



**National Land Commission v African Gas and Oil Company & 5 others (Civil Application E001 of 2023) [2023] KECA 1279 (KLR) (27 October 2023) (Ruling)**

Neutral citation: [2023] KECA 1279 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E001 OF 2023  
P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA  
OCTOBER 27, 2023**

**BETWEEN**

**NATIONAL LAND COMMISSION ..... APPLICANT**

**AND**

**AFRICAN GAS AND OIL COMPANY ..... 1<sup>ST</sup> RESPONDENT**

**MIRITINI PORT LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**CREEK PORT LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**SEMIX ENTERPRISES ..... 4<sup>TH</sup> RESPONDENT**

**MJAD INVESTMENT LIMITED ..... 5<sup>TH</sup> RESPONDENT**

**KAHIA TRANSPORT LIMITED ..... 6<sup>TH</sup> RESPONDENT**

*(Being an Application for stay of execution of the Judgment and Order pending an intended appeal from the Environment and Land Court at Mombasa (L. L. Naikuni, J) delivered on the 14th November 2022 in ELC Petition Consolidated Nos. 51-55 of 2019)*

**RULING**

1. By an application dated January 3, 2023, National Land Commission, hereinafter the applicant, seeks to have an order of stay of execution of the judgment and order of the Environment and Land Court [ELC] sitting at Mombasa (hon L Naikuni J) dated November 14, 2022. The application has been brought, among other provisions under rule 5(2) (b) of the [Court of Appeal Rules](#), hereinafter the Rules.



## Background

2. African Gas & Oil Company, Miritini Port Limited,, Creek Port Limited, Semix Enterprises and Mjad Investment Limited, who are the 1<sup>st</sup> to the 5<sup>th</sup> respondents respectively filed separate constitutional petitions against the applicant and Kahia Transporters Limited, the 6<sup>th</sup> respondent herein challenging the constitutionality of the compulsory acquisition of Land Parcel No MN/VI/4938, claimed by the 1<sup>st</sup> respondent; land parcel No MN/VI/4805, claimed by the 2<sup>nd</sup> respondent; Land Parcel No MN/VI/4948, claimed by the 3<sup>rd</sup> respondent; land parcel No MN/VI/3827, claimed by the 4<sup>th</sup> respondent; and land parcel no MN/VI/3916 claimed by the 5<sup>th</sup> respondent. It was their case that the applicant compulsorily acquired portions of their land [suit lands], claiming that the lands overlapped with the land reference Plot No 5169/VI/MN belonging to the 6<sup>th</sup> respondent; and without compensating them, utilized the suit lands for the construction of the Standard Gauge Railway and the Mombasa Southern By-pass.
3. The applicant’s position is that on June 4, 2022, in what he termed an interim judgment/ruling the learned ELC judge *suo motu* consolidated the petitioners cases and in the same vein directed the applicant to make compensation to the respondents’ advocates. After the case, the applicant contends that ultimately, the learned Judge rendered two judgments sequentially without conducting a trial.
4. The applicant contends that in its final judgment rendered on the November 14, 2022, the applicant was, *inter alia* ordered to pay within 30 days from the date of the judgment the sum of money of over Kshs 3.8 billion.
5. We heard the application through the virtual platform on the January 25, 2023. Present at the hearing were learned counsel Mr Mbuthia for the applicant; learned counsel Mr Matata for the 1<sup>st</sup> to 5<sup>th</sup> respondent and learned counsel Mr Omwenga for the 6<sup>th</sup> respondent. Each counsel filed submissions and case digests, which they relied on. Each briefly highlighted their submissions before us. There was also on record the replying affidavits sworn on behalf of the respondents.
6. We have considered the motion, the affidavits both in support of and in opposition thereto and the submissions made both in writing and orally before us. The principles governing the exercise of the court’s jurisdiction under rule 5(2) (b) of our *Rules* are now well settled. Firstly, the intended appeal should not be frivolous. In that regard, the applicant must show that they have an arguable appeal; and second, this court should ensure that the appeal, if successful, should not be rendered nugatory. These principles were restated in *Reliance Bank Ltd (In Liquidation) v Norlake Investments Ltd*, Civil Appl No Nai 93/02 (UR), thus:

“Hitherto, this Court has consistently maintained that for an application under rule 5(2) (b) to succeed, the applicant must satisfy the court on two matters, namely: -

  1. That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal,
  2. That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction.”
7. Lastly, both limbs must be demonstrated to exist before one can obtain relief under rule 5(2) (b).
8. Before we embark on the application, let us mention an issue raised by the 6<sup>th</sup> respondent in its replying affidavit. It is averred that the application was incompetent for reason the replying affidavit in support



of thereof was not properly commissioned. What is before us is an application under rule 5(2) (b) of the Rules. If the 6<sup>th</sup> Respondent wished to take up that point, it should have considered filing an application for striking out of the motion under rule 86 of the Rules.

9. On the first aspect as to whether the intended appeal is arguable and not frivolous, we restate this court's decision in Kenya Tea Growers Association & another v Kenya Planters & Agricultural Workers Union Civil Application Nai No 72 of 2001 wherein the Court addressed what is considered to be an arguable appeal thus:

“ He (the applicant) need not show that such an appeal is likely to succeed. It is enough for him to show that there is at least one issue upon which the Court should pronounce its decision”

10. It is trite that demonstration of the existence of even one arguable point will suffice in favour of the Applicant. (See Kenya Railways Corporation v Edermann Properties Ltd, Civil Appeal No Nai 176 of 2012 and Ahmed Musa Ismael v Kumba Ole Ntamorua & 4 others, Civil Appeal No Nai 256 of 2013).
11. Mr Mbutia for the applicant submitted that there were 16 suits pending before various Courts of parallel jurisdiction with the court that heard these consolidated Petitions. That the suits were at various stages of completion, that they touched on same or similar land and compensation was sought in all of them. He urged that the first triable issue is the fact this case was res judicata and or sub judice. Secondly, that the order to make compensation of astronomical sums of money payable from public funds was against public policy, especially because. Counsel urged that this was more so because the court had not determined the issue of ownership of the suit land, which issues were pending before other Courts. The other issue raised was that the learned ELC Judge adopted private valuation reports which were carried out arbitrarily without adhering to any standard, and whose valuation was excessive and many times over and above the valuation by the applicant. He also urged that the 1<sup>st</sup> Respondent had fully been compensated but had presented a second claim for the same property.
12. Mr Matata for the 1<sup>st</sup> to 5<sup>th</sup> respondents opposed the application. He urged that the applicant could not prove that it had an arguable appeal as it did not, simultaneously with the application file a Memorandum of Appeal. He urged that the respondents were not seeking double compensation, but had filed the claim in order to get the proper compensation based on valuation reports by professional valuers.
13. Mr. Omwenga urged that the applicant had a similar application pending before the superior court and that it could not abandon the application midstream and move to the appellate Court. For that proposition, he relied on the case of Car House Limited & another v Erastus Kavita Musyoka [2022] eKLR. While invoking the case of South Nyanza Sugar Company Limited v Awendo Town Council [2012] eKLR, he urged that the applicant must demonstrate that it had an arguable appeal.
14. We have considered the rival arguments of counsel. In this case, Mr Matata was correct that the applicant has not included a draft or fair copy of Memorandum of Appeal. However, it has elaborately set out as background, the grounds upon which the application is premised both on the face of the motion and in its supporting affidavit. From these grounds, we are able to observe that indeed the applicant has an arguable appeal, with several grounds of appeal. We bear in mind that the appeal need not succeed. All the applicant was required to prove is that the appeal is not frivolous. We find that it has succeeded in so doing, and that the appeal is not frivolous.
15. On whether the appeal will be rendered nugatory if it was successful and the Court declined to grant the order of stay. Mr Mbutia urged that the applicant was ordered to pay advocates who were not parties in the suit, and who did not own the suit lands, colossal sums of money. Placing reliance on



this court's decision in *NLC v Teresia Runji & others* Civil Application No 10 of 2020 (UR) where this Court stated:

“In this case the applicant has demonstrated that the compensation sought is in excess of Kshs 1 billion which by all standards is a colossal amount of money that may be difficult to recover from the respondents in the event that the appeal succeeds... The applicant has also raised the issue of double compensation and use of public funds.”

16. Mr. Mbutia urged us to use the same logic in the instant case, urging that the circumstances of the both cases were similar. He urged that public interest was in favour of granting the orders sought.
17. Mr Matata opposed the argument that public interest was in favour of the grant of the order sought. Counsel relied on the case of *Republic v Commissioner of Lands and another ex parte Kimondo Mubea* [2013] eKLR for the proposition that the Courts in determining disputes before it must balance the interest of the public vis a vis private interest.
18. Mr Omwenga urged that the applicant did not make any averment that the Respondents will be incapable of compensating the applicant in case their appeal succeeds. He invoked the case of *John Muthee Ngunjiri & 4 others v Kenya Power & Lighting Company Limited* [2018] eKLR, for the proposition that whether 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.
19. We have considered the arguments made by counsel to the parties on the second limb to this application. The uncontested fact that the compensation sought to be stayed is in the billions, that it is sought to be paid out of public funds and to persons who are not parties to the suit. The fact that there is no guarantee that once the payment is made, there will be a possibility to recover. Rather, even more persuasive, that the applicant will not face challenges and great difficulties trying to recover the sums. We find that, balancing the interests of all the parties involved, public interest dictates against use of such colossal sums of public funds where it is contested, as in this case, that the payout is justified.
20. In the result, we find merit in the applicant's application and the order which commends itself to us to make is as follows:
  1. The notice of motion application dated January 3, 2023 is hereby allowed in terms of order (3) as follows:
    - a. There shall be a stay of execution of the judgment and decree of hon L Naikuni made on November 14, 2022, pending the hearing and determination of the intended appeal.
    - b. The costs of this application to await the outcome of the appeal.
21. Those are our orders.

**DATED AND DELIVERED AT MOMBASA THIS 27<sup>TH</sup> DAY OF OCTOBER, 2023.**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

**J. LESIIT**

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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**

