



**Nairobi County Government v Nuclear Investment Limited (Civil Appeal
(Application) E874 of 2023) [2024] KECA 1596 (KLR) (8 November 2024) (Ruling)**

Neutral citation: [2024] KECA 1596 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E874 OF 2023
S OLE KANTAI, JM MATIVO & PM GACHOKA, JJA
NOVEMBER 8, 2024**

BETWEEN

NAIROBI COUNTY GOVERNMENT APPLICANT

AND

NUCLEAR INVESTMENT LIMITED RESPONDENT

*(Appeal from the Ruling of the Environment and Land Court of Kenya at
Nairobi (E.K. Wabwoto, J.) dated 12th October, 2023 in ELC No. 393 of 2018)*

RULING

1. The applicant Nairobi County Government prays in the Motion brought under various Articles of *the Constitution* of Kenya 2010, The Civil Procedure Rules and The *Fair Administrative Action Act*, 2015 for orders that we stay proceedings in the Environment and Land Court (ELC) at Nairobi in ELC No. 393 of 2018 pending hearing and determination of an appeal and that we set aside proceedings of 28th March, 2023 at that Court and that costs of the application be provided for. In grounds in support of the Motion and in an affidavit of the applicant's lawyer Charles M. Ongoto it is stated amongst other things that the ELC delivered a ruling on 12th October, 2023 against the applicant; that the applicant was not given a chance to be heard contrary to its constitutional rights under Articles 25 and 50(1) of the *Constitution of Kenya, 2010* and was denied the chance to present its evidence and challenge the respondent's evidence; that the applicant was denied an opportunity to make representations in an administrative action; that the applicant made an application to the High Court praying that proceedings at ELC of 28th March, 2023 be set aside which application was dismissed; that we should grant a stay as the proceedings in ELC are still ongoing; that the applicant stands to suffer substantial loss if stay is not granted and that the respondents would not be prejudiced if stay is granted. It is further stated that the plaintiff and 2nd defendant's case proceeded on 28th March, 2023 at that court; that the lawyer representing the applicant had other cases in other courts on the said date and that when he



arrived in court for hearing of the case subject of this application he found that the case had been heard and concluded; that:

"... the High Court failed to consider and recognize my reason for not attending the proceedings, which was a substantial cause, and as a result gave orders that were prejudicial to the Appellant";

that we should order a stay of proceedings in ELC.

2. There is a replying affidavit by Harun Kariuki, an advocate in the firm of Thiongo & Partners Advocates on record for the respondent Nuclear Investment Limited where it was deponed that the case at ELC was heard and parties directed to file written submissions which the respondent did; that the applicant and its lawyer were absent when the matter was called for hearing at noon on 28th March, 2023, a time that had been allocated when the applicant's counsel was in court that morning; that the hearing date had been taken by consent of all parties in the case; that parties were directed to file written submission but the applicant did not comply with those directions even after time for doing so was extended; that the case at ELC had been filed in 2018 and there was a Judgment date; counsel depones at paragraphs 10 and 11 of replying affidavit:
 10. That having failed to appear during the hearing or deputize an advocate to hold his brief, The Applicant cannot be heard to complain that it was denied the right to be heard as this was an error of judgment on his part as was held by the court in the ruling issued on 12th October, 2023.
 11. That while the Applicant seek to appeal against the ruling dated 12th October, 2023, it is worth noting that the said ruling has not been attached to the supporting affidavit in support of its application dated 16th November 2023 which renders the said application incompetent and not deserving of any orders";

that the applicant has not attached the ruling to be appealed to the Motion; that there are no valid reasons raised by the applicant for setting aside the said proceedings; that the Motion should fail and be dismissed.
3. When the Motion came up for hearing before us on a virtual platform on 30th January, 2024 learned counsel Miss Mumbu who held brief for Mr. Ongoto appeared for the applicant while learned counsel Mr. Kariuki who held brief for Mr. Thiongo appeared for the respondent. Both sides had filed written submissions. The applicant submits that its constitutional right to be heard was violated and its right to have an opportunity to make representations in an administrative action was also violated. The case of *JMK v MWM & Another* [2015] eKLR is cited for the proposition that the right to be heard is a valued right which should not be prejudiced or affected without the party being afforded an opportunity to be heard. It is further submitted that the applicant should not be made to suffer as a result of an oversight.
4. It is submitted for the respondent that the applicant has failed to disclose that the hearing date at ELC had been taken by consent of the parties; that counsel for the applicant was in court in the morning of the hearing date but was absent at the allocated time when the hearing proceeded in his absence; that the applicant was not denied an opportunity to be heard as it was its absence and that of its lawyer that led to the hearing proceeding in their absence; that ELC cannot be faulted for proceeding with the case in those circumstances.
5. We have considered the whole record and submissions made.
6. The applicant prays that we stay ongoing proceedings in ELC and that we set aside proceedings of that court that took place on 28th March, 2023.



- 7. For an applicant to succeed in an application for stay pending appeal it must, firstly, demonstrate that the appeal, or intended appeal, as the case may be, is arguable, which is the same as saying that the appeal is not frivolous. The applicant must, in addition, show that the appeal would be rendered nugatory absent stay – See the principles for grant of stay which were well summarized in the case of Stanley Kangethe Kinyanjui v Tony Ketter & Others [2013] eKLR.
- 8. We note that a record of appeal has been filed being C.A. No. E874 of 2023. It is proposed to be argued on appeal that the applicant was denied an opportunity to be heard contrary to its constitutional rights in that regard; that the applicant was denied an opportunity to present its case contrary to law. We find that these are arguable points on appeal and as has been held by this Court an arguable point on appeal is not one that must succeed.
- 9. On the nugatory aspect we are informed by the respondent that parties were directed by ELC to file written submissions and that the applicant failed to do so even after time to file submission was extended upon its (applicant's) application. We are also told that Judgment in ELC is scheduled to be delivered on 15th February, 2024, a date that will come earlier than the date of this ruling. We are not satisfied that the appeal will be rendered nugatory if we don't grant stay. Judgment in the appeal will determine the rights of the parties and parties in the case will have an opportunity to exercise their options whichever way. The applicant having failed to satisfy the second limb on which an application of this nature applies the Motion fails and is dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF NOVEMBER, 2024.

S. OLE KANTAI

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JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

M. GACHOKA, C.Arb, FCIArb

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

