



Kenya Ports Authority v Nightshade Properties Limited & 4 others (Civil Appeal (Application) E025 of 2021) [2022] KECA 385 (KLR) (4 March 2022) (Ruling)

Neutral citation: [2022] KECA 385 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPEAL (APPLICATION) E025 OF 2021
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
MARCH 4, 2022**

BETWEEN

KENYA PORTS AUTHORITY APPLICANT

AND

NIGHTSHADE PROPERTIES LIMITED 1ST RESPONDENT

NATIONAL LAND COMMISSION 2ND RESPONDENT

AUTHORITY 3RD RESPONDENT

HON. ATTORNEY GENERAL 4TH RESPONDENT

THE NATIONAL ASSEMBLY 5TH RESPONDENT

(An application for stay of proceedings and stay of execution pending the hearing and determination of an appeal against the judgement and orders of Malindi Environment and Land Court delivered by Olola, J. on 23rd March 2021 in Petition Number 33 of 2019)

RULING

- 1 This is a notice of motion application dated 16th November 2021, brought pursuant to Rule 5 (2) (b) of the [Court of Appeal Rules 2010](#), Sections 3A and 3B of the [Appellate Jurisdiction Act](#). The Applicant seeks the following prayers:

“ 1. SPENT

“2. That pending the hearing and determination of this Application, this Honourable Court does issue an order of stay of execution of the judgment and consequent orders of Honourable Justice J.O. Olola dated and delivered on 23.03.2021 and this Honourable Court be pleased to issue an order of stay of execution or implementation of order number 2 of the judgement delivered by the Superior court on 23.03.2021 which reads:”



That in default an order of injunction shall issue upon the expiry of 45 days restraining the 1st, 2nd and 5th Respondents whether jointly or severally by themselves, their servants, agents, contractors or however from remaining, entering upon or remaining on L.R. No Makowe Lamu or in any way interfering with the peaceful quiet possession and enjoyment of the property by the Petitioners

In order 4 and 5: THAT pending the hearing and determination of the Application and Appeal, this Honourable Court be pleased to issue an order of stay of the contempt proceedings commenced by way of the 1st Respondent's Notice of Motion dated 18th June 2021 filed before the Superior Court against the Managing Director of the Appellant;

6. Costs of the Application be provided in the Appeal.”

2. The Applicant has premised its application on the grounds found on the face of the Motion and the supporting affidavit of Turasha Kinyanjui, the Applicant's Acting General Manager, Board and Legal Services Division, sworn on 16th November, 2021. In summary he deposes that the 1st Respondent filed Malindi ELC Petition No. 33 of 2019 on 2nd December 2019 where they sought, inter alia an order of mandamus directing the National Land Commission, (2nd Respondent) to convene a meeting under the provisions of Section 112 of the *Land Act*, to determine the just compensation due to the Nightshade Properties Limited (1st Respondent) if the intention to acquire the 1st Respondent's property is upheld by the Court; an Order of Injunction restraining the Applicant and the 2nd and 3rd Respondents from entering upon or remaining on Land Reference No. 28101 Mukowe Lamu or in any way interfering with the peaceful quiet possession and enjoyment of the property by the 1st Respondent. The deponent avers that on 23rd March 2021, Olola, J. granted both orders of mandamus and injunction.
3. The Applicant avers that the effect of the second order made was to evict the Applicant from the suit property in the event the 2nd Respondent defaulted in complying with the first order.
4. He deposes that the Applicant, being aggrieved by the said decision filed the Notice of Appeal on 30th March 2021 and the Record of Appeal on 7th June 2021. He averred that before the appeal could be set for hearing the 1st Respondent filed a Notice of Motion on 18th June 2021 seeking to commit the Managing director of the Applicant, (Deponent) the Chairman of the 2nd Respondent and the Managing Director of the 3rd Respondent to civil jail for alleged contempt for failing to comply with orders of the Court made on 23rd March 2021. He deposes that the application was scheduled for hearing on 21st October 2021, At the time of hearing this application (7th December, 2021) the contempt proceedings were set to be heard on 15th December 2021.
5. The 1st Respondent, did not file any affidavit or grounds of opposition in response to the application. However, it filed written submissions dated 2nd December 2021, the content of which clearly opposes this application.
6. When the matter came up for virtual hearing on the 7th of December 2021, the Applicant represented by Messrs. Paul Munyao chose to rely on his submission. The 5th Respondent represented by Messrs Kuyioni, submitted that his client fully supported the Applicant's application. Mr. Mogeni for the 1st Respondent relied on his submission.
7. Before we delve into the application we wish to set out briefly the background to this case. The Applicant is a State Corporation. In this application it is not in dispute that the 1st Respondent's property known as L.R. No. 28101 Mokowe Lamu was compulsorily acquired by the 2nd Respondent,



on behalf of the National Government through a process that started in 2014. The purpose of the compulsory acquisition was for the construction of the Lamu Port-South Sudan-Ethiopia Transport (LAPSSET) Corridor Project including the Lamu Port. The Applicant was contracted to carry out construction of first three berths and associated infrastructure for Lamu Port at Mandy Bay, Lamu, and evidenced in the redacted copy of the contract 'PM7' in Applicant's supporting affidavit. The Applicant contends that it entered into possession of the suit property in 2015, and started carrying out construction as contracted.

8. The 1st Respondent's complaint is that it has not been compensated for the compulsory acquisition, and thus the suit in the ELC. The 1st Respondent obtained two orders, the first one of mandamus directed at the 2nd Respondent, and the second one, an injunction directed against the Applicant and others, as alternative in case of default of compliance to the first order. The position being the 1st Respondent was in the process of prosecuting contempt of court proceedings for non-compliance of both orders.
9. It is important to set out the order the court made at this point. The order of the court made on the 23rd March 2021 was follows:
 - a. an order of mandamus directing the National Land Commission, to convene a meeting under the provisions of Section 112 of the *Land Act* within 45 days from the date of the judgment to determine just compensation due to Nightshade properties limited.
 - b. in default of compliance the Order of Mandamus, an order of injunction shall issue upon the expiry of 45 days restraining the Appellant, 2nd and 3rd Respondents whether jointly or severally by themselves, their servants, agents, contractors or however from remaining, entering upon or remaining on the suit property or in any way interfering with the peaceful quiet possession and enjoyment of the property by the Petitioners.
10. The Applicant lodged its Notice of Appeal within 14 days of the judgment pursuant to Rule 75 of the Court of Appeal Rules and therefore this court is properly seized of the application, as prescribed by Rule 5 (2)(b) of this court's rules.
11. We have considered this application, the supporting affidavit and the submissions by counsel to the Applicant and the 1st Respondent. We are also guided by the law and the principles which apply to such an application. We shall consider whether the Applicant has satisfied the twin principles for grant of the stay sought, which are, first whether the Applicant has presented an arguable appeal and second, whether the intended appeal would be rendered nugatory if the interim orders sought were denied.
12. On the first principle the Applicant's position is that once the Environment and Land Court (ELC) learned Judge found as a fact that the suit property had been compulsorily acquired for public purpose, which was the implementation of the LAPSSET project, and ordered the 1st Respondent to convene the meeting to inquire about and to determine the compensation for the compulsory acquisition of the suit property, it was an error in law and in fact to issue default orders effectively requiring the Applicant to vacate the suit property.
13. The Applicant urged that the legal regime for compulsory acquisition of land is well laid down in the provisions of the *Land Act*, 2012, and that the remedy that was available to the 1st Respondent was compensation and not vacant possession, and therefore the Court erred. The Applicant contends further that the court's order was complied with because the meeting as ordered by the court took place at Mukowe Chief's Camp, having been convened vide Gazette Notice No. 3782 dated 23rd April 2021,



even though the 2nd Respondent had not concluded the inquiry, and as a result the 1st Respondent had not been compensated.

14. Mr. Mogeni for the 1st Respondent in his written submissions dated 2nd December 2021, urged that the application was brought under Rule 5 (2) (b) of this court's rules and therefore invoked the Court's equitable jurisdiction and that the granting of orders should be made on principles established under equity. For that proposition he cited the case of *V. J. Makokha & 4 others v Lawrence Sagini & 2 others* [1994] eKLR. Counsel urged that this was a perfect case where the Court should withhold its discretion in the interest of justice since the Applicant did not come to equity with clean hands. He asserted that the Applicant had not shown its desire to obey the first limb of the judgment which was not appealed from, neither had it made any attempt to deposit the amount due or offered for compensation with the 2nd Respondent.
15. The 1st Respondents maintains that the ELC, upon the filing of the application for contempt by the 1st Respondent, it ordered the Applicant to appear before it which it failed to do, despite all other parties appearing before it, and therefore it should not be given audience before this Court. Further, there was no arguable appeal because the orders of the Court were in the alternative, and failure to comply with them meant that consequences would follow. It was submitted that there has been default which has not been explained by the Applicant.
16. As to whether the appeal will be rendered nugatory if the stay sought is not granted, the Applicant submitted that it has been in possession of the suit property since October 2016 and urges that the developments on the suit property are complete, which include extensive construction and development works of the Lamu Port, the berths and its ancillary structures including its headquarters and administration blocks at great expense using public funds amounting to approximately Kshs 992,419,922.40 and USD 259,441,740.62. It urges that the effect of the intended execution of order No. 2 of the court will be eviction from the suit property. It urged that the Lamu Port is an important national and international facility which is already operational. It urged that the order if executed will occasion extreme loss and difficulty to the Applicant, and will completely paralyse the operations at the Lamu Port.
17. The Applicant placed reliance on the case of *Reliance Bank (In liquidation) v Norlake Investment Ltd* (2002) EA 227 to guide the Court when determining whether or not what was sought to be stay if allowed to happen was reversible and if not whether the damages would be reasonable to compensate the aggrieved party.
18. The 1st Respondent submitted that since the appeal was against the order for vacant possession, the appeal could only be rendered nugatory if the Applicant offered security towards complying with the provisions of Article 40 of *the Constitution*, and that they cannot be heard to say the appeal will be rendered nugatory without any form of compensation.

Counsel urged that the Applicant took forceful possession of the 1st Respondent's land without following the law, that it conceded that compensation was ordered, however, none had been received. The 1st Respondent urged that if the court will be in doubt in regard to whether the two principles were met or not, we should bear in mind that the 1st Respondent stood to suffer more having been denied proprietary rights by the Applicant who continues to enjoy its property without paying compensation.
19. The issue that presents for determination is whether the prayers sought may be granted. Rule 5 (2) (b) of the Court of Appeal Rules, is titled "Suspension of sentence, injunction and stay of execution and stay of further proceedings", and provides as follows:

“(1)



(2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may—

a.

in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.”

20. In the case of *Stanley Kangethe Kinyanjui vs. Tony Ketter & Others* [2013] eKLR this court summarized the case law and principles applicable to applications for stay of proceedings as follows:

“From the long line of decided cases (although none was cited by counsel, perhaps due to their notoriety) on Rule 5(2)

b. aforesaid, the common vein running through them and the jurisprudence underlying these decisions can today be summarized as follows:

- i. In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this court. See *Ruben & 9 Others v Nderitu & Another* (1989) KLR 459.
- ii. The discretion of this court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so.
- iii. The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. *Halai & Another v Thornton & Turpin* (1963) Ltd. (1990) KLR 365.
- iv. In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. *David Morton Silverstein v Atsango Chesoni*, Civil Application No. Nai 189 of 2001.
- v. An applicant must satisfy the court on both of the twin principles.
- vi. On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No. Nai 345 of 2004.
- vii. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. *Joseph Gitahi Gachau & Another v Pioneer Holdings (A) Ltd. & 2 others*, Civil Application No. 124 of 2008.
- viii. In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or



law at that stage as doing so may embarrass the ultimate hearing of the main appeal. *Damji Pragji (supra)*.

- ix. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. *Reliance Bank Ltd v Norlake Investments Ltd [2002] 1 EA 227* at page 232.
 - x. Whether or not 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.
 - xi. Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecunity, the onus shifts to the latter to rebut by evidence the claim. *International Laboratory for Research on Animal Diseases v Kinyua, [1990] KLR 403.*” (See also *Multimedia University & Another vs. Professor Gitile N. Naituli (2014) eKLR* and *Halai & another v Thornton & Turpin (1963) Ltd [1990] eKLR.*)”
21. Having set out the applicable principles, we now turn to the determination of the application. The Applicant needs to satisfy the court that it has at least one arguable appeal, and secondly that the appeal may be rendered nugatory if the orders sought are not granted. We need not rehash what was said by the parties.
 22. On the issue of whether the appeal is arguable, we have considered that the land was compulsorily acquired by the 2nd Respondent. We agree with the Applicant that it is an arguable point whether the remedy available to the 1st Respondent for compulsory acquisition lies in damages or re-instatement into the suit property. Secondly, the Applicant has shown the amount of money that has been expended in the project on constructions on the suit property, which he averred was in excess of Kshs. 18 billion and USD 260 million. It is averred that the project is partly complete and is already in use both locally and in the region, meaning that it is an important facility both nationally and internationally. We are persuaded that it will be against public interest if access to the facility is curtailed.
 23. As to the nugatory aspect, it has been demonstrated that the developments on the suit property are enormous and a lot of time and money has gone into the project. We are persuaded that if the application is declined, the Applicant may never be able to recoup what has gone into the project, were it to succeed with its appeal. That will render the appeal nugatory. We are persuaded that in all the circumstances of this case, if what is being sought to be stopped takes place, it will be irreversible. That would also render the appeal nugatory.
 24. We have come to the conclusion that the Applicant has satisfied the twin principles for grant of stay of proceedings pending hearing and determination of the appeal. Consequently, the order which commends itself to us is as follows:
 1. Pending the hearing and determination of the appeal:
 - (i) THAT there shall be a stay of execution of the judgment and consequent orders of the ELC dated and delivered on 23rd March 2021; and,



(ii) THAT there shall be an order of stay of the contempt proceedings commenced by way of the 1st Respondent's Notice of Motion dated 18th June 2021 filed before the Superior Court against the Managing Director of the Appellant;

2. Costs of this motion shall be in the appeal. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 4TH DAY OF MARCH 2022.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

