



**Engineers Board of Kenya v Gibbs Africa Limited (Civil Application E131 of 2022) [2022] KECA 1183 (KLR) (21 October 2022) (Ruling)**

Neutral citation: [2022] KECA 1183 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E131 OF 2022  
HM OKWENGU, HA OMONDI & JM MATIVO, JJA  
OCTOBER 21, 2022**

**BETWEEN**

**ENGINEERS BOARD OF KENYA ..... APPLICANT**

**AND**

**GIBBS AFRICA LIMITED ..... RESPONDENT**

*(Being an application for stay of execution against the Judgment and Decree pending the lodging, hearing and final determination of an intended appeal of the High Court of Kenya at Nairobi (A. K. Ndungu, J.) dated 24th March, 2022; in HC. Judicial Review No. E1145 of 2020)*

**RULING**

1. The Motion Application dated 21<sup>st</sup> April, 2022; supported by a certificate of urgency, and a supporting affidavit of even date is brought pursuant to Rule 5(2) (b) of the *Court of Appeal Rules*, and seeks orders for granting a stay of execution of the judgment and orders of the High Court at Nairobi by Ndungu, J. delivered on 24<sup>th</sup> March, 2022; pending the hearing and determination of this application and subsequently, pending the lodging, hearing and determination of the applicant's intended appeal; and that costs be in the cause.
2. The respondent opposes the application through a replying affidavit 26<sup>th</sup> April, 2022.
3. The background to this matter is that the respondent filed a notice of motion dated 10<sup>th</sup> December, 2020; seeking orders of certiorari, prohibition, and mandamus. By a ruling dated 24<sup>th</sup> March, 2022; the High Court issued an order of mandamus which has the effect of commanding the registration of the respondent as an engineering consulting firm against the provisions of Section 20 (1)) (a) (b) of the *Engineers Act* 2021 and Rule 5 (2) (c) (iii) of the *Engineers Rules 2019*; that the implementation of this judgment has the sum effect of propagating an illegality; that the respondent has already threatened to cite the Registrar of the Engineers Board with contempt; and should stay not be granted, the Registrar of the Engineers board risks being jailed for contempt which would render the appeal nugatory.



4. In opposing the application, the respondent states that on 10<sup>th</sup> November, 2020; it received a letter from the applicant dated 2<sup>nd</sup> November, 2020; declining the application for registration as an Engineering Consulting Firm. As a result of this denial, the respondent filed an application, and a ruling was given on 2<sup>nd</sup> December, 2020; with the court granting stay of the decision of the applicant's letter pending the hearing and determination of the substantive application. Despite the stay orders, the applicant went ahead to publish a list of registered Engineering Consultation Firms failing to publish the respondent's name.
5. Subsequently, judgment in the substantive motion was delivered on 24<sup>th</sup> March, 2022 in favor of the respondent, and if the stay sought is granted, then the respondent stands to suffer irreparable hardship while waiting determination of the appeal as the on-going infrastructure projects being undertaken by the respondent are at risk of non-completion and the respondent stands to suffer as the respondent's bids will continue to be disqualified on account of lack of registration; that the penal notice issued by the respondent is as a result of disobedience of a lawful order of the court of 2<sup>nd</sup> December, 2020; by the applicant staying the refusal by the applicant to register the respondent; that the applicant has no arguable appeal and that the appeal will not be rendered nugatory if stay is not granted as the orders issued are reversible; and the applicant has not demonstrated the hardship it will suffer should stay not be granted and as such no prejudice will be occasioned.
6. In determining whether an applicant has satisfied the requirements necessary for granting an order for stay of execution, this Court has stated that whether it be an application for injunction, stay of execution or stay of proceedings the applicable principles are the same. To succeed in an application in 5 (2) (b) the applicant has to establish that;
  - i. The appeal is arguable.
  - ii. The appeal is likely to be rendered nugatory if the stay is not granted and appeal succeeds.
7. In the case of *Wasike vs Swala* [1984] 591 this Court held that an arguable appeal is not one that would necessarily succeed but one that merits consideration by the court. Also, an arguable appeal is one that is not idle and/or frivolous.
8. The gist of this application is that High Court allowed the respondent's application, the sum effect being that the respondent be registered as an engineering consulting firm in contravention of the Engineer's Act, 2011 and the Engineers Rules 2019; and the applicant contends that the implementation of the judgment propagates an illegality.
9. Our perusal of the pleadings, the issue whether or not the respondent met the statutory requirements under the specific Sections of the Engineer's Act 2011 and the Engineer's Rules 2019 and we consider this to be an issue of fact as well as law. We hold the view that this is an arguable point. [See *Kenya Tea growers Association & Another v Kenya Plantation and Agriculture Workers Union* (2012) eKLR where this Court held that even one bona fide arguable issue will satisfy this first limb]. This Court is therefore satisfied that the appeal is arguable.
10. The second limb is whether the appeal will be rendered nugatory should the application not be granted, and this Court has held in the case of *Reliance Bank Limited vs Norlake Investment Limited* [2002] 1 EA 227 that the factors which render an appeal nugatory are to be considered within the circumstances of each case and in so doing the court is bound to consider the conflicting claims of both sides. In the case of *African Safari Club Limited vs Safe Rentals Limited* Nai. Civ. App. 53/2010 this Court held;

“...with the above scenario of almost equal hardship by the parties, it is incumbent upon the court to pursue the overriding objective to act fairly and justly...to put the hardships of both



parties on scale... we think that the balancing act is in keeping with one of the principles aims of the oxygen principle of treating both parties with equality or placing them on equal footing in so far as is practicable.”

11. In short, the court is to decide which party’s hardship is greater. With that in mind, if the applicant’s prayer for stay of execution is denied and the appeal eventually succeeds, the appeal cannot be rendered nugatory as, the orders can be reversed, and the respondent deregistered. The respondent contends that the applicant herein ignored the interim ruling of 2<sup>nd</sup> December, 2020; granting stay and went on ahead to publish a list of firms leaving out the respondent and the said action was very intentional.
12. We are in agreement with the respondent that it will suffer irreparable harm as it continues to be disqualified from projects due to lack of registration; it is not able to complete the projects it currently has; and is at risk of these projects being canceled and/or taken away from them.
13. The applicant on the other hand argues that should stay not be granted, then other Engineering Consulting Firms will take advantage and file suits to be registered by the applicant Board without having fulfilled the statutory obligations under both the Engineer’s Act and Engineer’s Rules. Whether or not an appeal will be rendered nugatory depends on whether what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the aggrieved party.
14. The applicant has not shown any hardship or damage that will be suffered; as a matter of fact, the penal notice was, and the contempt proceedings are in the offing because of non-compliance with the court order on account of dissatisfaction with the outcome. In a bid to balance which of the two parties would suffer greater harm, the only way to remedy would be to comply with the order, and then have the appeal heard. It is clear that the orders being appealed against are reversible, a fact that has been conceded to by the applicant that in the event that the appeal succeeds, court has the power to make the necessary orders that would right any miscarriage of justice and/or illegality including deregistration of the respondent.
15. As the applicant is required to demonstrate both limbs, having failed to demonstrate the nugatory aspect consigns this application to dismissal. Accordingly, and for the foregoing reasons this application fails and is hereby dismissed with costs to the respondent.

**DATED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF OCTOBER, 2022.**

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**HANNAH OKWENGU**

**JUDGE OF APPEAL**

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**H. A. OMONDI**

**JUDGE OF APPEAL**

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**J. MATIVO**

**JUDGE OF APPEAL**

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

*Signed*



DEPUTY REGISTRAR

