



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC APPEAL NO. 16 OF 2015

DIRECTOR GENERAL NATIONAL ENVIRONMENT MANAGEMENT

AUTHORITY (NEMA).....APPELLANT

VERSUS

AFRICAN NETWORK FOR ANIMAL WELFARE SUING THROUGH ITS

EXECUTIVE DIRECTOR, JOSEPHAT NGONYO.....1ST RESPONDENT

THE EAST AFRICAN WILDLIFE SOCIETY.....2ND RESPONDENT

PAULA KAHUMBU.....3RD RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY.....4TH RESPONDENT

PERMANENT SECRETARY MINISTRY OF ROADS....5TH RESPONDENT

RULING

The 1st, 2nd and 3rd respondents appealed to the National Environment Tribunal (“the tribunal”) against the decision of the appellant to grant to the 4th respondent Environmental Impact Assessment Licence (“EIA Licence”) for the construction of the Nairobi Southern by-pass. The 1st, 2nd and 3rd respondents contended that the said licence was issued without any due regard to the impact the said project would have on the Nairobi National Park. The 1st, 2nd and 3rd respondents’ appeal was allowed by the tribunal in a ruling that was delivered on 30th May, 2013.

In its ruling, the tribunal reserved its decision on the issue of costs and directed the parties to address it on the same later in accordance with Rule 39 of the National Environment Tribunal Rules of Procedure (Legal Notice No. 191 2003). The parties addressed the tribunal on the issue of costs on 27th June, 2013. The tribunal considered both oral and written submissions which were made before it by the parties and in a ruling delivered on 13th February, 2015 awarded the 1st, 2nd and 3rd respondents costs against the appellant and the 4th respondent in the sum of Kshs.2,010,294/- together with interest at the rate of 12% per annum from the date of delivery of the ruling until payment in full. The appellant was dissatisfied with the decision of the tribunal on the issue of costs and appealed against the same to this court on 12th March, 2015.

The appellant challenged the decision of the tribunal on several grounds. The appellant is yet to file a record of appeal to enable the court consider whether or not to admit the appeal for hearing. The tribunal’s case file has also not been forwarded to this court. As I am writing this ruling, I have not had the benefit of the proceedings of the tribunal. I have not even had sight of the decision of the tribunal on the appeal that was before it.

What is now before the court is the 1st, 2nd and 3rd respondents’ application brought under Section 1A, 1B and 3A of the Civil Procedure Act, Chapter 21 Laws of Kenya and, Order 26 Rules 1 and 5 and Order 42 Rule 6(1) of the Civil Procedure Rules seeking the following orders:

1. THAT the appellant does within seven (7) days after being ordered to do so give security for the 1st to 3rd Respondents’ costs to the satisfaction of the court.

2. THAT in the alternative leave be granted to the 1st to 3rd respondents to execute for the recovery of the entire costs allowed by the tribunal if the appellant will not have deposited the same with the court.

3. THAT the court does issue directions on the filing of the record of appeal and the hearing of the appeal.

4. THAT the costs of the application be in the cause.

The 1st, 2nd and 3rd respondents' application was brought on the grounds that although the appellant had appealed against the decision of the tribunal on costs, it had not requested the tribunal for its proceedings and ruling. The 1st, 2nd and 3rd respondents (hereinafter referred to only as "the applicants") contended that as at the time of delivery of the said ruling, the proceedings and ruling of the tribunal were already typed and ready for collection. The applicants contended that although the appellant was exercising its right of appeal under section 130 of the Environmental Management and Co-ordination Act, 1999 (EMCA), the appellant had neither provided security for costs nor prepared the appeal for hearing. The applicants averred that it was necessary for them to be granted leave to execute for the recovery of their costs if the appellant was not coming forth with security.

The application was opposed by the appellant through a replying affidavit sworn by Edward K. Wabwoto on 22nd February, 2016. In the affidavit, the appellant contended that the applicants' application was premature and lacked merit because the court had not given directions on the hearing of the appeal. The appellant contended that it was keen on prosecuting the appeal contrary to the allegations made in the application. The appellant averred further that the application did not meet the requirements for granting the prayers sought. The appellant contended that there was no evidence placed before the court showing that it would be unable to pay the costs that were awarded to the applicant's by the tribunal.

The application was argued by way of written submissions. The applicants filed their submissions on 19th July, 2016 while the appellant filed its submissions on 27th September, 2016. In their submissions, the applicants highlighted the provisions of Order 42 Rule 6 (1) of the Civil Procedure Rules on stay of execution and Order 26 Rule 1 and 5 on security for costs. The applicants also highlighted the provisions of section 130 (2) of EMCA on automatic stay of the decisions of the tribunal where an appeal has been filed. The applicants submitted that the automatic stay under section 130(2) of EMCA was intended to avert injuries to the environment and not to assist parties such as the appellant to evade payment of costs by using the appeal as a cloak. The applicants cited the case of Republic v Town Clerk of Webuye County Council, Ex parte Ayub Murumba Kakai (2014) eKLR and submitted that a decree holder's right to enjoy the fruits of his judgment must not be thwarted and that when faced with such scenario the court should adopt an interpretation that favours enforcement and as far as possible secures accrued rights. The applicants submitted that since there was no injury likely to be occasioned to the environment should they proceed to execute the order on costs, the appellant was not entitled to a stay of execution under section 130 (2) of EMCA. The applicants urged the court to grant them leave to execute for the recovery of their costs.

In its submission in reply, the appellant submitted that the orders sought by the applicants could not be granted because they were contrary to the provisions of section 130 (2) of EMCA which grants an automatic stay of execution of the decisions of the tribunal where an appeal has been filed until the appeal is heard and determined. The appellant submitted that the provisions of Order 26 Rules 1 and 5 and Order 42 Rule 6 of the Civil Procedure Rules cannot override the express provisions of section 130(2) of EMCA. The appellant submitted that substantive provisions of a statute must override subsidiary legislation. In support of this submission, the appellant cited the Supreme Court case of Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others (2013) eKLR where the court held that Rule 77 of the Court of Appeal Rules could not limit or override the provisions of Article 164(3) of the Constitution, section 3 of the Appellate Jurisdiction Act and section 85A of the Election Act which vests in the court power to hear appeals from the High Court. The appellant submitted that granting the orders sought by the applicants would be tantamount to determining the appeal without a hearing.

I have considered the application and the response thereto by the appellant. I have also considered the submissions by the advocates for the parties. The applicants have sought two substantive orders. The first order sought is for security for costs. This prayer is grounded on Order 26 Rule 1 of the Civil Procedure Rules. I am of the view that Order 26 Rule 1 of the Civil Procedure Rules is not applicable to the proceedings before the court. Order 26 Rule 1 of the Civil Procedure Rules applies only to suits strictly so called. What is before the court is not a suit but an appeal. The appellant herein cannot therefore be called upon to furnish security for costs under Order 26 Rule 1 of the Civil Procedure Rules. Security for costs in appeals is provided for under Order 42 Rule 14 of the Civil Procedure Rules which the applicants have not invoked.

I wish to add that even if the court had power under Order 26 Rules 1 of the Civil Procedure Rules to make an order for security for costs of an appeal; the applicants had to establish that the appellant would be unable to pay their costs should it lose the appeal. In the present case, there is no evidence or suggestion that the appellant would not be able to pay the costs of this appeal or those which were awarded by the tribunal.

In their application, the applicants had also referred to Order 42 Rule 6 of the Civil Procedure Rules. I am of the opinion that a respondent to an appeal cannot move the court under Order 42 Rule 6 of the Civil Procedure Rules to compel an appellant to provide security save where such appellant has sought an order for stay of execution. Under Order 42 Rule 6 of the Civil Procedure Rules, security is only required of an appellant who has sought a stay of execution. The providing of security is a condition which must be met before an order for stay of execution is granted. In the case before me, the appellant has not sought an order for stay of execution of the order appealed against. I am of the view that it is not open to the applicants in the circumstances to seek security from the appellant under Order 42 Rule 6 of the Civil Procedure Rules.

The other order sought by the applicants is leave to execute for the recovery of the costs that were awarded to them by the by the tribunal. As concerns this prayer, I am in agreement with the submissions by the appellant that the execution in respect of which leave is sought is barred by section 130(2) of EMCA. Section 130 (2) of EMCA provides for an automatic stay of execution of all decisions of the tribunal where an appeal has been filed until the appeal is heard and determined. Execution for the recovery of costs is not exempted. I am not in agreement with the applicants' novel argument that the automatic stay is limited only to instances where there would be an injury to the environment

should execution be undertaken.

The upshot of the foregoing is that save for the directions sought in the application, the other orders sought by the applicants are not for granting. I decline to grant prayers 1 and 2 in the application dated 25th November, 2015 and direct that the appellant shall compile and file in court a record of appeal within 60 days from the date hereof in default of which its appeal shall stand struck out without any further reference to the court. It is so ordered.

Delivered and Dated at Nairobi this 21st day of February 2019

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

N/A for the Appellant

Ms. Mukami h/b for Mr.Makumi for the 1st to 3rd Respondents

N/A for the 4th Respondent

N/A for the 5th Respondent

Catherine-Court Assistant