REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

APPEAL NO. 3 OF 2018

SAVE LAMU…….....1ST APPELLANT

SOMO M. SOMO……...2ND APPELLANT

RAYA FAMAU AHMED……..3RD APPELLANT

MOHAMMED MBWANA……...4TH APPELLANT

JAMAL AHMED ALI……5TH APPELLANT

ABUBAKAR MOHAMMED TWALIB……...6THAPPELLANT

VERSUS

NATIONAL ENVIRONMENTAL MANAGEMENT

AUTHORITY (NEMA)……...1ST RESPONDENT

AMU POWER COMPANY LIMITED……..2ND RESPONDENT

RULING

1. By this Notice of Motion application dated and filed herein on 24th September 2018, the six Appellants pray for orders that pending the hearing and determination of the Appeal filed herein, this Court be pleased to stay the proceedings in the National Environment Tribunal (hereafter NET) Appeal No. 196 of 2016.

2. The application is supported by an affidavit sworn by one Michael Kioko Munguti, a Court Process Server in the Appellant's Counsel's office and is premised on the grounds:-

i) That the NET has set down the said Appeal No. 196 of 2016 for hearing of the Respondent's case from 24th to 28th September 2018;

ii) That the setting down of dates for hearing of the Respondents cases followed the dismissal of an Application for adjournment by the Applicant to provide testimony of their five remaining expert witnesses at a later date; the ruling on dismissal was delivered on 6th September 2018. As the Appellants therefore had no more witnesses present before the Tribunal on the day, the Tribunal held their case closed;

iii) That as a consequence of that decision, the Applicant filed the Appeal before the Court;

iv) That the Applicants are apprehensive that if this Court does not stay the proceedings before the Tribunal the same may continue and conclude to the detriment of the Appellants;

v) That in the event the matter proceeds before the Tribunal before the Appeal is heard, the Appellants ability to prove their case may be prejudiced through lack of consideration of evidence they believe would be of great assistance to their case;

vi) That if the proceedings before the Tribunal continue before the Appeal is heard and determined, the Appellants' right to fair hearing, to access to justice, and to a clean and healthy environment would be greatly compromised;

vii) That in such event, the Appellants will suffer irreversible damage. Moreover, the Appellants have an arguable appeal with a reasonable chance of success;

viii) That the balance of convenience favours the Applicants. The public interest in the subject matter of appeal before the Tribunal is immense and should fall in favour of the precautionary principle in environmental protection recognised in Article 69 of the Constitution, and the right to a clean and healthy environment recognised in Article 42 and bolstered by Articles 69 and 70 of the Constitution;

ix) That any prejudice caused by the delay in proceedings with the NET Appeal can be mitigated by an expedited hearing of the Appeal before this Court;

x) That the stay orders sought are the only way to balance all the competing interests and hold even the scales of justice and to facilitate the just and proportionate resolution of the Appeal before the Court;

xi) That an order of stay of the NET proceedings is therefore necessary to safeguard the Applicants' right of appeal, protect the res, preserve the status quo and prevent the Appeal before the Court, if successful, from being rendered nugatory, futile and academic; and

xii) That no prejudice shall be occasioned to the Respondents should the Application be allowed.

3. In a Replying Affidavit sworn and filed herein on 1st October 2018, the National Environment Management Authority (the 1st Respondent) through its Principal Legal Officer Erastus K. Gitonga contends that the Appellant's application is fraught with non-disclosure of material facts, suppression of the truth and is wholly intended to mislead the Court.

4. According to the 1st Respondent, the Tribunal made directions on 28th March 2018 aimed at expediting the conclusion of the Appeal. Among the directions issued then was that parties avail all their witnesses on the hearing dates allocated for their respective cases and that if any party failed to avail all or some of its witnesses on the dates allocated to the party, the said party would have to close its case without calling those witnesses.

5. The 1st Respondent avers that subsequently the matter was mentioned before the Tribunal on 26th July 2018 when it was agreed that the Appellants' case would be heard uninterrupted between 3rd and 7th September 2018. A further mention on 31st July 2018 confirmed that the Appellants would avail all their remaining witnesses and that they needed two weeks' notice to avail their foreign expert witnesses.

6. The 1st Respondent further avers that the Appellants produced some witnesses on 3rd, 4th and 5th September 2018 after which they sought to depart from the earlier agreed position by applying for an adjournment to call other witnesses. The formal application for adjournment was on 6th September 2018 dismissed inter alia on the grounds that it lacked merit. It is therefore the 1st Respondent's case that the Appellants are only bent on delaying justice in this matter as the contested License was issued two years ago.

7. Amu Power Company Ltd (the 2nd Respondent) filed their Replying Affidavit in response on 2nd October 2018. In the affidavit sworn by its Chief Operating Officer Cyrus Kirima, they join the 1st Respondent in calling for the rejection of the Appellant's application.

8. According to the 2nd Respondent, the application herein is actuated by extreme bad faith as the Appellants waited until the last minute to move the Court after their application for an adjournment was disallowed on 6th September 2018. The 2nd Respondent asserts that the subject matter herein had been pending before the Tribunal for a while and hence the Tribunal issued clear directions to expedite the same on 28th March 2018.

9. It is the 2nd Respondent's case that subsequent to the issuance of the said directions, the Appellants confirmed that they would avail all their witnesses on the confirmed dates for hearing. However on 29th August 2018, the Appellants applied for an adjournment on the purport that their 'foreign' witnesses would not be available.

10. According to the 2nd Respondent, this application is part of a wider, concerted attempt by Civil Society groups to file a multiplicity of suits to frustrate its proposed coal fired power plant project. It is their case that the grant of the orders sought herein will greatly prejudice it as it is unable to start the construction of the coal fired power plant yet it had made huge financial commitments with a huge negative impact on its financial health.

11. I have considered the application and the respective responses thereto. I have equally perused and considered the submissions made herein and Lists of Authorities to which I was referred by the Learned Advocates for the parties.

12. Order 42 Rule 6(1) and (2) of the Civil Procedure Rules provides for stay of proceedings thus:-

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and make

such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellant Court to have such order set aside.

(2) No order of stay shall be made under sub rule (1)unless

a) The Court is satisfied that substantial loss may result to the applicant unless the order is made and the application has been made without unreasonable delay; and

b) Such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

13. The legal considerations in an application for stay of proceedings have been enunciated in a host of judicial decisions. The threshold for the grant of such orders was provided in ***Global Tours and Travels Ltd- Nairobi Winding up Cause No. 40 of 2000 (unreported***) where Ringera J.(as he then was) stated that:-

"…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. Such discretion is unlimited save by virtue of its character as a judicial discretion; it should be exercised rationally and not capriciously or whimsically. 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 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 timeously."

14. The Applicants before me are the Appellants in the National Environment Tribunal (NET) Appeal No. 196 of 2016 which, at the time this Ruling was reserved, was pending the filing of Written Submissions and subsequent delivery of Judgment. The Application before me was triggered by a decision made by the Tribunal on 6th September 2018 wherein it dismissed a formal application made by the Appellants and dated 3rd September 2018, seeking for an adjournment.

15. According to the Appellants, the purpose of their application for adjournment was to enable them call five witnesses in a case where 12 out of their planned 17 witnesses have since testified. The five witnesses they intended to call were, according to them, environmental experts in the fields of Marine, health and climate and who had already filed their Witness Statement and were to give evidence on the effects the proposed Lamu Coal Fired Power Project would have on the environment.

16. It is the Appellants case that the dismissal of their application for adjournment prejudiced their right of access to justice, right to a fair hearing and to a clean and healthy environment. They assert that in denying them an adjournment to facilitate expert testimony on potential adverse effects of the proposed coal plant, the Tribunal disregarded the principle of sustainable development as provided under Article 10 of the Constitution.

17. As I understand it, an adjournment is granted by a Court, or as in this case, a Tribunal, in the exercise of its discretion. Such discretion will be based on the reasons given by the party applying and on the particular circumstances of the case. In this regard, an appellate Court will not normally interfere with the exercise of such discretion unless it has been shown that the discretion was not exercised judiciously.

18. As was held in ***Mbogo & Another –vs- Shah (1968) EA 93***, the appellate Court will not interfere with the exercise of discretion of a Court unless it is satisfied that it misdirected itself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the Court was clearly wrong in the exercise of the discretion and that as a result there had been injustice.

19. Indeed as was stated in ***Job Obanda –vs- Stage Coach International Services Ltd & Another, (Civil Appeal No. 6 of 2001),*** the elements the trial Court should take into consideration in dealing with the question of adjournment are the adequacy of reasons given for the application, how far, if at all, the other party is likely to be prejudiced by the adjournment, and how far such other party can be suitably compensated by the order against the applicant to pay costs.

20. From the material presented before me; it is evident that the Appeal pending before the NET was filed in the year 2016. The Appellants were themselves unhappy with the pace at which the Tribunal was handling the matter. As a result and by a letter dated 27th July 2017, the Appellants wrote to the Honourable the Chief Justice of the Republic of Kenya complaining about the delays in the Appeal and expressing their desire that the same be concluded expeditiously.

21. Subsequently, at a sitting held on 28th March 2018, the Tribunal issued directions aimed at expediting the matter. Among those was a directive issued to all parties to avail all their witnesses on the hearing dates allocated for their respective cases with a caution that those who failed to do so would have to close their case without calling those witnesses.

22. At another session held on 31st July 2018, the Appellants agreed with the Tribunal that their case would be heard for an uninterrupted period running from 3rd to 7th September 2018. As it turned out however, some of their witnesses based abroad would not be available and by a formal application dated 3rd September 2018, they asked the Tribunal to adjourn the hearing for those witnesses to other dates.

23. At paragraph 5 of the Affidavit of Mr. Waikwa Wanyoike, one of the Counsels for the Appellants, filed in support of the said application, he provided reasons for the unavailability of the witnesses as follows:-

"5. That further, the Appellants have made further efforts to procure the witnesses and it was impossible for them to be available. Mr. Peter Orris has his daughter's wedding on September 8, 2018. Dr. Kairo is away in Australia on work assignment. Paul Winn, Nick King and Rico Euripidon had work assignments scheduled way in advance."

24. It is apparent that the Tribunal considered the above among other reasons and proceeded to decline the application for adjournment and thereby prompted this Appeal. In this regard, Section 130(4) of EMCA provides as follows:-

"(4) Upon the hearing of an appeal under this Section, the Environment and Land Court may:-

(a) Confirm, set aside or vary the decisions or order in question;

(b) Remit the proceedings to the Tribunal with such instructions for further consideration, report, proceedings or evidence as the Court may deem fit to give;

(c) Exercise any of the powers which could have been exercised by the Tribunal in the proceedings in connection with which the appeal is brought; or

(d) Make such other order as it may deem just, including an order as to costs of the appeal or of earlier proceedings in the matter before the Tribunal.

25. I have re-evaluated the circumstances surrounding the proceedings before the Tribunal from the material placed before me and I am not persuaded that a stay of the proceedings before the Tribunal would be just and fair in the circumstances. As the Court of Appeal stated in ***Japheth Pasi Kilonga & 8 Others –vs- Mombasa Autocare Ltd(2015)eKLR***:-

"The single most drawback in the administration of justice in this jurisdiction is the delay in the determination of cases, resulting in overwhelming case backlog. Adjournment has been identified as the leading contributing factor to this. Lord Denning, MR in the oft-cited case of **Fitzpatrick –vs- Batger & Company Ltd(1967)2 All ER 657** *warned that:-*

"Public policy demands that the business of the Courts should be conducted with expedition."

Like never before today this policy is emphasized more as it is underpinned in the Constitution. Article 159(2) (b) & (d) enjoins Courts to ensure justice is not delayed and is administered without undue regard to procedural technicalities. Sections 14(5) of the Supreme Court Act, 3A and 3B of the Appellate Jurisdiction Act and 1A and 1B of the Civil Procedure Act have also enacted the overriding objective which require the Courts to facilitate the just, efficient, expeditious, proportionate and affordable resolution of disputes.

26. In my mind, I think it was still possible for the Tribunal to demand expedition in the disposal of cases before it and do justice at the same time. The Appellants had 12 of their witnesses testify and they did cross examine the Respondents witnesses. As I have stated, the Appeal was filed before the Tribunal more than two years ago and there was need to expedite and conclude the proceedings.

27. That would not however be the end of the remedies available to the Appellants. Under Section 130(4) (a) and (b) of EMCA, upon hearing the Appeal preferred herein, this Court may confirm, set aside or vary the decision or order declining to grant the adjournment or remit the proceedings to the Tribunal with such instructions for further consideration, report, proceedings or evidence as the Court may deem fit to grant.

28. As the Court of Appeal stated while dealing with similar circumstances in ***Omagwa Onyancha –vs- Simon Nyaundi Ogari & Another(2008)eKLR:-***

"….Assuming for a moment that the applicant has an arguable appeal……, would the success of that appeal be rendered nugatory if we refused to grant a stay of proceedings as sought in this application? Since the hearing of the Petition has commenced, the same will eventually come to an end and a Judgment delivered by the High Court at Kisii. But if the applicant succeeds in the intended appeal then proceedings in the High Court would be rendered unnecessary but an appropriate order for costs can be made to remedy that."

29. Echoing similar sentiments in ***Christopher Ndolo Mutuku & Another –vs- CFC Stanbic Bank Ltd (2015) eKLR***, Gikonyo J. put it more aptly for our case as follows:-

"The Court is aware the Defendant has an unfettered right of appeal which it has sought to exercise. But that right has to be balanced against the right of the Plaintiff to equal treatment in law and to have his case determined without unreasonable delay. That Constitutional desire demands that proceedings should not be hindered without just and sufficient cause. That position of the law is informed by the principle of justice in Article 159 of the Constitution which expresses the now common principle of law known as the overriding objective of the law; that cases should be disposed of in a just, proportionate, expeditious and affordable manner. That explains why the law on stay of proceedings pending appeal will be concerned with the sole interest of justice to order a stay of proceedings.

30. In the circumstances of this case, I find and hold that the grant of stay of proceedings in a matter already concluded by the Tribunal while

the Appellants' right to appeal remains unfettered would go contrary to the principles enunciated under Article 159 of the Constitution in regard to the expeditious disposal of such proceedings.

31. Having made that finding, I did not consider it necessary at this stage to deal with the other matters raised by the parties in regard to the Appeal. The application dated 24th September 2018 is dismissed with costs to the Respondents.

Dated, signed and delivered at Malindi this 24th day of January, 2019.

J.O. OLOLA

JUDGE