



Energy & Petroleum Regulatory Authority (previously known as Energy Regulatory Commission) v Gitson Energy Limited & 5 others (Civil Appeal (Application) E043 of 2022) [2024] KECA 116 (KLR) (9 February 2024) (Ruling)

Neutral citation: [2024] KECA 116 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E043 OF 2022
SG KAIRU, F TUIYOTT & JW LESSIT, JJA
FEBRUARY 9, 2024**

BETWEEN

ENERGY & PETROLEUM REGULATORY AUTHORITY (PREVIOUSLY KNOWN AS ENERGY REGULATORY COMMISSION) APPLICANT

AND

GITSON ENERGY LIMITED 1ST RESPONDENT

CABINET SECRETARY OF THE NATIONAL TREASURY ... 2ND RESPONDENT

MINISTRY OF ENERGY 3RD RESPONDENT

KENYA POWER & LIGHTING COMPANY LTD 4TH RESPONDENT

KENYA ELECTRICITY TRANSMISSION COMPANY LIMITED 5TH RESPONDENT

ATTORNEY GENERAL 6TH RESPONDENT

(An application for stay of execution of the judgment of the High Court of Kenya at Nairobi Judicial Review Division (Nyamweya, J.) dated 11th November 2021 and delivered on 15th November 2021 by Ndungu, J. in High Court Judicial Review Miscellaneous Application No. 324 of 2018)

RULING

1. By its application dated 21st February 2022 presented principally under Rule 5(2)(b) of the Court of Appeal Rules, the applicant, Energy & Petroleum Regulatory Authority (previously known as Energy Regulatory Commission) (hereafter referred to as the applicant or the Authority) seeks an order for stay of execution of the judgment of the High Court (Nyamweya, J.) (as she then was)) dated 11th November 2021 and delivered on 15th November 2021 by A. Ndungu, J.



2. That application was initially heard by the Court (differently constituted) and a ruling thereon delivered on 21st October 2022. However, following an application dated 16th November 2022, that ruling was reviewed and set aside by order of the Court given on 30th March 2023 paving way for the re-hearing of the application dated 21st February 2022.
3. We heard the application on 6th November 2023. The parties were represented by counsel. Mr. Maina appeared for the applicant. Ms. B. Atuhairi held brief for Mr. Irungu for the 1st respondent. Mr. Weche appeared for the 2nd, 3rd, and 6th respondents. Ms. Joy Anami held brief for Dr. Mutubwa for the 5th respondent.
4. In its suit before the High Court, the 1st respondent, Gitson Energy Ltd, complained that it obtained approval from the 3rd respondent, Ministry of Energy, for the construction of a wind power project in Marsabit County despite which that Ministry was frustrating it and discriminating against it in the implementation of the project. The High Court, in its said judgment of 11th November 2021, the subject of the intended appeal, granted the 1st respondent an order of mandamus to compel the Ministry of Energy and the Authority to include the 1st respondent's "300MW Wind Energy Project" in its list of approved projects and in consultation with the 1st respondent, to "issue the appropriate permit and licence" to the 1st respondent "in line with the approval dated 16th February 2010 granted to" the 1st respondent by the Ministry "to develop a 300 MW Wind Energy Project in Bubisa, Marsabit."
5. Aggrieved, the Authority filed a notice of appeal dated 23rd November 2021 on which the present application dated 21st February 2022 is hinged. We have considered it alongside the affidavit in support; the replying affidavit sworn by James Gitau, a director, and the CEO of the 1st respondent as well as the rival submissions by the parties.
6. The essence of the applicant's arguments in support of the application, supported by the Attorney General, is that 1st respondent was required by the Ministry, as communicated by the letter dated 16th February 2010, to conduct and submit a feasibility study of the wind project consisting of a technical report, a grid connection study and a financial viability report and live model and that the effect of the impugned judgment is to compel the Authority to issue licences and permits to the 1st respondent without sufficient regulatory checks; that granting the same would be against the current regulatory framework in the sector which safeguards safety and the environment; that a feasibility study is necessary to ensure the project can interconnect with the existing electricity grid without causing disruptions to existing infrastructure.
7. It is urged that the High Court erred in granting the orders of mandamus when the conditions precedent for a grant of licence to the 1st respondent, including availability of land in Marsabit had not been met; and that the 1st respondent's first port of call should have been the Energy Tribunal as opposed to the court. It was submitted further that it is in the public interest to grant the prayers sought.
8. In opposition to the application, it was submitted that long after the delivery of the impugned judgment, a substantive appeal is yet to be filed; that it has not been demonstrated that the applicant will suffer substantial loss if the orders sought are declined and neither is any security offered; that in filing the present application the applicant is engaged in forum shopping to impede the 1st respondent's project; that in any event the intended appeal is not arguable; that the applicant has concealed material facts namely that the 1st respondent conducted a detailed feasibility study by an internationally accredited firm.



9. The legal standard applicable in applications of this nature requires an applicant to demonstrate that the intended appeal is not frivolous and that in the event the orders sought are declined and the appeal eventually succeeds, it will be rendered nugatory. See for instance Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others [2013] eKLR.
10. On arguability, there is the contention that the learned Judge of the High Court erred in failing to appreciate that the 1st respondent had not fulfilled conditions precedent for the grant of the licence including absence of feasibility study and availability of land. Bearing in mind that an arguable appeal is not one that must necessarily succeed, we are satisfied that the intended appeal is not frivolous.
11. On the nugatory aspect, it was urged that once the licence is granted to the 1st respondent, it cannot be undone if the appeal eventually succeeds and the approvals that will have been granted cannot be reversed; that the appeal raises issues of public importance; that the project affects the public and it is imperative that conditions precedent to granting the licence be fulfilled. We are, for those reasons, satisfied that this is a proper case for the grant of the orders sought.
12. In the result, we grant prayer 3 of the application dated 21st February 2022 and order a stay of execution of the judgment of the High Court dated 11th November 2021 and delivered on 15th November 2021 pending the hearing and determination of the appeal.
13. Costs of the application shall be in costs in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF FEBRUARY 2024.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

