China Road & Bridge Corporation - Kenya v Wachira & 5 others (Civil Appeal (Application) E723 of 2024) [2025] KECA 628 (KLR) (4 April 2025) (Ruling)

Neutral citation: [2025] KECA 628 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL (APPLICATION) E723 OF 2024

LA ACHODE, WK KORIR & JM NGUGI, JJA

APRIL 4, 2025

BETWEEN

CHINA ROAD & BRIDGE CORPORATION - KENYA ..... APPLICANT

AND

CHARLES WACHIRA ..... 1ST RESPONDENT

ESTHER WAMBUI ..... 2ND RESPONDENT

ELIZABETH MBUGUA ..... 3RD RESPONDENT

EVANS KINUTHIA ..... 4TH RESPONDENT

COUNTY GOVERNMENT OF KAJIADO ..... 5TH RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 6TH RESPONDENT

(Being an Application for stay of execution of Judgment dated, signed and delivered on 17th October, 2024 by Hon. Lady JusticeL. Komingoi of ELC, Kajiado pending the filing, hearing and determination of an intended appeal by the Applicant against the JudgmentinELC Petition No. 2 of 2020)

RULING

1. On 17th October, 2024, the Environment and Land Court at Kajiado (L. Komingoi, J.) delivered a judgment in Kajiado ELC Petition No. 2 of 2020 where she, *inter alia*, issued an order of mandamus directed at China Road & Bridge Corporation- Kenya, the applicant herein, to decommission the quarrying site on the land known as LR No. Ngong/Ngong/2627 and rehabilitate and restore the site to its former state within six (6) months from the date of the judgment.

2. The applicant was aggrieved by the judgment and has timeously lodged a Notice of Appeal in this Court. It also lodged the present application dated 20th December, 2024. The application seeks, in the main, the following prayer:

> "This Honourable Court be pleased to stay the execution of the Judgment of the Environment and Land Court at Kajiado dated, signed and delivered by Hon. Lady Justice L. Komingoi in ELC Petition No. 2 of 2020, pending the hearing and determination of the Applicant's intended appeal against the Judgment."

3. The application is supported by the grounds on its face and the affidavit of William Ochieng Ouko, its public relations officer, sworn on 20th December, 2024.

4. It is opposed through the replying affidavit of Charles Wachira, the 1st respondent, who has sworn it on behalf of himself and the 2nd, 3rd and 4th respondents. The replying affidavit was sworn on 14th January, 2025.

5. The 5th and 6th respondents did not file any documents related to the application nor appear for the hearing though they were duly served with both the application and the hearing notice.

6. A brief background to the litigation will set the context of the application. The 1st – 4th respondents are officials of Kerarapon Residents Association and Kerarapon Water Association. They sued on behalf of the residents of Kerarapon, an estate in Ngong within Kajiado County. They brought the petition against the applicant primarily predicated on the constitutional right to a clean and healthy environment. Their claim was that the quarrying activities going on on the land known as LR No. Ngong/Ngong/2627 operated by the applicant were causing them loss and damage. In particular, they claimed that the earth moving machines deployed to do blasting, excavation and extraction cause noise pollution and raise dust which cause respiratory ailments. In addition, the blasting, excavation and quarrying have compromised the integrity of the foundation of their homes which are near the quarrying site. They claimed that the applicant had agreed to decommission the quarrying site and restore it to status quo ante and urged the court to order them to adhere to that plan. The 1st – 4th respondents were apprehensive that instead of following through with the decommissioning plan, the applicant had plans to extend the quarrying site. They sought orders to stop any such expansion.

7. The learned Judge, for the most part, agreed with the 1st – 4th respondents on the question of the impacts of the quarrying activities on their right to a clean and healthy environment. Noting that the applicant had already set out plans for decommissioning the quarrying site vide a rehabilitation plan dated August, 2019 which is incorporated as part of the Environment Impact Assessment Report and the Licence conditions, the learned Judge found that the extended quarrying activities must come to a close.

8. In the end, the learned Judge granted the following two consequential orders:

    a. A declaration ... that the quarrying activities being conducted by [the applicant] on the parcel of land known as LR. No. Ngong/Ngong/2627 are unconstitutional and against public policy and national interest.

    b. An order of mandamus is hereby issued compelling the 1st respondent to decommission the quarrying on fourty (40) acres of the portion of the land and to rehabilitate and restore it to its former state. This process to be undertaken within six (6) months from the date of this judgment and in accordance with the rehabilitation plan dated August 2019, the Environment Impact Assessment and the Licence Conditions."

9. The present application aims to stay, especially, the second positive order of mandamus.

10. The application was argued by way of written submissions followed by oral highlights by respective learned counsel. The applicant's submissions are dated 15th January, 2025. Those of the 1st – 4th respondents are dated 17th January, 2025. During the plenary hearing of the application, learned counsel, Mr. Obok, appeared for the applicant while learned counsel, Mr. Onyango, appeared for the 1st – 4th respondents. Although there was evidence that the other respondents had been served, they were not present and neither had they filed any replying affidavits or submissions.

11. The parties are agreed as to the applicable law. It is Rule 5(2)(b) of the Court of Appeal Rules, 2022. That Rule grants this Court unfettered discretion to order a stay of execution of an order pending appeal. The only qualification is that this wide discretion must be exercised judicially and not capriciously. That jurisdiction is original. (See *Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya)* [2015] eKLR).

12. To guide the Court in its judicial exercise of the discretion donated by Rule 5(2)(b), this Court has developed principles which are now well settled. This Court in *Chris Mungga N. Bichage v Richard Nyagaka Tongi & 2 Others* [2013] eKLR succinctly set out the principles as follows: -

> " The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated."

13. The Supreme Court, in *Ethics and Anti-Corruption Commission v Prof Tom Ojienda & Associates & 2 Others* CA No 21 of 2019, re-stated the principles that guide the Court to add a third one in appropriate cases: whether it is in the public interest that an order of stay should be granted. The apex Court stated as follows:

> " In the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* [2014] eKLR, this Court enunciated three principles for consideration in determining applications for stay of execution. They are: "whether the appeal or intended appeal is arguable and not frivolous; that unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory; and that it is in the public interest that the order of stay be granted."

14. In the present case, the applicant argues that it has an arguable appeal; that refusal of the grant of stay orders will render that appeal nugatory; and that the public and national interest stand to suffer irreparably should an order for stay of the impugned judgment not be issued as prayed in the application.

15. The applicant argues that some of the grounds it hopes to take up against the impugned judgment include the fact that the learned Judge did not stipulate her reasoning for arriving at the conclusion that the 1st – 4th respondents' rights to a clean and healthy environment were infringed and that the quarrying activities are unconstitutional and against public policy and national interest. Another ground the applicant will take up on appeal is the question whether the learned Judge ignored the fact that the rehabilitation plan she ordered to be adhered to was prepared for progressive restoration of the exhausted quarry pits only and not for the restoration of all the pits that are in use for the on-going

construction of the Western by-pass Road Project. The applicant further submits that the learned Judge demonstrably failed to give the defence and the applicant's evidence its due weight, merit and regard including in interpreting the scientific evidence presented to the court. All these, the applicant submits, are examples of serious and arguable points it will take up on appeal.

16. On the nugatory aspects of the application, the applicant says that if the judgment is implemented, it would have serious and irreversible consequences yet an appeal is pending before this Court. In particular, the applicant says that it is engaged in ongoing construction of some of the major road infrastructure projects in Kenya such as the Nairobi Western By-pass Road Project. The decommissioning of the quarry in question will, it says, immensely affect the cost of completion of these ongoing projects since they are all supported by the quarrying operations from the affected quarry.

17. The applicant submits that its appeal will be rendered nugatory because the applicant is in possession of the quarry which it is lawfully using to support implementation of on-going contractual infrastructure projects which are of national interest. The cost of stoppage of these projects due to delay in completion of the projects on account of lack of material from the quarry to implement them during the pendency of the appeal is so monumental that the 1st – 4th respondents would not be in a position to compensate.

18. The applicant also submits that the public and national interest stand to suffer irreparably should an order of stay of execution not issue. This is because, it argues, the national projects which the applicant is supporting using the quarry will ground to a halt as from 7th April, 2025 absent a stay order. The effect of the closure of the quarry will be to increase the costs of these national projects; costs which will ultimately be additional burden to the tax payer.

19. Finally, the applicant submits that the principle of proportionality supports the grant of an order of stay in this case. This is because, it submits, the applicant is undertaking a project of national importance – which is to build a critical road infrastructure – and that the attendant costs of the delay to the taxpayer should be balanced against the private costs to the 1st – 4th respondents in determining if to grant stay.

20. On the other hand, the 1st – 4th respondents do not think that the appeal filed herein raises any arguable point. They say that the court's findings and orders were based on uncontroverted evidence that they have suffered harm and loss; that the judgment was based, in part, on a written memorandum of understanding between the applicant and the residents of Kerarapon where the applicant made a promise to restore the quarrying pits to their near original status upon completion of the construction of the Southern Bypass which has now been completed yet the applicant has proposed to extend rather than stop the quarrying; and that the applicant had, in their own evidence, set out plans to decommission the quarrying site. They think these points make the appeal inarguable, even frivolous.

21. On the nugatory aspects of the application, the 1st – 4th respondents submit that the potential escalation of the costs of completion of the applicant's contract to construct the Western bypass cannot be termed "nugatory" in the ordinary sense of the word because that activity was not contemplated in the Environmental Impact Assessment (EIA) Licence that was granted to the applicant since that licence was limited to excavating materials specifically for the construction of the Southern Bypass and not the Western Bypass or any other future bypasses or roads.

22. The 1st – 4th respondents also argue that the "balance of difficulty" (their term) tilts in their favour since the impact of granting the stay would mean that the residents of Kerarapon will have to live with the cost of the noise and dust pollution in addition to the incalculable damage to their residences. The 1st– 4th respondents cite the famous decision of this Court in *Kenya Shell Limited v Benjamin Karuga*

Kibiru & Another [1986] KECA 94 (KLR) for the proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without a just cause.

23. Finally, the 1st-4th respondents submit that public interest considerations favour them in the sense that constitutional provisions on the right to a clean and healthy environment should not be undermined by profit concerns which, in their view, is what the applicant suggests in its arguments for stay. The Court, they argue, has an obligation to protect constitutional safeguards more than business prospects of a private entity.

24. On the first limb, that is whether the applicant has demonstrated that its intended appeal is arguable, this Court, in *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR, described an arguable appeal in the following terms:

> "(vii). An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous.
>
> viii). In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal."

25. We have looked at the Draft Grounds of Appeal enumerated by the applicant and considered their submissions elucidating them, as well as the opposing arguments by the 1st – 4th respondent. We have no doubt in our mind that the appeal presented by the applicant is eminently arguable considering the definition in our caselaw that an arguable appeal is not one that must necessarily succeed, but one which ought to be argued fully before the Court. In other words, as the cases have emphasized, an arguable appeal is not one which has a winning argument or even one that has a likelihood of success; it is merely to say that it presents serious legal issues which warrant further judicial consideration on appeal. In our view, the question whether the learned Judge reached her conclusions about the violation of the right to a clean and healthy environment of the 1st – 4th respondents peremptorily and without appropriate analysis in keeping with our decided cases; and whether the learned Judge misapprehended the scientific evidence on the impacts of quarrying on the denizens of Kerarapon are only two of the questions which this Court will ultimately have to determine on substantive appeal. The applicant, therefore, has easily satisfied the first limb of the test under Rule 5(2)(b) of our *Rules*.

26. Turning to the second limb of the test, that is whether the applicant has successfully demonstrated that the appeal will be rendered nugatory if stay of execution is not granted, we are far less sanguine that the applicant has satisfied the condition. This is because, whereas the applicant has ponderously argued that there would be incalculable escalation of costs in the construction of the Western Bypass, an infrastructural development of national importance, because the execution of the impugned judgment would compel the applicant to stop construction during the pendency of the appeal herein, it has placed no evidence whatsoever before us to demonstrate that its contractual obligations with the Government of Kenya for the construction of the Western Bypass is pegged to its sourcing road construction materials from the quarrying pits located on the land known as LR No. Ngong/Ngong/2627. Additionally, the applicant did not demonstrate (or even allege) to this Court that the Environmental Impact Assessment (EIA) Licence it possesses allows or even contemplates that it would use the quarrying pits located on the land known as LR No. Ngong/Ngong/2627 to source materials for the construction of the Western Bypass.

27. Finally, the applicant has not placed any evidence before us to show that should it be compelled to shut down its quarries located on the land known as LR No. Ngong/Ngong/2627 pursuant to the execution of the impugned judgment, it would be insuperably difficult or impossible to find other sources of construction materials within reasonable distance from Nairobi. Indeed, there is nary

a deponed fact to that effect in the supporting affidavit of William Ochieng Ouko sworn on 20th December, 2024.

28. Consequently, we are not persuaded that the intended appeal would be rendered nugatory if the stay requested herein is declined. The same analysis persuades us that public interest considerations do not favour the grant of stay. We note that the issue at stake in the litigation engendered in the application before us the right to a clean and healthy environment guaranteed by the *Constitution* to the 1st – 4th respondents and the other denizens of Kerarapon, which a competent court of law has found to have been violated by the applicant through its continued quarrying activities. Without the presentation of compelling further evidence to the contrary, which the applicant has not even attempted to do, the precautionary principle advocates for taking preventative action to avoid potential harm to the environment, even when there is scientific uncertainty about the nature or extent of the harm.

29. In the present case, given the totality of the material placed before the Court, the application of the precautionary principle would advocate for the mitigation of the potential risks associated with quarrying, even if the full extent of the risks is not yet known. In our view, therefore, given the state of evidence, public interest tilts in favour of denying the stay of execution not in granting it.

30. We have said enough to demonstrate that the application dated 20th December, 2024 has no merit and we hereby dismiss it with costs to the 1st – 4th respondents.

31. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF APRIL, 2025.

L. ACHODE

JUDGE OF APPEAL

.....

W. KORIR

JUDGE OF APPEAL

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JOEL NGUGI

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR