



Chief Officer, Trade & Enterprise Development, Kwale County & 2 others v End to End Limited (Civil Application E081 of 2022) [2023] KECA 100 (KLR) (3 February 2023) (Ruling)

Neutral citation: [2023] KECA 100 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E081 OF 2022
SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA
FEBRUARY 3, 2023**

BETWEEN

**CHIEF OFFICER, TRADE & ENTERPRISE DEVELOPMENT, KWALE
COUNTY 1ST APPLICANT
CECM, TRADE & ENTERPRISE DEVELOPMENT, KWALE
COUNTY 2ND APPLICANT
KWALE COUNTY GOVERNMENT 3RD APPLICANT
AND
END TO END LIMITED RESPONDENT**

((Being an application for stay of proceedings in High Court Civil Suit No 113 of 2022 pending the hearing and determination of the appeal against the directions issued on 25th October 2022 by Hon Lady Justice Njoki Mwangi))

RULING

1. The Applicants herein, who we shall for ease of reference refer to as the Kwale County and its Chief Officers, have, by way of a Notice of Motion application dated November 7, 2022, sought a stay of proceedings in Mombasa High Court Civil Suit 113 of 2021 pending hearing and determination of an appeal against the impugned directions issued therein on October 25, 2022. The said application is supported by an affidavit sworn on November 7, 2022 by Mr Hassan Ngalaa, the 1st Applicant herein, who states that if the contempt proceedings against them continue in the High Court pursuant to the directions given on October 25, 2022, the court will be proceeding without jurisdiction and contrary to section 6 of the *Arbitration Act*, and will threaten the said applicants' legal rights to a fair hearing and defence.
2. The application is in turn opposed by End to End Limited, the Respondent herein, by way of an affidavit sworn on November 22, 2022 by Mr Abdirahman Mohamud Abdow, the Respondent's



director. End to End Limited urged that the trial court is yet to pronounce itself on the contempt application hence the instant application is premature. Further, that section 6 of the *Arbitration Act* does not prevent continuance of a suit pending before the court.

3. The background to the instant application is rather convoluted. End to End Limited filed Mombasa Civil Suit No 113 of 2021 in the High Court at Mombasa seeking, inter alia, a permanent injunction restraining Kwale County and its Chief Officers from cancelling, terminating, re- advertising, sub-contracting and reissuing or awarding the tender number CGK-EU/124/DTDCD11/2018-2019 for the construction of a fresh produce wholesale market at Kombani-Waa Ng'ombeni Ward, Kwale County to another company; damages for breach of contract; specific performance; full payment of works already completed; and interest and costs of the suit. Contemporaneously with the suit, End to End Limited filed an application dated November 8, 2021 seeking the same injunctive orders. On November 11, 2021 Sewe J ordered that

' The current status quo obtaining in respect of the subject contract as at 11.17 am on this November 11, 2021 be maintained pending further orders of the Court on November 17, 2021'.

4. Kwale County and its Chief Officers subsequently filed an application dated November 16, 2021 seeking a stay of proceedings; that the matter be referred for arbitration arising from an arbitration clause in the subject agreement between the Kwale County and End to End Limited; and for the vacation of the ex parte orders. Sewe J thereupon directed as follows on November 17, 2021:

- a. THAT the Respondent's (Kwale County and its Chief Officers) application be placed on the file, and that it be disposed of first,
- b. THAT the said application be served on the Applicant and a response thereto, if any, be filed within 7 days from the date thereto.
- c. THAT in the interim, restraining order be issued in terms of prayer (2) of the Applicant's (End to End Limited) Notice of Motion dated November 8, 2021 pending further orders on November 29, 2021.
- d. THAT corresponding leave be and is hereby granted to the Respondent to file and serve a supplementary affidavit if need be. The same be done before November 29, 2021.

5. End to End Limited then moved the High Court by an application dated November 29, 2021 to cite Kwale County and its Chief Officers for contempt of Court. When the applications came before Sewe J on November 29, 2021 the learned Judge indicated that she was proceeding on her annual leave and that the application be placed before the duty Judge on December 6, 2021 for directions. The Judge also extended the interim orders until that date. On December 6, 2021, the said applications were placed before Njoki Mwangi J who, after hearing proposals on the hearing of the pending applications, directed that 'in view of the explanation given by the counsel on record, the court will proceed to give priority hearing to the application dated November 29, 2021 for contempt of court', and further directed as follows:

- a. THAT the Defendant's Counsel is given 5 days to file and serve a replying affidavit to application dated November 29, 2021,
- b. THAT the Plaintiff Counsel will within 7 days of service file and serve supplementary affidavit if need be. He will also file and serve written submissions



- c. THAT the Defendant's counsel will within 14 days from January 5, 2022 file and serve their submissions
 - d. THAT the application dated November 29, 2021 be heard on January 20, 2022
 - e. THAT the interim orders granted to the Plaintiff on November 17, 2021 and extended on November 29, 2021 are hereby extended until the hearing and determination of the Application dated November 8, 2021
 - f. THAT the County Commander, Kwale County and the OCS Kwale Police stated are hereby directed to ensure that the interim orders granted by the Court to the Plaintiff are enforced.
6. These directions prompted the filing of the first appeal in this Court by Kwale County and its Chief Officers, being Civil Appeal E013 of 2022. End to End Limited yet again filed another application dated October 13, 2022, seeking to cite Kwale County and its Chief Officers for contempt, and on October 13, 2022 Njoki Mwangi J directed as follows as regards the said application:
- a. THAT the said Notice of Motion application dated October 13, 2022 be and is hereby certified as urgent
 - b. THAT pending the hearing and determination of the application dated October 13, 2022, the status quo pertaining as of today shall be maintained. For the avoidance of doubt, there shall be no opening, no launching, no entry into premise of the market in issue by the Respondent or anyone acting on their instruction. Further to the foregoing, the interim Order extended by the Court on December 6, 2021, are hereby restated.
 - c. THAT the Regional Police Commanders and the Regional Police Commissioner are directed to ensure that the above orders are enforced and that peace is restored in the Market which forms the subject of this Application namely, the Fresh Produce Wholesale Market at Kombani-Waa Ng'ombeni Ward in Kwale County.
 - d. THAT the Applicant will effect service of the application dated October 13, 2022 to the Respondent for interpartes hearing on October 25, 2022.
7. On October 25, 2022, the counsel for Kwale County and its Chief Officers informed the learned Judge that the application dated October 13, 2022 was opposed by way of a Notice of Preliminary Objection, and sought to have their application for stay of proceedings heard first, which position was opposed by the counsel for End to End Limited. Njoki Mwangi J then gave the following directions on the way forward:
1. That the Court will hear the notice of preliminary objection and contempt of court application together.
 2. That the defendant's counsel will file and serve submissions on the notice of preliminary objection first within 14 days.
 3. That the plaintiff's counsel to file and serve written submissions in response to the submissions filed for the Notice of preliminary objection and also in support of the application dated October 13, 2022.
 4. The defendant's counsel to have 7 days after service to respond to the submissions filed by the plaintiff's counsel.
 5. That highlighting on November 21, 2022.



8. On October 31, 2022 the advocates for Kwale County and its Chief Officers lodged a Notice of Appeal October 28, 2022 against the directions given by Njoki Mwangi J on October 25, 2022, and proceeded to file the instant application.
9. Learned counsel, Mr KN Kibara appeared for Kwale County and its Chief Officers during the virtual hearing of the application, that was held on December 6, 2022, and relied on written submissions dated November 15, 2022. The counsel urged that the draft memorandum of appeal attests to the arguability of the appeal; and that the appeal challenges the jurisdiction of the court to entertain a dispute that ought to be referred to arbitration by dint of an arbitration clause in the contract between the parties. On the nugatory aspect, the counsel submitted that the contempt proceedings being quasi criminal in nature attracted grave penal consequences which included custodial sentence, and that unless the Court intervened, the applicants' constitutional guaranteed liberty and freedom would be curtailed without being accorded due process hence the urgency of the application.
10. Further, that in view of section 6 of the *Arbitration Act*, which proscribes the applicants from taking a positive step in arbitral bound proceedings, the impugned order had thrown the applicants into a legal conundrum which threatened their sacrosanct legal rights and defence within the context of legal principles espoused in *Scott vs Avery (1843-1860) ALLER*, and that their rights and freedoms as enshrined under Article 47 and 50 (1) of the *Constitution* stood to be violated as they will be denied the opportunity to ventilate their defences and due process.
11. Learned counsel Mr Abdiaziz appeared for End to End Limited, and while relying on written submissions dated November 22, 2022, urged that the proceedings in a contempt application are not proceedings within the meaning of Section 6 of the *Arbitration Act*, and are conducted pursuant to inherent power of the Court, as they go to the root of the administration of justice. Further, that the applicants misunderstood and misapplied the reading and import of section 6 of the *Arbitration Act* since an arbitration clause in the contract was not an automatic prevention of filing a suit in the courts of law.
12. The counsel refuted that Kwale County and its Chief Officers had an arguable appeal as the appeal is premature, and submitted that the said applicants had come to Court with unclean hands, and were seeking this Court's approval and free pass to continue disobeying Court orders until their application is heard and determined, which would be a travesty of justice. In addition, that the intended appeal was frivolous and idle, given the narrow angle the applicants were pursuing of seeking to stop the High Court from hearing a contempt application. Lastly, it was submitted that the nugatory test was not met because Kwale County and its Chief Officers can still approach this court on appeal if dissatisfied with the trial court's decision.
13. We have considered the respective submissions made by the both learned counsel. There are two requirements that need to be met in an application for stay brought pursuant to Rule 5 (2) (b) of the *Court of Appeal Rules, 2022*, as is the instant application. The first requirement is that an applicant need to demonstrate that they have an arguable appeal, and the second is that the said appeal will be rendered nugatory if the stay is not granted. These two requirements are settled by various decisions by this Court, and were restated and amplified in *Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others [2013] eKLR*. It is notable in this regard that Rule 5(2)(b) of the Court of Appeal Rules of 2022 governs orders for 'a stay of execution, an injunction or a stay of any further proceedings' and the said requirements therefore equally apply to an application for stay of proceedings.
14. On the first limb as to whether Kwale County and its Chief Officers, have an arguable appeal, it is evident from the pleadings and submissions that parties do not contest the fact that there are multiple applications pending before the High Court filed by both parties, and that the application by Kwale



County and its Chief Officers seeking to stay the proceedings in the High Court and refer the matter to arbitration is brought pursuant to section 6 of the *Arbitration Act* to restrain the Court from dealing further with a matter sought to be referred to arbitration. The learned counsel for Kwale County and its Chief Officers has raised fifteen grounds in the draft memorandum of appeal that challenge the directions that the contempt application be heard before the stay of proceedings application, and raise the issue of the High Court's jurisdiction to hear contempt of court application in light of the provisions and implications of section 6 of the *Arbitration Act*, and of the previous directions given in the matter by Sewe J In our view these are arguable points, and we are in this regard mindful that an arguable point is not necessarily one that must succeed, but merely one that is deserving of consideration by the Court.

15. On the second limb of whether the applicants' appeal will be rendered nugatory if a stay of proceedings is not granted, it is evident that the appeal challenges the jurisdiction of the High Court, and if indeed the High Court does proceed with the hearing and determination of the matters pending before it, then hearing the appeal will be rendered an academic exercise. In addition, it is notable that Kwale County and its Chief Officers are faced with an application for contempt of Court, and will be affected by the findings on the issue of jurisdiction in terms of any further proceedings in the matter. It is thus our finding that the applicants have met the threshold for the second limb.
16. The result is that Notice of Motion application dated November 7, 2022, is found to be merited. We accordingly grant an order of stay of further proceedings in Mombasa High Court Civil Suit 113 of 2021 pending the hearing and determination of the intended appeal against the impugned directions issued therein by Njoki Mwangi J on October 25, 2022.
17. As the application arises from directions made by the High Court, we make no order as to costs of the application.
18. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 3RD DAY OF FEBRUARY, 2023.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

