



**Otieno (Suing on his own behalf and on behalf of the General Public) v Funds Account Manager, Mathare National Constituency Development Fund & 2 others; Public Procurement Review Board & 12 others (Interested Parties) (Civil Application E207 of 2022) [2023] KECA 399 (KLR) (31 March 2023) (Ruling)**

Neutral citation: [2023] KECA 399 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E207 OF 2022  
F SICHALE, LA ACHODE & PM GACHOKA, JJA  
MARCH 31, 2023**

**BETWEEN**

**EZEKIEL OTIENO (SUING ON HIS OWN BEHALF AND ON BEHALF OF THE GENERAL PUBLIC) ..... APPELLANT**

**AND**

**FUNDS ACCOUNT MANAGER, MATHARE NATIONAL CONSTITUENCY DEVELOPMENT FUND ..... 1<sup>ST</sup> RESPONDENT**

**MATHARE NATIONAL GOVERNMENT CONSTITUENCY DEVELOPMENT FUND BOARD, MATHARE NG-CDF OFFICE ..... 2<sup>ND</sup> RESPONDENT**

**CDF COMMITTEE, MATHARE NATIONAL GOVERNMENT CONSTITUENCY DEVELOPMENT FUND – MATHARE NG-CDF OFFICE ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**PUBLIC PROCUREMENT REVIEW BOARD ..... INTERESTED PARTY**

**PUBLIC PROCUREMENT & REGULATORY AUTHORITY .... INTERESTED PARTY**

**ANTHONY OLUOCH ..... INTERESTED PARTY**

**ORIS & SONS CONTRACTOR LIMITED ..... INTERESTED PARTY**

**GRAVILLE ENTERPRISES ..... INTERESTED PARTY**

**FIXKAR E.A GROUP LIMITED ..... INTERESTED PARTY**

**LAVILLE ENTERPRISES LIMITED ..... INTERESTED PARTY**

**SAFA SERVICE PROVIDERS LIMITED ..... INTERESTED PARTY**



**FLEX (K) LIMITED ..... INTERESTED PARTY**  
**MERCOW ENGINEERING AND GEN. SUPPLIES LIMITED .... INTERESTED PARTY**  
**PROPERTY SUSTAINABILITY & SERVICES SOLUTION LIMITED ..... INTERESTED PARTY**  
**ETHICS AND ANTI-CORRUPTION COMMISSION ..... INTERESTED PARTY**  
**KEVIN MCAKECH ..... INTERESTED PARTY**

*(Appellant’s Notice of Motion under Sections 3, 3A and 3B of the Appellate Jurisdiction Act, Rule 5(2)(b) of the Court of Appeal Rules, 2010 seeking Stay of Execution pending the hearing and determination of the Application as well as pending the hearing and determination of the Intended Appeal from the decision of the High Court of Kenya Constitutional & Human Rights Division at Nairobi (Ong’udi, J) dated 22nd March, 2022 IN Constitutional Petition Number E035 of 2022)*

## **RULING**

- 1 The applicant, Ezekiel Otieno (suing on his own behalf and on behalf of the General Public) filed the instant motion dated April 8, 2022. The motion sought orders against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> respondents, and 13 Interested Parties. In the main, the applicant sought an order staying the ruling of Ongudi, J delivered on March 22, 2022 and that the 3 respondents be prohibited from releasing any funds in respect of tenders awarded to the Interested Parties. The motion was supported by the applicant’s affidavit sworn on April 8, 2022. The motion was resisted by some of the respondents as will be discussed herein.
- 2 A brief background will give context to the motion. The applicant filed a constitutional petition on January 24, 2022. The gist of the petition was that there was massive corruption in the evaluation and awards of tenders in Mathare National Constituency Development Fund.
- 3 The respondents and the interested parties in response to the petition filed a preliminary objection raising several issues including the lack of jurisdiction on the part of the trial court. In the impugned ruling, Ongudi, J. held that:

“The petition and notice of motion both dated January 24, 2022 are struck out for being premature, the doctrine of exhaustion not having been complied with”.
- 4 The applicant being aggrieved with the said outcome filed the instant motion. On November 29, 2022, the motion came up before us for hearing. Mr. Mbugua held brief for Mr. Arusi for the applicant; Mr. Ochieng Oginga appeared for the 3<sup>rd</sup> respondent, Mr. Kamenyu for the 5<sup>th</sup> & 10<sup>th</sup> interested parties and also held brief for Mr. Wesonga for the 4<sup>th</sup> respondent. Mr. Kamenyu and Mr. Wesonga were not opposed to the motion.
- 5 In urging the motion, Mr. Mbugua relied on the applicant’s written submissions dated April 22, 2022 and the applicant’s replying affidavit of July 17, 2022. He urged us to stay any payment of the tender sum.
6. In his response, Mr. Oginga pointed out that no Notice of Appeal had been filed.



- 7 In the applicant's submissions dated April 22, 2022, the applicant asserted that the petition filed by him was on behalf of the people of Mathare who stand to suffer if the impugned tenders are not stopped on their trails. He submitted that he has an arguable appeal, the High Court having misapprehended the applicant's suit.
- 8 In the 3<sup>rd</sup> respondent's submissions dated April 28, 2022, it was contended that the motion is premised on a defective Notice of Motion for having been filed out of time and not having been signed by the Deputy Registrar; that the motion is overtaken by events as the projects have been completed and the tenderers paid, and that there was no order capable of being stayed.
- 9 In the replying affidavit of Moses Akaalo, the Chairman of Mathare NG – CDF (the 2<sup>nd</sup> respondent herein) of May 13, 2022, he deponed that the various projects including the construction of classrooms had been concluded and a certificate of completion issued. Similarly, in the replying affidavit of Wycliff Odongo Owuor, sworn on April 28, 2022, he deponed that the motion is overtaken by events and that there was no order capable of being stayed. This position was reiterated in the submissions of the 10<sup>th</sup> interested party.
- 10 The twin principles to be satisfied in an application such as this one are well settled. Firstly, an applicant has to show that he/she has an arguable appeal. Secondly, he/she must demonstrate that the intended appeal will be rendered nugatory absent stay. With regard to the first limb, the respondents' position is that the trial court was not seized of jurisdiction given that the *Public Procurement and Assets Disposal Act* sets out mechanisms for resolutions of disputes such as the one raised by the applicant. If indeed this be true, then the trial court was right in coming to the conclusion that the applicant ought to have taken advantage of the dispute resolution mechanism set out in the *Public Procurement and Assets Disposal Act*. In our view, this argument seems to have merit and we shall desist from making any further comments on this issue lest we embarrass the bench that will be seized of the substantive appeal. We do not think that the applicant has demonstrated that he has an arguable appeal.
- 11 On the nugatory aspect, again it was the respondents' position and which was not denied that the tenders were awarded and construction works completed and payments made. In other words, there was nothing to stay as the horse had bolted. This being the case, we have come to the conclusion that there is nothing capable of being stayed. Having come to the above conclusion, we do not find it necessary to discuss whether the applicants had filed a Notice of Appeal, as it was contended that no notice of appeal had been filed. This Court is seized of jurisdiction in a 5(2)(b) application upon filing of a Notice of Appeal. However, we shall not belabor the point having come to the conclusion that the twin principle being conditions precedent in a 5(2)(b) application have not been satisfied.
- 12 In view of what we have stated above, the motion herein lacks merit and it is hereby dismissed with costs.

**Dated and delivered at Nairobi this 31<sup>st</sup> day of March, 2023.**

**F. SICHALE**

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**JUDGE OF APPEAL**

**L. ACHODE**

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**JUDGE OF APPEAL**

**L. GACHOKA**



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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

