



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENT AND LAND COURT MILIMANI
CIVIL APPEAL NO. 50 OF 2016

ISAAC GOTOHO, PETER MWANGI & SANJEEV SHARMA

Suing as Chairman, Vice Chairman & Committee Member of

THE RUNDA ASSOCIATION.....APPELLANT/APPLICANT

=VERSUS=

THE DIRECTOR GENERAL, NEMA.....1ST RESPONDENT

THE GROVE LIMITED.....2ND RESPONDENT

RULING

The matter for determination is the Notice of Motion Application dated **23rd May 2016**, brought by the appellant herein seeking for orders that;-

1) Spent

2) Spent

3) That the Honourable Court be pleased to issue a temporary injunction restraining the 2nd Respondent by itself, its servants and/or agents from continuing with the developments on all those parcels of land known as L.R No. 29173, 7785/345/= and 7785/352 which comprise an amalgamation of 15 separate parcels situated at Runda and in respect of which it has obtained approvals to construct what it refers to as 'low density mixed use development, 200 bed-residential hotel, a retail centre of two floors and a four floor office block which developments are being undertaken pursuant to the 1st Respondent's decision dated 25th July 2014, granting Licence No. NEMA/EIA/PSL/349 to the 2nd Respondent pending the hearing and determination of this appeal.

4) That this Honourable Court issues such further orders and or directions as it may deem just and fit.

5) That the costs of this application be in the appeal.

The application is supported by the grounds stated on the face of the application and on the annexed affidavit of **Peter Mwangi**. These grounds are:-

a) *By a Ruling delivered on 10th May 2016, the National Environment Tribunal dismissed the Applicant's Appeal No. NET/143/2015, by which the Appellant had challenged the 1st Respondent's decision dated 25th July 2014, granting Licence No. NEMA/EIA/PLS/349 to the 2nd Respondent.*

b) *The said appeal herein was founded on a number of grounds, among which are that the proposed development site is situated on a wetland and that there was no proper public participation prior to the issue of the Licence that is sought to be impugned as required both under the Constitution of Kenya and the Environmental Management & Co-Ordination Act.*

c) *As the said Appeal was anchored on the pillars of ecological sustainable development as stipulated in the Constitution and the Environmental Management Conservation Act [EMCA], there was an automatic STOP Order issued pursuant to S.129(4) of EMCA immediately following the filing of the said appeal via NET/143/2015 by which the status quo ante on the activities on the subject property was to be maintained pending the hearing and determination of the appeal.*

d) *Following the ruling delivered on 10th may 2016 , therefore the said STOP Order lapsed accordingly with the result that the 2nd Respondent has, even before the expiry of the 30 –days-period within which an appeal under S.130 of EMCA was to be lodged, resumed construction operations on the site.*

e) *This appeal seeks to protect ecological integrity and sustainable development in line with the very important precautionary principle and it is important that the status quo of the development that is being challenged be maintained via a temporary injunction pending the hearing and determination of this appeal.*

f) *There is therefore no STOP order restraining the 2nd Respondent from going on with the developments on the suit site and which, if not restrained as currently sought, will render the pending challenge and this appeal no more than an academic exercise and thereby defeat the ends of justice.*

g) *This appeal and the challenge to the 1st Respondent's grant of Licence No. NEMA/EIA/PSL/349 to the 2nd Respondent raises weighty environmental concerns posed by the 2nd Respondent's intended development on the suit property and it is just and expedient that the Court has an opportunity to address its mind to the issues as expeditiously as possible.*

h) *There is a real and imminent danger of irreversible damage being done on the environment should the intended project go on without the appeal being heard on merits. The substance of the merits thereof can only be properly ventilated via an appeal on merits.*

On his supporting Affidavit, **Peter Mwangi** averred that he is the Appellant Association's Vice Chairman and an Advocate of the High Court of Kenya and is conversant with the pertinent facts *vis-a-vis* this application and the intended appeal, and that he has the authority of the Appellant's Association to make and swear this affidavit on the Applicant's behalf. Further that from the grounds set out in the Memo of Appeal, the appeal raises weighty environmental issues which require a thorough investigation by this court to ensure a fair and just determination thereof. Further that there is a real and imminent danger of irreversible damage being done on the environment should the intended project go on without the appeal being heard on merit. The substance of the merits thereof can only be properly ventilated via an appeal on merits. .

The application is opposed by the Respondents herein. The 1st Respondent filed grounds of opposition and stated that:-

1) That the Court has no jurisdiction to entertain this Application as it offends the express provisions of Order 42 of the Civil Procedure Rules 2010 and Section 130(1) of the Environmental Management & Co-Ordination Act.

2) That no order can be made under the provisions of the law stated by the Appellant to stop the Construction of the 2nd Respondents project. If any Order for stay or injunction were to be made, then the same can only be pursuant to the provisions of Order 42 Rule 6 of the Civil Procedure Rules 2010;

3) That the Appellant has not met the criteria for the grant of injunction under the provisions of Order 42 Rule 6. As it has not demonstrated;-

a) Substantial loss; and

b) Sufficient case for the grant of an order of injunction as set out in Giela Vs.Cassman Brown 7 Co.Ltd (1973) EA 358;

4) That the 2nd Respondent's project had been approved by the 1st Respondent by the issuance of an Environmental Impact Assessment Licence and upon dismissal of the Appellant's Appeal before the Honourable Tribunal through its Ruling delivered on 10th may,2016 there was no indication by the Appellant immediately thereafter of its intention to Appeal against that decision.

The 1st Respondent urged the Court to disallow the appellant's application.

Rohan Naloo Ballo Bhai Patel, a Director of the 2nd Respondent swore a Replying Affidavit in opposition to the instant Notice of Motion. He averred that the 2ND Respondent was registered as proprietor of all the piece of land known as **LR No. 7785/1451** which is an amalgamation of three parcels of land originally known as **LR No. 29173,7785/345 & 7785/352** not only have these three titles since ceased to exist but the 2nd Respondent's land is not amalgamation of 15 separate parcels of land as alleged in the Appellant's Application. He further averred that the appellant's Appeal in **NET 143/2015** before the National Environmental Tribunal was founded on numerous ground; it was alleged that the proposed development was on a wetland and that there had been no proper public participation prior to the issuance of the Environmental Impact Assessment Licence matters which the 2nd Respondent easily demonstrated to be false. He also averred that the conduct of the Appellant throughout the proceedings before the 1st Respondent tribunal is indicative of malafides action; the Appellant filed the appeal out of time without any evidence in support of its grounds of appeal. Indeed as disclosed in the e-mails between the Appellant and its advocates, it was a deliberate tactical decision so that the Appellant may enjoy the automatic statutory stay on the development and thereafter, they would move the Court and obtain ex-parte orders against the development as per exhibit "**RBP1**". Further that he was advised by the 2nd Respondent's advocates which advised he believed to be correct that since injunctions are equitable reliefs, unexplained delay and approaching the Court with unclean hands disentitles parties to injunctive reliefs. It was his allegation that as a result of the Appellant's actions in instituting the said appeal to the 1st Respondent tribunal, the 2nd Respondent has suffered considerable losses amounting to aggregate sum of **Kshs.118,539,396** /=**as of 30th April 2016**,which continue to accrue at the daily rate of **Kshs.287,717**/= as per exhibit marked "**RBP2**". He also contended that in light of the severe negative repercussions that an order of injunction would occasion, the 2nd Respondent in the circumstances of this case, it is apparent that the balance of convenience tilts in favour of the 2nd Respondent is not issuing the orders sought. He urged the Court to dismiss the application with costs to the Respondents.

The application was canvassed by way of written submissions. The Law Firm of **Ochieng ,Onyango, Kibet & Ohanga Advocates** for the appellant filed their written submissions on **14th July 2016**, and urged the Court to allow the instant application . They relied on **Section 130(2) of EMCA** which provides that:-

“ No decision or order of the tribunal shall be enforced until the time for lodging an appeal has expired or where the appeal has commenced, until the appeal has been determined”.

M/s I M Lukoba Advocate for the 1st Respondent filed the written submissions on behalf of the 1st Respondent on ***14th July 2016***, and relied on the case of ***Patricia Njeri & 3 others Vs National Museum of Kenya , Nairobi Civil Appeal No. 492 of 2004*** ; where the Court held that;-

“ An order of injunction pending Appeal is a discretionary matter. The discretion must however be exercised judicially and not in a whimsical or arbitrary fashion. This discretion is guided by certain principles....”.

Further the Law Firm of ***Oraro & Co. Advocates*** for the 2nd Respondent filed their written submissions on ***14th July 2016***, and relied on various decided cases among them ***Nakumatt Holdings Ltd Vs National Environmental and Management Authority (2005) KLR 668*** where the Court found that ***Section 130(2) of EMCA*** had not been violated as the tribunal had not made a decision or Order capable of being enforced.

2nd Respondent further relied on the case of ***Madhupaper International Ltd Vs Kerr, Civil Appeal No. 116 of 1985*** where the Court of Appeal held that: -

“Jurisdiction to grant an injunction pending an appeal is discretionary and is to be exercised judicially and not arbitrarily. It would be wrong to grant the injunction where the appeal is frivolous or where to grant it would inflict greater hardship than it would avoid”.

The Court has now considered the instant Notice of Motion and the annexures thereto. The Court has also carefully considered the written submissions, the cited authorities the relevant provisions of law and the Court makes these findings.

There is no doubt that the appellant herein had filed an appeal before ***National Environment Tribunal (NET)*** over the issuance of a conditional Licence No. ***NEMA/EIA/PSL/349*** on ***23rd July 2014***. The said Appeal was canvassed at ***NET*** and a decision was delivered on ***9th May 2016***, whereby the appellant's appeal was dismissed. The appellant filed the instant application on ***23rd May 2016***, and interlocutory orders of injunction was issued. The appellant has sought to have the said interim order of injunction confirmed, whereas the Respondents have urged the Court to set aside the said interim orders of injunction and dismiss the instant application with costs. The Court is therefore called upon to determine whether the applicant is deserving of the orders sought.

The application herein is anchored on various provisions of law but more specifically under ***Sections 3, 13, 18 & 19*** of the ***Environment & Land Court Act (Cap) 12A) Laws of Kenya*** and ***Sections 1A, 1B ,3A & 63 (e)*** of the Civil Procedure Act.

The Principles for grant of injunction pending Appeal have variously been elucidated in various judicial pronouncements. Further courts have jurisdictions to grant injunction pending appeal but such discretions must be exercised judicially. This was the position taken in the case of ***Patricia Njeri & 3 Others Vs National Museum of Kenya (supra)***. In the case of ***Kamau Muchuha Vs The Ripples Ltd Civil App.No 186 of 1992*** the court held that:

“ In an application for injunction pending Appeal , it may well be that the intended appeal is not frivolous but the court does not have to decide whether the judge was right or wrong since the determination will be made at the hearing of the appeal itself”.

At this juncture therefore, the court is not to determine on the merit of the appeal. All the Court is to determine is whether the applicant has a reasonable argument and that the appeal is not frivolous. Further that the applicant must show that failure to grant the injunction would render the appeal nugatory.

The bone of contention herein is the issuance of conditional licence no **NEMA/EIA/PSL/349** to the 2nd Respondent herein by the 1st Respondent. The issuance of the said licence meant that the 2nd Respondent was free to construct low density development in their properties **LR No. 7785/345 and 7785/352** situated in Runda, Nairobi . The appellant is opposed to the said construction on various grounds.

I have seen the Memorandum of Appeal filed on **20th May 2016**, and various issues have been raised by the appellant therein. The appellant has a reasonable argument and this court finds that the appellant's appeal is not frivolous. The 2nd Respondent has also admitted that after the appellant's appeal was dismissed by **NET**, the 2nd Respondent entered into a construction contract with **Sentrim Contracts Ltd** to carry out site preparations and earth works. That means therefore that the 2nd Respondent is ready to carry on with the construction work on the ground. This is before the issues raised by the appellant in its Memorandum of Appeal have been canvassed and dealt with. If the 2nd Respondent is allowed to carry on with the constructions work, then the Appeal lodged by the appellants herein will be rendered nugatory. It is therefore prudent to stay any construction work on the suit premises herein until the Appeal is heard and determined.

Further **Section 130(2) of EMCA** provides that :'

“ No decision or order of the tribunal shall be enforced until the time for lodging an appeal has expired or where the appeal has commenced, until the appeal has been determined”.

The appellant has now filed a Memo of Appeal. In the said Memo of Appeal, a number of pertinent issues have been raised. It is fair and just that the court should first determine the said issues raised in the Memo of Appeal before the 2nd Respondent can be allowed to continue with the construction.

However, the appellant will not be given a blank cheque on the intended Appeal. The Court will set time frame within which the intended Appeal should be set down for hearing. Further the appellant should deposit security as to costs.

Consequently, the Court finds that the appellant's application dated **23rd May 2016**, is merited and is allowed in terms of **prayer no. 3**.

Further the appellant should set the intended appeal for hearing within the next 3 months from the date of this Ruling. Failure to do so, the orders issued herein will automatically lapse.

The appellant /applicant is further directed to deposit a sum of **Kshs.1,500,000/=** in Court as security for costs within a period of 7 days from the date of this Ruling in default, the order of injunction issued herein will also lapse automatically. The costs of the application shall be in the Appeal.

It is so ordered.

Dated, Signed and Delivered this **20th** day of **January 2017**.

L.GACHERU

JUDGE

In the presence of :-

Mr Abidha for Appellant/Applicant

Mr Awere holding brief for Amoko for 2nd Respondent

None attendance for the 1st Respondent

Court Clerk: Hilda

Court.

Ruling read in open Court in the presence of the above stated advocates and absence of counsel for 1st Respondent.

L.GACHERU

JUDGE