



County Government of Trans Nzoia v Hersi & 3 others (Civil Application E104 of 2021) [2022] KECA 114 (KLR) (11 February 2022) (Ruling)

Neutral citation: [2022] KECA 114 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E104 OF 2021
RN NAMBUYE, PO KIAGE & F TUIYOTT, JJA
FEBRUARY 11, 2022**

BETWEEN

COUNTY GOVERNMENT OF TRANS NZOIA APPLICANT

AND

ASHA HERSI 1ST RESPONDENT

MILTONE CONTRACTORS LIMITED 2ND RESPONDENT

ECO BANK KENYA LIMITED 3RD RESPONDENT

VALLEY AUCTIONEERS 4TH RESPONDENT

(Being an application for stay of execution pending the appeal from the Judgment of the High Court of Kenya at Bungoma (Riechi, J.) dated 3rd June, 2021 in HCCC NO. 06 OF 2019)

RULING

1. By a motion dated 8th July 2021 and brought under Rule 5(2)(b) of the *Court of Appeal Rules*, the appellant, County Government of Trans Nzoia, seeks orders as against Asha Hersi, Miltone Contractors Limited, Eco Bank Kenya Limited and Valley Auctioneers, the respondents, that;
2. THAT pending the lodging, hearing and determination of the intended appeal herein, a stay of execution of the judgment and decree of the High Court in HCCC 6 of 2019 at Bungoma delivered on 3rd June, 2021 be and is hereby granted. (sic)
3. THAT this Honorable Court be pleased to make such further and or other orders as it may deem just, fair and reasonable and appropriate in the circumstances for the ends of justice to be met;
4. THAT the cost of and incidental to this application do abide by the outcome of the intended appeal.



2. The applicant awarded the 2nd respondent a tender for road maintenance in Matumbei ward. Consequently, the 2nd respondent took a loan of Kshs. 30,000,000 from the 3rd respondent and offered parcel number EAST BUKHUSU/SOUTH KANDUYI/2952 as security. Additionally, a tripartite/ domiciliation agreement was entered into between the applicant, the 2nd and 3rd respondents. Therein, the applicant undertook to channel all payments relating to the tender through the 3rd respondent, and the 2nd respondent granted the 3rd respondent lien over all the said proceeds.
3. When the applicant failed to make the payments, the 3rd respondent intended to exercise its statutory power of sale over the charged property, prompting the 1st and 2nd respondents to file suit. Among other orders, they asked the High Court to compel the applicant to honor the terms of their assignment/ domiciliation agreement or, in the alternative, pay Kshs.33,000,000. Upon hearing arguments from all the parties, the learned Judge, delivered judgment against the applicant and ordered it to pay the 1st and 2nd respondent the Kshs. 33,000,000.
4. Aggrieved, the applicant filed a notice of appeal which gives us jurisdiction to hear and determine applications under the rule invoked.
5. The notice of motion is founded on 7 grounds appearing on the face of it and is supported by an affidavit sworn by Sifuna Wakofula, the applicant's County Secretary. He maintained that; the applicant has an arguable appeal with a high chance of success; the learned Judge erred by failing to properly apply the relevant provisions of the Public Procurement and Disposal Act and by ignoring the pertinent illegalities that surrounded the tendering process which tainted the letter of award issued.
6. In opposition, the 1st and 2nd respondents filed a replying affidavit which was sworn by the 1st respondent. She deposed that there was no illegality in the tendering process or the subsequent execution of the domiciliation agreement. A valid agreement existed between the parties hence the application herein is frivolous and an abuse of the Court process.
7. The principles upon which this Court grants relief under Rule 5(2)(b) of its Rules are well settled that; an applicant must show that he has an arguable appeal and that if the orders sought, be they of stay of execution or injunction are not granted, the said appeal would be rendered nugatory. See, *STANLEY KANGETHE KINYANJUI Vs. TONY KETTER & 5 OTHERS [2013] eKLR*.
8. We have considered the application and conclude that the grounds raised by the applicants are arguable and if the relief is not granted, the appeal shall be rendered nugatory. As we allow the application, we note that justice must be served on all the parties herein given the sum involved and the risk of foreclosure that is faced by the 2nd respondent. Therefore, we shall grant a conditional stay.
9. We hereby grant the stay of proceedings as sought on condition that the applicant provides a bank guarantee for Kshs. 10,000,000 with the 3rd respondent within 30 days failing which, the interim order shall lapse. If the order is complied with, the stay shall extend to the hearing and determination of the appeal.
10. The costs of the motion shall be in the intended appeal.

DATED AND DELIVERED AT KISUMU THIS 11TH DAY OF FEBRUARY, 2022.

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE



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JUDGE OF APPEAL
F. TUIYOTT

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JUDGE OF APPEAL

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

SIGNED

DEPUTY REGISTRAR

