, asking him to file an explanation in regard to the suspension to enable the authority make an informed decision. In the said letter, the employer stated thus;

“This action if proven renders you professionally invaluable to the authority during the period of suspension.”

In my view, the contents of that letter would cause reasonable apprehension to the applicant and it's likely that he may lose his job as he has deponed in his affidavit.

The respondent in its submissions have argued that the applicant has not demonstrated the substantial loss that he is likely to suffer and has asked the court to be guided by the decision in the case of **Masisi Mwita vs Damaris Wanjiku Njeri (2016) eKLR** which quoted the case of **Machira T/a Machira & Co. Advocates v. East African Standard (No. 2)** where the court held;

“To be obsessed with the protection of an appellant or intending appellant in total disregard or flirting mention of the so far successful opposite part is to flirt with one party as a crocodile tears are shed for the other, contrary to sound principles for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally ought to be put into effect the way applications for stay of further proceedings or execution pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedures for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court”

However, as the court stated in the case of **Selestica Limited vs. Gold Rock Development Limited 2015 eKLR**

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh his right against the success of a litigant who should not be deprived of the fruits of his judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”

The court has considered those two legal positions and I have also perused the memorandum of appeal. The appellant has raised substantial legal issues on whether he was given a sufficient and fair opportunity to make his representations to the Board as required under section 4(1) of the Fair Administrative Action Act and whether he was notified of the nature of the complaint against him.

The issue can only be determined in the appeal and it's only fair that the applicant herein be granted a stay of decision of the Board.

As regards prayer 3 of the application, it follows that, to enable him compile his record of appeal, the respondent should supply him with the proceedings, the documents and all the evidence that forms part of the proceedings before the Board. I accordingly grant prayer 3 of the application.

In granting those orders, I am also alive to the concerns that were raised by the respondent and in particular its submission that the decision of the Board was made in Public interest. In that regard, it is important that the appeal herein is heard and determined expeditiously to avoid a situation where the applicant is likely to lose interest and/or delay the hearing of the appeal while riding on the interlocutory orders. I therefore grant a stay of execution for 90 days within which the appeal should be prosecuted failing which, the stay order shall automatically lapse. The 90 days shall start to run from when the normal business of the court resumes.

Cost of the application shall abide the outcome of the appeal.

It is so ordered.

Dated, signed and delivered at NAIROBI this 7TH day of MAY, 2020.

L. NJUGUNA

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent