



REPUBLIC OF KENYA



KENYA LAW
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Water Resources Authority v Patel Coffee Estate (Environment and Land Appeal 45 of 2023) [2024] KEELC 1651 (KLR) (14 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1651 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL 45 OF 2023**

**A OMBWAYO, J
MARCH 14, 2024**

BETWEEN

WATER RESOURCES AUTHORITY APPELLANT

AND

PATEL COFFEE ESTATE RESPONDENT

RULING

Application

1. This ruling is in respect of the appellant's Notice of Motion application dated 21st December 2023 which seeks the following prayers;
 - a. Spent
 - b. Spent
 - c. Spent
 - d. Pending the hearing and determination of the appeal herein, this honourable court be pleased to grant an injunction staying the orders issued by Hon. Bernard Ochoi on 8th December, 2023 in Nairobi in Water Tribunal Appeal No. TRWAC/E001/2023.
 - e. The honourable court be pleased to grant a stay of proceedings in Nairobi Water Tribunal Appeal No. TRWAC/E001/2023 pending the hearing and determination of the appeal.
 - f. The costs of the application be provided for.
2. The grounds on the face of the application are that on 8th December, 2023, Hon. Bernard Ochoi delivered a Ruling issuing a temporary injunction restraining the Appellant from decommissioning the Tindress Dam located in Nakuru County. That the said order was given despite the dam posing a serious risk to the public should it breach. That the ruling failed to appreciate the mandate of



- the appellant in regulation of dams. That on 9th May, 2018, an earth embankment dam owned by respondent breached its banks, flowed downstream resulting in the death of 48 people and displaced several households.
3. That the Tindress dam is bigger than the respondent's dam which breached its banks in 2018 and should the Tindress dam breach its banks, it would cause serious damage. That the respondent has always been aware of the intended decommissioning as it had been issued with a directive on the same and it initiated compliance by submitting its dam decommissioning and removal plan which was approved by the appellant. That the appellant issued public notices informing the public on the various measures put in place and encouraged compliance by dam owners following communication from the Kenya Meteorological Department of the predicted el nino rains.
 4. That should the orders issued by Hon. Benard Ochoi remain in place, the public would be at risk as the Tindress dam will remain in operation despite the risk it poses to the general public. That it is in the interest of justice that the order mentioned and proceedings be stayed pending the determination of the application and appeal herein.
 5. The application was supported by the affidavit of John Kinyanjui sworn on 21st December, 2023. He deposed that he was the manager, Water Resources Assessment and Monitoring of the Appellant herein. That the Appellant is a state corporation established under the Water Act, 2002 and it is responsible for regulating the management and use of water resources in the country. That the appellant was mandated by the Water Harvesting and Storage Regulations, 2021 and the Water Resources Regulations 2021 to receive and process applications for dam construction.
 6. He deposed that the Respondent owns a parcel of land measuring 3,502 acres which had two dams. In 2018 one of the dams breached its banks causing extensive destruction of properties and death. That upon inspection of the other dam known as Tindress dam, the appellant issued directives to the respondent to start decommissioning it. That the respondent vide the letter dated 27th October, 2021 wrote to the appellant submitting its decommissioning and removal plan. That by a letter dated 14th January, 2022 the Appellant communicated its approval and requested the respondent to inform it of its intended commencement date to enable it monitor the activities. That in an undated letter, the respondent purported to seek issuance of a permit to the dam and depart from the compliance order earlier issued alleging that it had partially decommissioned the dam and due to unidentified challenges, they were not proceeding with the complete decommissioning. That the appellant through the letter dated 23rd August, 2022 reiterated the need for the respondent to complete the decommissioning exercise as had been earlier directed which was mandatory before a permit could be issued.
 7. He deposed that subsequently, the Respondent filed an application dated 11th October, 2023 seeking for a temporary injunction restraining the appellant from decommissioning the Tindress dam before the Water Tribunal. That the appellant opposed the said application and Hon. Bernard Ochoi in his ruling delivered on 8th December, 2023 granted a temporary injunction restraining the appellant from decommissioning the Tindress dam. That the said order was issued without taking into consideration the serious risk it poses to the public if it breaches. That the ruling failed to appreciate the appellant's mandate of regulation of dams. That the appellant being dissatisfied with the said ruling preferred an appeal to this court which appeal is arguable with overwhelming chances of success and that it was therefore in the interest of justice that the application herein be allowed as prayed.

Respondent's Response

8. The respondent filed a replying affidavit sworn by Vinoj Jaya Kumar its general manager on 18th January, 2024.



9. He deposed that the appellant sent the letters dated 26th September 2023 and 3rd October 2023 to the respondent seeking that it decommissions the Tindress dam. That the respondent filed an appeal to the Water Tribunal vide an application dated 11th October, 2023 on the basis that it had complied with the Appellant's directive not to store water in the dam as it was now dry. That the respondent invited the appellant to inspect the dam to ascertain its safety but it refused to do so. That the water tribunal heard the respondent's application and granted the temporary injunction pending the hearing and determination of the said appeal. That the tribunal also directed the appellant to conduct a physical inspection of the dam and file a comprehensive report which it is yet to do. That the appellant did not consider that the respondent had engaged structural engineers who redesigned the dam and ensured that it complied with all the safety measures. That the dam is of benefit to the entire community and was issued with an EIA license on 14th February, 2023.
10. He further deposed that the respondent applied for a water permit from the appellant and paid the assessment fee of Kshs. 40,000/= on 19th January, 2023. That they received a letter dated 31st May, 2023 from the appellant notifying them that their permit application had been rejected and that their recommendation for the full decommissioning of the dam still stood as per their letter dated 23rd January, 2023. That the appellant did not explain how they arrived at that decision. That the court cannot grant the injunctive orders sought and that the appellant approached this court on the basis of unsubstantiated allegations to persuade the court to grant them the orders sought.
11. In response to the respondent's replying affidavit, the appellant filed a supplementary affidavit sworn by John N. Kinyanjui. The supplementary affidavit was sworn on 6th February 2024 and filed on 21st February 2024.
12. He reiterated his averments in the supporting affidavit and deposed that the Tindress dam was inspected and various recommendations made. That NEMA also directed the respondent to undertake decommissioning of the dam in order to allow flow of the natural river course. That the appellant had on 14th January, 2022 communicated its approval of the decommissioning of the said dam and in response the respondent wrote the letter dated 24th January, 2022 communicating its composition of the performance monitoring unit as directed and also submitted to the applicant its workplan for the decommissioning exercise. That even though the respondent had applied for decommissioning of the dam, which application was approved, it sought for a water permit thereby departing from the compliance order issue. That the reason why the respondent refused to issue the water permit was because the respondent had failed to comply with the original order for decommissioning of the dam.
13. He deposed that the appellant urges the court to stay the tribunal orders so that the appellant can proceed with the decommissioning of the Tindress dam.

Submissions

14. The appellant filed its submissions on 21st February, 2024 while the respondent filed its submissions on 8th March, 2024. The appellant reiterated its averments in its supporting affidavit and identified the following issues for determination;
 - a. Whether the applicant has established a sufficient cause to warrant issuance of the orders sought.
 - b. Whether substantial loss would ensue from a refusal to grant the orders sought.
 - c. Whether the intended appeal will be rendered nugatory if the orders sought are not granted.



- d. Whether the applicant has met the threshold for grant of stay of proceedings in Nairobi Water Tribunal Appeal No. TRWAC/E001/2023 pending the hearing and determination of the appeal.
15. On the first issue, the appellant relied on the case of *Cortec Mining Kenya Ltd vs Cabinet Secretary Ministry of Mining & 9 others* [2015] eKLR and submitted that the respondent was informed of the requirement to decommission the dam but it failed to comply. They argued that the respondent could not then expect to be issued with a water permit after it had failed to comply with statutory requirements. Therefore, they had established a sufficient cause to warrant issuance of the orders sought.
16. With regard to the second issue, the appellant relied on several cases among them the cases of *Ken Kasinga vs Daniel Kiplangat Kirui & 5 Others* [2015] eKLR, *Moffat Kamau & 9 others vs Actors Kenya Ltd & 9 Others* [2016] and submitted that if the injunctive reliefs are not lifted, there is a likelihood that the Tindress dam will breach and cause serious damage to property.
17. On the third issue, the appellant reiterated that unless the orders issued by Hon. Benard Ochoi are set aside, the Tindress Dam will continue to be in operation despite the respondent contravening the law.
18. On the fourth issue, the appellant relied on Order 42 Rule 6 (1) of the *Civil Procedure Rules*, the case of *Re Global Tours & Travel Ltd* HCWC No. 43 of 2000 and submitted that the appellant had demonstrated that it had an arguable appeal with high chances of success and if the proceedings are not stayed, the appeal would be rendered nugatory. The appellant then sought that the application be allowed as prayed.
19. The respondent in its submissions identified the following issues;
- a. The propriety of the application.
 - b. Whether the applicant has made out a case for grant of stay of proceedings relief.
 - c. Who should bear the costs of this application.
20. On the first issue the respondent submitted that the appellant was seeking to stay an injunction which was essentially a negative order. The respondent relied on Order 42 Rule 6 of the *Civil Procedure Rules*, the case of *Co-operative Bank of Kenya Limited vs Banking Insurance & Finance Union (Kenya)* [2015] eKLR and submitted that the appellant has not demonstrated that it will suffer any harm if the injunctive relief is not granted. The respondent further submitted the said order of stay is incapable of being granted and it should therefore be struck out.
21. With regard to the second issue, the respondent relied on the cases of *Re Global Tours & Travel Ltd* HCWC No. 43 of 2003, *Kenya Wildlife Service vs James Mutembei* [2019] eKLR and submitted that the appellant has no interest to see that the Tindress Dam is reconstructed to the required standard but wants to shut down the dam on the misguided belief that the events of 9th May 2018 would reoccur. The respondent also submitted that the appellant's appeal is premised on the ground that the tribunal interfered with its mandate and therefore the appeal as filed is not arguable or capable of success. The respondent therefore sought that the appellant's application be dismissed with costs to it.

Analysis and determination

22. After considering the pleadings, the following issues arise for determination;
- a. Whether an injunction should be granted staying the orders issued on 8th December, 2023 in Water Tribunal Appeal No. TRWAC E001/2023.



- b. Whether an order of stay of proceedings should issue with regard to Water Tribunal Appeal No. TRWAC E001/2023 pending the hearing and determination of this appeal.
 - a. Whether an injunction should be granted staying the orders issued on 8th December, 2023 in Water Tribunal Appeal No. TRWAC E001/2023.
23. The appellant is seeking for an order of injunction to be issued against the orders granted in Water Tribunal Appeal No. TRWAC E001/2023 on 8th December, 2023. The water Tribunal had issued a temporary injunction restraining the respondent from decommissioning the Tindress dam.
 24. The respondent opposed the grant of the said order and argued that the tribunal issued a negative order and therefore this court cannot issue an injunction.
 25. As aforementioned, the tribunal issued a temporary injunction restraining the respondent from decommissioning the Tindress dam. Being aggrieved by the said order, the appellant filed an appeal to this court seeking that the ruling of the water tribunal be set aside and judgement be entered in its favour.
 26. It is my view that determining the issue of whether or not an injunction should issue against the said order would be akin to determining the present appeal at an interlocutory stage. Consequently, the said order cannot be granted at this stage of the proceedings.

b. Whether an order of stay of proceedings should issue with regard to Water Tribunal Appeal No. TRWAC E001/2023 pending the hearing and determination of this appeal.

27. The appellant sought for an order of stay of proceedings to be issued with regard to Water Tribunal Appeal No. TRWAC E001/2023 pending the hearing and determination of the present appeal. The respondent argued that the appellant’s appeal is misguided and lacks merit and therefore stay of proceedings should not be granted.

Order 42 Rule 6(1) of the *Civil Procedure Rules* provides as follows;

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”

28. The court in the case of *Lucy Waithera Kimanga & 2 others v John Waiganjo Gichuri* [2015] eKLR held as follows;

“(13) The Court is aware the Defendant has unfettered right of appeal which it has sought to exercise. But that right has to be balanced against the right of the Plaintiff to equal treatment in law and to have his case determined without unreasonable delay. That constitutional desire demands that proceedings



should not be hindered without just and sufficient cause. That position of the law is informed by the principle of justice in Article 159 of the *Constitution* which expresses the now commonly principle of law known as the overriding objective of the law; that cases should be disposed of in a just, proportionate, expeditious and affordable manner. That explains why the law on stay of proceedings pending appeal will be concerned with the sole question of whether it is in the interest of justice to order a stay of proceedings. And in deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. It will also consider such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously...

- (16) Are the reasons given sufficient for this court to impose a stay of proceedings? As a general rule, stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue. The mere fact that an appeal is arguable alone does not fit the constitutional yardstick used to gauge whether a stay of proceedings should or not be imposed. That is only one of the factors which the court should consider. There are other equally important factors to consider namely;
- i) The need for expeditious disposal of cases and the impediment the stay would place on the right of the Respondent to have the case determined expeditiously;
 - ii) The interest of justice in the case; the pros and cons of granting or not granting the order;
 - iii) The prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one,
 - iv) The scarcity and optimum utilization of judicial time and
 - v) Whether the application has been brought expeditiously.” (Emphasis mine)

29. As aforementioned, the appellant is seeking that the court stays the proceedings before the Water Tribunal TRWAC/E001/2023 on the ground that it has an arguable appeal with high chances of success and that if the proceedings are not stayed, its appeal will be rendered nugatory.

30. The court in *Lucy Waitthera Kimanga & 2 others v John Waiganjo Gichuri* (*supra*) further held as follows;

- “(17) The Applicant put much effort in showing that he has arguable appeal with high probability of success. The points he has raised may be arguable but he has failed to show how continuing of these proceedings will cause him prejudice. He has stated in most generalized manner that the appeal will be rendered nugatory because it has high chances of success. But he has not shown how



an appeal arising out of an interlocutory application would be prejudiced by hearing this case” (emphasis mine)

31. Similarly, in the present matter, the appellant has merely stated that it has an arguable appeal with high chances of success but has not demonstrated how the appeal will be rendered nugatory if the proceedings before the water tribunal continue. Consequently, the appellant’s Notice of Motion application dated 21st December 2023 lacks merit and is hereby dismissed with costs to the respondent.

RULING DATED, SIGNED AND DELIVERED AT NAKURU VIRTUALLY THIS 14TH DAY OF MARCH 2024.

A.O .OMBWAYO

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

