Kenya National Highways Authority v Fort Properties Limited & another (Civil Application E047 of 2024) [2024] KECA 719 (KLR) (21 June 2024) (Ruling)

Neutral citation: [2024] KECA 719 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPLICATION E047 OF 2024

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

JUNE 21, 2024

BETWEEN

KENYA NATIONAL HIGHWAYS AUTHORITY .... APPLICANT

AND

FORT PROPERTIES LIMITED .... 1ST RESPONDENT

NATIONAL LAND COMMISSION .... 2ND RESPONDENT

(Being an application for stay of execution and stay of proceedings pending filing. hearing and determination of an intended appeal from the Ruling and Orders of the Environment and Land Court at Mombasa (L. L. Naikuni, J.) dated 24th April 2024 in ELC Petition No. 29 of 2020)

RULING

1. By a Notice of Motion dated 30th April 2024, the applicant, Kenya National Highways Authority, seeks an order staying the execution or implementation of the orders issued by the Environment and Land Court (the ELC) in Mombasa ELC Petition No. 29 of 2020 by which the 1st respondent was allowed to garnishee, attach and pay out of the applicant's funds a sum of Kshs 765,645,675 held in the applicant's operations Bank Account No. 01141xxxxxxxxx domiciled at the Co-operative Bank of Kenya, Head Branch, Nairobi pending hearing and determination of the intended appeal. The applicant also sought an order staying further proceedings in the same suit pending hearing and determination of the intended appeal, and for costs of the application.

2. The genesis of this application was a petition dated 1st October 2020 filed by the 1st respondent against the Attorney General, the applicant and the 2nd respondent. The 1st respondent's case was that it was the registered proprietor of Land reference numbers MN/VI/4931 and MN/VI/4929 measuring approximately 2.217 and 7.333 Hectares respectively, and situate within the County of Mombasa; that the Government acquired the said parcels of land for purposes of the construction of the Mombasa Southern Dongo Kundu by - pass and Kipevu terminal link road; that, towards the compensation of

the 1st respondent, the 2nd respondent issued the 1st respondent with a certificate of award in the sums of Kshs.242,950,000 and Kshs. 114,292,750 respectively for the two properties; and that, despite efforts by the 1st respondent in pursuing compensation, payment was never made.

3. It was the non-payment of the said sum that led to the filing of the petition before the ELC. On 28th October 2021, the learned Judge (Naikuni, J.) entered judgement for the 1st respondent and in his own words issued the following orders:

   a. That a declaration that the Petitioner's rights to acquire and own property guaranteed under Article 40 of *the Constitution* of Kenya and Section 111(1) and 115 (1) of the *Land Act*, 2012 have been contravened by the Government of Kenya, the 2nd Respondent and/or the 3rd Respondent;

   b. That a declaration that the Petitioner's rights to fair administrative action guaranteed under Article 47 of *the Constitution* of Kenya has been contravened by the 3rd Respondent.

   c. That a mandatory injunction compelling the 2nd and 3rd Respondents to pay to the Petitioner within the next thirty (30) days from this date hereof the full compensation awarded to the Petitioner for the acquired portion, in MN/VI/4931 being Kenya Shillings Two Forty Two Million Nine Hundred & Fifty Thousand (Kshs. 242,950,000/=) from the funds being held by the Government of Kenya, the National Treasury.

  d. That a declaration that the Petitioner is entitled to interest on the compensation award for the suit property MN/VI/4931 at the prevailing court interest rate or as such a rate as this Honorable Court shall deem just with effect from 21st March, 2014 and/or from the date when the 2nd Respondent, its agents, servant, employers and/or its contractors entered upon the Suit Property or such other relevant date this Honorable Court shall deem fit immediately;

   e. That Mesne profits calculated at Kenya Shillings Two Hundred Thousand (Kshs. 200, 000.00) per month or 12% the courts rate per annum for the unlawful continued occupation of the Petitioners property being MN/VI/4929 from 2nd June, 2015 to the month vacant possession is given.

   f. That the 3rd Respondent be compelled to issue within 30 days of this court's judgment;

   iv. The publishing in Kenya Gazete the degazettment of the cancelled portion of the property in MN/VI/4929.

   v. Vacant possession of the cancelled portion being MN/VI/4929 by the Respondent, their agents, servants, security personnel and/or employees.

   iv. Pay the awarded amount being Kshs. 242,950,000.00 plus interest and mesne profits.

   a. The Costs of this Petition and interest.

4. Armed with the judgement, the 1st respondent moved the court by way of a Notice of Motion dated and filed on 11th August 2022 in which it sought, inter alia, to garnishee a sum of Kshs. 931,645,675 held to the credit of the applicant in Co-operative Bank of Kenya account no. 011411xxxxxxxxx at

its Head Office branch Nairobi. By a ruling delivered on 15th May 2023, the trial court granted the application as against the applicant. By an application dated 14th June 2023, the applicant sought to have the said order reviewed based on, inter alia, the provisions of section 68 of the *Kenya Roads Act*. The 1st respondent filed yet another application dated 15th June 2023 praying that the garnishee order nisi be made absolute. On 24th April 2024, the court dismissed the applicant's application but allowed the 1strespondent's application, directing that the funds be paid within 30 days.

5. Dissatisfied with the said ruling, the applicant filed a Notice of Appeal dated 24th April 2024 and lodged the present application. The applicant's case as deposed to by Ian Mudavadi, its senior legal adviser, is that, following the impugned ruling , a sum of Kshs 765,645, 675 in the applicant's Bank Account No. 011411xxxxxxxxx with the Co- operative Bank was attached for the release to the 1st respondent within 30 days of the impugned decision; that the said action is in breach of the express provisions of section 68(1) of the *Kenya Roads Act*; that the applicant performs a strategic national function, which is the construction, maintenance and rehabilitation of national highways and trunk roads within the country and, as such, its operations are of strategic national importance; and that the implementation of the freezing of the applicant's said Bank Account has placed the applicant at great prejudice as the applicant is unable to process the salaries of its employees and carry out its critical mandate.

6. It was further contended that, in the absence of a stay order, the applicant's intended appeal shall be rendered nugatory on the basis of the colossal sum of Kshs 768,670, 675 being paid out to the 1st respondent, a private entity with no known business and/or financial capacity to refund, and whose directors may disappear without a trace were the intended appeal to succeed; that, in the meantime, the applicant's strategic and critical statutory functions would have been grounded to a complete halt in addition to incurring contractual liabilities from its contractors on site, whose budgetary allocations from the National Treasury would have been arbitrarily paid out to a private entity in breach of section 68 of the *Kenya Roads Act*; that the applicant has an arguable appeal based on an error of law in refusing to uphold the statutory immunity against execution of the applicant's funds and property; that the general public and public interest stand to suffer irreparably should the applicant's account remain frozen; that the amount in issue wholly comprises of interests, the applicant having settled the sum of Kshs 242,950,000 awarded to the 1st respondent in compensation for the compulsory acquisition of its property; that, the applicant being a government agency and state corporation will in normal course of government business have the decretal sums budgeted for and paid to the 1st respondent in the event that its intended appeal fails and, therefore, there should be no order as to security for costs; and that no prejudice will be suffered by the 1st respondent should the stay sought be granted.

7. Opposing the application, the 1st respondent relied on the replying affidavit sworn by Ketan Patel, its director, sworn on 7th May 2024 in which he set out the background of the dispute and averred that the 1st respondent is a registered company in Kenya with Kenyan directors; that, upon taking out garnishee proceedings, the applicant paid Kshs 150,000,000 and Kshs16,000,000 in partial settlement of the decretal sum; that the application is unmerited as it seeks to blur the lines on what a state corporation is and what a government agency is;that, while there is a Notice of Appeal dated 24th April 2024, there is none in respect of the judgement dated 28th October 2021; and that, since the applicant had made a similar application before the trial court, this application is an abuse of the court process and should be dismissed with costs.

8. We heard this application on the Court's GoTo virtual platform on 3rd June 2024 when Senior Counsel Prof. Mumma appeared with Mr. Agwara for the applicant, learned counsel Mr. Matheka appeared for the 1st respondent while Mr. Mbuthia appeared for the 2nd respondent. Both Prof. Mumma and

Mr. Matheka relied on their written submissions, which they briefly highlighted while Mr. Mbuthia signified his support for the application.

9. On behalf of the applicant, reliance was placed on the written submissions dated 6th May 2024 filed by Prof. Albert Mumma & Co. Advocates in which it was submitted in appreciation of the twin principles that this Court considers in determination of such applications, namely that the applicant has an arguable appeal; that section 21(4) of the *Government Proceedings Act*,section 68 of the *Kenya Roads Act* and Order 29 rules 2(2) (c) and 4(1) and (3) of the Civil Procedure Rules, bar execution against the applicant or issuance of an order of attachment of the applicant's funds; and that the application dated 15th June 2023 was res judicata, the court having rendered its ruling on the 1st respondent's application dated 11th August 2022 that sought orders nisi and absolute. The applicant cited the decision in Robert Mwania Kiattu & Another v Peter Njenga Muhika & 2 Others [2023] Civil Application No. E054 of 2023(UR), highlighting the fact that an appeal which challenges a ground upon which the learned Judge made a finding demonstrates that an intended appeal is arguable.

10. Regarding the second condition as to whether the intended appeal, if it were to succeed, would be rendered nugatory unless stay is granted, the applicant submitted that, without such an order, the sum of Kshs 768,670,675 will be paid to the 1st respondent, a private entity with no known business or financial capacity to refund in the event that the appeal succeeds; and that both the applicant and the public at large stand to suffer substantial loss, not just in attaching and paying out the funds without a budgetary allocation by the Treasury, but also due to the disruption of critical services of road maintenance and development. In support of this submission, the applicant cited the case of KCB Bank Kenya Limited v Omondi Justus Rangángá & 28 Others Civil Application No. E459 of 2022 (UR) to underscore the position that reasonable fear that a respondent would be unable to pay back the decretal sum is a constituent of what renders an appeal nugatory. According to the applicant, since it is a statutory corporation in sound financial position to pay the decretal amount should the appeal fail, there is no necessity for orders to deposit security as a condition for the grant of stay orders. We were urged to grant the orders sought.

11. The firm of Wandai Matheka & Co Advocates filed submissions dated 27th May 2024 on behalf of the 1st respondent, submitting that the existence of a partially satisfied decree that is not appealed from negates the contention that the applicant has an arguable appeal; that, should the appeal succeed, the 1st respondent would be expected to pursue execution in a forum different from garnishee proceedings, such as judicial review and, if the appeal does not succeed, the 1st respondent would be paid not only the decretal sum, but further interest thereby burdening the tax payer on account of the applicant's complicity; that, either way, the applicant will still pay the 1st respondent the decretal sum; and that the applicant cannot profit from its own laxity, negligence and deliberate acts of impunity in failing to compensate the 1st respondent. The 1st respondent urged us to dismiss the application.

12. We have considered the application, the affidavits in support and in opposition thereto, the written and oral submissions and the law.

13. The principles that guide this Court in applications of this nature are that, first, an applicant approaching the Court pursuant to the provisions of rule 5(2) (b) of the Rules of this Court must demonstrate that the intended appeal or appeal, as the case may be, is arguable or, as is often said, not frivolous; and, secondly, that the intended appeal or appeal would be rendered nugatory absent stay. These conditions apply conjunctively and sequentially so that, where an applicant fails to surmount the first hurdle, there is no need to consider the second limb and, where an applicant meets the first condition but fails to meet the second, the application fails.

14. Explaining these principles, this Court in Peter Gathecha Gachiri v Attorney General and 4 Others Civil Application Nai 24 of 2014 (unreported) held that:

> "Rule 5(2)(b) of the Rules of this Court on which the application is premised confers on us independent discretionary jurisdiction exercisable in accordance with the twin principles, namely, that the appeal must be shown to be arguable and, in addition, that the appeal, if successful, shall be rendered nugatory if stay is not granted. These principles have been developed by the court as a guide in the exercise of its discretionary power in determining an application premised on Rule 5(2)(b). The rationale in these principles is intended to balance two parallel propositions; first, that a successful litigant should not be deprived of the fruits of a judgment in his favour without just cause and; secondly that a litigant who is aggrieved by a decision must not be deprived of the right to challenge it in the next higher court (see Butt v Rent Restriction Tribunal [1982] KLR 417. See also Kenya Shell Ltd v. Kibiru & Another [1986] KLR 410...It is imperative for an applicant seeking an order under Rule 5(2)(b) to satisfy the Court on both principles. An applicant must show that the appeal is not frivolous and is arguable. It is now settled that an applicant need not demonstrate a plethora of arguable points. It is sufficient even if there be a solitary arguable point. An applicant must further show that the appeal, if successful, will be rendered futile if stay is not granted."

15. However, as held in Stanley Kang'ethe v Tony Keter & 5 others [2013] eKLR, it is sufficient if a single bonafide arguable ground of appeal is raised. See Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004. Further, as was observed in Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd & 2 others, Civil Application No. 124 of 2008, an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court. In other words, it is one that is not frivolous and is deserving of consideration by the Court and warrants a response from the opposite party. See Kenafric Matches Ltd v Match Masters Limited & Another Civil Application No. E902 of 2021 (UR).

16. In this case, the applicants intend to argue in the intended appeal, inter alia, that section 21(4) of the *Government Proceedings Act*, section 68 of the *Kenya Roads Act* and Order 29 rules 2(2) (c) and 4(1) and (3) of the Civil Procedure Rules, bar execution against the applicant or issuance of an order of attachment of the applicant's funds, and that the application dated 15th June 2023 was res judicata. The 1st respondent does not seriously contend and, in our view, rightly so, that the intended appeal is not arguable. It is clearly arguable whether the aforesaid provisions of the law clothe the applicant with immunity against execution by attachment of its properties. The fact that the applicant has not indicated that it intends to appeal against the main judgement, even if true, does not bar the applicant from challenging the mode of execution against it. Accordingly, we do not hesitate to find that the intended appeal is arguable.

17. Regarding the second limb, the general position is that, where it is alleged that the respondent will not be able to refund the decretal sum if paid over in satisfaction of the decree, it is upon the applicant to place before the Court material on the basis upon which this belief is founded. See Caneland Ltd. & 2 Others v Delphis Bank Ltd. Civil Application No. Nai. 344 of 1999.

18. Nevertheless, it may not be possible for the applicant to know with certainty, the respondent's financial means. Therefore, all that an applicant can reasonably be expected to do, is to swear, upon reasonable grounds, that the respondent will not be in a position to refund the decretal sum if it is paid over and the intended or pending appeal was to succeed. The applicant is not expected to go into the bank accounts, if any, operated by the respondent to see if there is any money there. As is often said, the properties

a man has is a matter so peculiarly within his knowledge that an applicant may not reasonably be expected to know them. In those circumstances, the legal burden still remains on the applicant, but the evidential burden would shift to the respondent to show that he would be in a position to refund the decretal sum. See *Kenya Posts & Telecommunications Corporation v Paul Gachanga Ndarua Civil Application No. Nai. 367 of 2001* and ABN Amro Bank, N.K. v Le Monde Foods Limited Civil Application No.15 of 2002.

19. What amounts to reasonable grounds for believing that the respondent will not be able to refund the decretal sum is a matter of fact which depends on the circumstances of a particular case. In this case, it is deposed that the the colossal sum of Kshs 768,670,675 being paid out to the 1st respondent, a private entity with no known business and/or financial capacity to refund the said sum, and whose directors may disappear without trace were the intended appeal to succeed and that, in the meantime, the applicant's critical statutory functions would be grounded to the detriment of the public since no budgetary allocation was made for such payment. The applicant has not, by way of affidavit evidence disclosed its financial capability. In Job Kilach v Nation Media Group & 2 Others Civil Application No. Nai. 168 of 2005, this Court, in granting stay, considered the amount involved and its effect in the the applicant's operations. Likewise, in Kenya National Chamber of Commerce and Industry Ltd. v Edon Consultants Civil Application No. Nai. 308 of 2000, this Court observed that execution is an expensive and disruptive process and, if there is a possibility of the applicant's operations being adversely affected beyond monetary compensation, stay ought to be granted. The Supreme Court weighed the public interest element in Gitirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR where it held that the Court must consider whether or not it is in the public interest that the order of stay be granted as dictated by the expanded scope of the Bill of Rights and the public spiritedness that runs through *the Constitution*.

20. We have said enough to show that this application is merited.In determining this application, we are also required to take into account the principle of proportionality since, as held inthe case of African Safari Club Limited v Safe Rentals Limited [2010] eKLR:

> "…it is incumbent upon the Court to pursue the overriding objective to act fairly and justly… to put the hardships of both parties on scale… We think that the balancing act is in keeping with one of the principles aims of the oxygen principle of treating both parties with equality or placing them on equal footing in so far as is practicable."

21. In view of the forgoing, we hereby allow the applicant's Notice of Motion dated 30th April 2024 and grant stay of execution or implementation of the orders issued by the Environment and Land Court (the ELC) in Mombasa ELC Petition No. 29 of 2020 by which the 1st respondent was allowed to garnishee, attach and pay out of the applicant's funds the sum of Kshs 765,645,675 held in the applicant's operations Bank Account No. 011411xxxxxxxx, domiciled at the Co-operative Bank of Kenya, Head Branch, Nairobi pending the hearing and determination of the intended appeal. Since the applicant is a public corporation undertaking statutory duties, and neither the applicant nor the respondents stand to benefit if the sums in question remain frozen, we hereby direct that the attachment be lifted forthwith.

22. The costs of the application will be in the appeal.

23. It is so ordered.

DATED AND DELIVERED AT MALINDI THIS 21ST DAY OF JUNE, 2024

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA C.Arb, FCIArb.

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify this to be a true copy of the original

Singed

DEPUTY REGISTRAR