



**Kenya Pipeline Company Limited v Kurugu Food Complex (Civil Application E310 of 2024) [2024] KECA 1507 (KLR) (25 October 2024) (Ruling)**

Neutral citation: [2024] KECA 1507 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E310 OF 2024  
SG KAIRU, LA ACHODE & AO MUCHELULE, JJA  
OCTOBER 25, 2024**

**BETWEEN**

**KENYA PIPELINE COMPANY LIMITED ..... APPLICANT**

**AND**

**KURUGU FOOD COMPLEX ..... RESPONDENT**

*(Being an application for stay of execution of the judgment of the Environment and Land Court Nairobi (D Mwangi J.) delivered on 23rd May 2024 in NAI ELC Case No. 589 of 2010)*

**RULING**

1. The applicant, Kenya Pipeline Company Limited filed the application dated 18<sup>th</sup> June 2024 seeking substantive orders of stay of execution, of the judgment and decree of the trial court pending the hearing and determination of the applicant's appeal in the Court of Appeal. They also prayed that the cost of this application and those of the appeal be borne by the respondent, Kurugu Food Complex.
2. The application is premised on the grounds on the face thereof, and on the supporting affidavit sworn on 18<sup>th</sup> June 2024 by Gloria Khafafa, the manager, legal services of the applicant.
3. The genesis of this application is in a suit the respondent filed in the Environment and Land Court (ELC), Nairobi, ELC No. 589 OF 2010, claiming that the applicant through his agents without any right, invaded and trespassed into the respondent's premises, destroyed the pole fence thereon and laid heavy gauge pipes therein, without any lawful authority or license from the respondent.
4. In response, the applicant prayed that the amended plaint be struck out for containing fatal defects and for offending the provisions of Order 8 Rule 7 of the Civil Procedure Rules. The applicant averred that it was granted approval to lay its pipeline on the way leave. That the certificate of title to the suit premises was issued several years after the pipeline had been constructed and therefore, it was acquired subject to the respondent's existing rights.



5. The applicant asserted that it is not true that it is trespassing on the respondent's property since the new pipeline is laid parallel to the existing pipeline, upon the same Kenya Railway/Kenya Power and Lighting Co. Ltd way leaves. The applicant denied the allegations of trespass in toto and averred: that it obtained lawful authority in 1991 to use the way leaves; that the respondent was not in a lawful position to grant the requisite consent; that the respondent's rights if any, are subject to the applicant's existing rights; and, that a juridical person cannot have "quiet use and enjoyment of property".
6. The respondent also averred that the applicant introduced the particulars of trespass in paragraph (5a) and the laying of the heavy gauge line in paragraph (5b) by way an amended plaint. That these were not pleaded at the institution of the suit and therefore, the applicant was introducing a new cause of action through the back door.
7. Upon considering the evidence the learned Judge delivered a judgment on 23<sup>rd</sup> May, 2024, in favour of the respondent. The learned Judge held that the respondent is the absolute and indefeasible owner of the suit premises and had a valid cause of action against the applicant with regard to Line 2. Further that the respondent being the lawful proprietor of the property, is entitled to compensation in terms of mesne profits for all the time it had been denied use of the suit premises.
8. Consequently, the court granted the respondent orders as follows:
  - i. Kshs.49, 934,160 as mesne profits,
  - ii. A mandatory injunction to re-route the pipelines within 180 days,
  - iii. A permanent injunction against the applicant from entering and carrying out any works and in any way from interfering with the respondent's peaceful possession and enjoyment of the suit premises and
  - iv. Costs of the suit.
9. Dissatisfied with the decision of the court the applicant filed a notice of appeal in the trial court together with an application for stay of execution of the order for mesne profit. A stay of 30 days was granted which lapsed on the 22<sup>nd</sup> June 2024 and was extended for 180 days.
10. Meanwhile the applicant filed a memorandum of appeal in the Court of Appeal. Apprehensive that the respondent may proceed with execution of the order for mesne profits despite the preferred appeal challenging the judgment, the applicant filed the instant application before us.
11. The grounds of the application are that the appeal has overwhelming chances of success and if this application is not granted the applicant is likely to be prejudiced. That it will suffer loss and irreversible damage, together with the greater public as the applicant is a public entity vested with public funds. Further that the pipeline system serves the Kenyan public and neighboring countries including Uganda, Rwanda, Burundi, Eastern DRC, South Sudan and Northern Tanzania. As such, re-routing the pipeline as ordered by the trial court will require halting transportation of petroleum products and crippling many business operations.
12. In rebuttal to the application, the respondent filed a replying affidavit sworn on 3<sup>rd</sup> July 2024 by Peter Kurugu on behalf of the respondent. He deposed that the original suit arose in the year 2010 and had been pending in Court for 14 years before the decision of M.D Mwangi J in favor of the respondent. That the instant application is premature because the respondent is yet to tax its party and party bill of costs and obtain a certificate of taxation in order to initiate the execution process. Also, that there is no immediate threat of execution as the grace period of 180days does not expire until 23<sup>rd</sup> November 2024.



13. The respondent deposed further that the process of execution does not amount to substantial loss under Order 42 rule 6 of the Civil Procedure Rules. That a stay of execution would allow the applicant to continue to deprive the respondent of peaceful quiet possession and enjoyment of its own property as guaranteed under Article 40 of *the Constitution*. Further that it is in a position to refund the applicant the entire decretal sum in the event the appeal is decided in favor of the applicant. Lastly, the respondent deposed that the application is frivolous, devoid of merit, vexatious and is brought with bad faith. That it ought to be dismissed with costs.
14. This application was disposed of by way of written submissions. The firm of M/s Lilan & Koech Associates filed the submissions dated 5<sup>th</sup> July 2024 on behalf of the applicant, while M/s Igeria & Ngugi Advocates filed the submissions dated 15<sup>th</sup> July 2024 on behalf of the respondent.
15. The applicant submits that its memorandum of appeal raises bona fide issues such as: that the trial court denied the applicant a right to fair hearing contrary to Article 50 of *the Constitution*, by making findings adverse to it, on issues not pleaded by the respondent hence, denying it a right of response; and that the trial court failed to consider public interest concerns when arriving at the decision to compel the appellant to re-route pipeline No.2.
16. On the arguability aspect, the applicant argues that it has been denied the right to fair hearing under Article 50 of *the Constitution* by the learned Judge making inference to a non-existent cause of action, giving it primacy in the judgment and arriving at a decision adverse to the applicant, without giving it adequate opportunity to defend itself.
17. In opposition, the respondent asserts that the applicant has not met the threshold under rule 5 (2) (b). That the application is frivolous, devoid of merit, vexatious and brought in bad faith. Also, that allowing a stay of execution will allow the applicant to continue to deprive the respondent of peaceful quiet possession and enjoyment of its own property as guaranteed under Article 40 of *the Constitution*. Additionally, the respondent contends that the applicant veered off the way leave granted to it by the Kenya Railways Corporation (KRC) and erroneously laid its pipeline on the respondent's property.
18. On the second limb of the nugatory aspect, the applicant argues that re-routing the pipeline is a huge engagement that consumes time and public funds that would be impossible to compensate by way of damages should the appeal succeed. The applicant posits that if the stay orders are not granted there will be no point in pursuing the appeal as it would be an academic exercise. That public funds will already have been used and massive business interruption occasioned, which would otherwise be unnecessary. On the other hand, the respondent argues that in the event that the appeal is decided in favor of the applicant, it will be in a position to refund to the applicant the entire decretal sum.
19. We have looked at the application, the grounds in support thereof, the reply to the application, the submissions on record and the law. The discretion of this court under rule 5 (2) (b) to grant a stay or injunction, is not only wide and unfettered provided it is just to do so, it is also original. The applicant must however satisfy the Court on the twin principles first, that the intended appeal is arguable, or that it is not frivolous, and secondly, that unless the relief sought is granted, the appeal will be rendered nugatory if it succeeds.
20. On whether the intended appeal is arguable, we have considered the grounds advanced in the memorandum of appeal. We are guided by the decision in *Kenya Commercial Bank Limited v Nicholas Ombija* (2009) eKLR, where the Court held that an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court. On the sufficiency of the grounds to warrant a grant of the orders of stay sought, the Court in *Transouth Conveyors Limited v Kenya*



Revenue Authority & another (2007) eKLR CA No. 37 of 2007, observed that a single issue will suffice and that an applicant need not establish a multiplicity of arguable issues.

21. In the present application, we have no doubt in our minds that the intended appeal raises several points among them whether the trial court improperly made reference to Pipe Line No.2 which had not been pleaded, and made a decision thereon denying the applicant a fair hearing. Further that the trial court failed to consider public interest concerns when arriving at the decision to compel the appellant to re-route Pipe Line No.2. In our view these are not frivolous grounds. We however, say no more on this lest we embarrass the bench that will be seized of the appeal.
22. On the second principle, the applicant states that the appeal will be rendered nugatory if an order for stay is not granted considering the financial implication of removing the line and later returning it in case the appeal is successful. Also, the applicant argues that a lot of people in Kenya and beyond rely on the line for oil supply and will suffer prejudice. The respondent on the other hand argues that they had been denied quiet possession and enjoyment of the land for 14 years and waiting until the appeal is determined will prejudice them further.
23. On how to assess whether the nugatory aspect has been satisfied we turn to the decision of this Court in *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others (2013) eKLR*, where the Court stated as follows:

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- iv) In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. *David Morton Silverstein v Atsango Chesoni, Civil Application No. Nai 189 of 2001*.
  - x) Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.
24. In the instant case, in the event the appeal succeeds, the appeal will be rendered nugatory as the financial outlay required to satisfy the award of mesne profits of Kshs.49, 934,160 and for removing and re-installing the pipeline is enormous. We also note that the area served by the pipeline is vast. It extends to the western region of Kenya and beyond its borders. A large populace stands the risk of being exposed to hardship and prejudice if the stay is not granted. That in our view would render the success of the appeal an academic exercise.
  25. We have weighed the interest of both parties in this application. We note that the applicant is a public body and that in the circumstances of this case public interest concerns weigh in on behalf of the applicant. The grace period of 180 days does expires in on 23<sup>rd</sup> November 2024.
  26. Consequently, we are satisfied that the applicant has met the threshold in the twin principles under rule 5 (2) (b) of this Court's Rules. We therefore allow the application in terms of prayer 3 and grant an order of stay of execution of the judgment of the trial court delivered on 23<sup>rd</sup> May 2024 in Nairobi ELC Case No.589 of 2010 pending the hearing and determination of the applicant's appeal. The costs of the application shall abide by the outcome of the appeal.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF OCTOBER, 2024.**

**S. GATEMBU KAIRU, FCIArb**



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**JUDGE OF APPEAL**

**L. ACHODE**

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**JUDGE OF APPEAL**

**A. O. MUCHELULE**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR.**

