



Mwakweli & 3 others v Vipingo Development Limited & 2 others (Civil Application E060 of 2021) [2022] KECA 1378 (KLR) (16 December 2022) (Ruling)

Neutral citation: [2022] KECA 1378 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPLICATION E060 OF 2021
SG KAIRU, JW LESSIT & GV ODUNGA, JJA
DECEMBER 16, 2022**

BETWEEN

**OMAR SALIM MWAKWELI 1ST APPLICANT
DAVID PIA KATANA 2ND APPLICANT
KIBWANA MWIJUMA KIBWANA 3RD APPLICANT
MOHAMMED JUMA MGALA 4TH APPLICANT**

AND

**VIPINGO DEVELOPMENT LIMITED 1ST RESPONDENT
NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 2ND
RESPONDENT
KILIFI COUNTY GOVERNMENT 3RD RESPONDENT**

(Being an application for stay of decision, stay of proceedings and injunction pending appeal from the ruling of the Environment and Land Court of Kenya at Mombasa rendered by Hon Justice Olola dated 30th July 2021 in ELC Constitutional Petition E11 of 2020)

RULING

1. The applicants herein pray in the motion dated December 20, 2021 brought under rule 5(2)(b) of the [Court of Appeal Rules](#), sections 3, 3A and 3B of the [Appellate Jurisdiction Act](#), for the following orders:
 1. That on the grounds set forth in the certificate of urgency by Mr Mohamed Ali and the affidavit in support of the application both filed herewith, this application be certified urgent and due to the circumstances of this case, service of the same be dispensed with and it be heard *ex parte* in the first instance for purposes of granting interim orders in terms of prayer 2 hereunder.



2. That there be a stay of decision of July 30, 2021 in Petition E11 of 2020 delivered by the Honourable Justice Olola pending the hearing and determination of this application *inter partes*.
 3. That there be a stay of decision of July 30, 2021 in Petition E11 of 2020 delivered by Honourable Justice Olola pending the hearing and determination of the appeal from that decision.
 4. That there be a stay of any and all ongoing proceedings at the Environment and Land Court at Malindi regarding Petition E11 of 2020.
 5. That the court be pleased to grant an injunction or an interim preservation order against the 1st respondent herein, and its employees, agents associates, officers of the company, and any other persons through which it may act, barring any dealings whatsoever including any modifications or construction of any kind on the suit land (plot LR No 4393/III/MN, Vipingo area, Kilifi County) pending the hearing and determination of this application.
 6. That the court be pleased to grant an injunction or an interim preservation order against the 1st respondent herein, and its employees, agents, associates, officers of the company, and any other persons through which it may act, barring any dealings whatsoever including any modifications or construction of any kind on the suit land (plot LR No 4393/III/MN, Vipingo area, Kilifi County) pending the hearing and determination of this application.
 7. That consequent to the grant of the orders, the court be pleased to grant such further orders or directions as may be necessary to give effect to the foregoing orders as prayed.
 8. That the cost of this application be provided.
2. A brief summary of the genesis of this dispute is necessary. The Applicants herein moved the High Court vide a petition dated October 15, 2020 seeking order of declaration that the 1st respondent had violated various provisions of the Constitution and law particularly the provisions dealing with the environment. They sought orders prohibiting the 1st respondent from constructing on the suit land and an order compelling the 1st respondent to remove from the suit land its construction and an order compelling the 1st respondent to restore the degraded environment to its prior condition.
 3. It was contended that the 1st respondent's proposed construction of a Liquefied Petroleum Gas (LPG) on LR No 4393/MN would lead to soil erosion and environmental degradation of the suit land and its environs.

It was further contended that the 1st respondent's intention of transporting LPG tanks from Mombasa Port to the site of the said project in Kilifi would not only cause congestion and interruption along the highway but would also lead to oil leakages from the trucks. The applicants pleaded that the suit land holds shrubs, sedges and various types of grass on fossilized coral rock outcrops as well as sisal plantation all of which the 1st respondent intended to clear with the likely effect of negative impact on the surrounding eco system.
 4. It was not lost to the petitioners that the massive amounts of construction materials to be used would generate huge amounts of waste and lead to deterioration of the suit land and its environs and its transportation was likely to pollute the sea in the event that the vessels run aground during low or rough tides. It was further contended that the project was likely to cause noise pollution and ruin the water quality occasioned by suspension of sediments resulting from the excavation of the sea bottoms during construction. According to the petitioners, the construction of the jetty was likely to lead to oil spills



from the machinery hence ruining fishing ponds, a source of livelihood for local populations. It was the applicants' case that the 1st respondent failed to conduct a strategic environmental assessment for the project and no master plan was disclosed. It was therefore contended that article 42 of the Constitution was violated.

5. In response to the petition, the 1st respondent, inter alia, raised preliminary objections challenging the jurisdiction of the court on the ground that the petitioners ought to have sought redress from the National Environmental Tribunal or the National Environmental Complaints Committee. After hearing the parties, the learned trial judge found merit in the said preliminary objection and proceeded to strike out the said petition. It is that decision that provoked the instant appeal.
6. The motion before us is supported by an affidavit sworn by Omar Salim Mwakweli, the 1st applicant herein on December 8, 2021 in which he reiterated the averments in the petition as set out above. It was the deponent's averments that the 1st respondent's said activities have led to soil erosion and environmental degradation of the suit land and its environs; that the eco system around the suit land is being negatively affected; that the suit land and its environs have deteriorated; that the transportation of the construction materials has polluted the sea; that the project produces a lot of dust and noise; and that the project will expose the suit land and its environs to air pollution since LPG contains metals and organic compounds which interfere with public health.
7. It was therefore averred that unless the orders sought in this application are granted, the appeal would be rendered nugatory yet the applicants have filed a notice of appeal and have requested for proceedings. Further, that the appeal is arguable with high chances of success.
8. In response to the application, the 1st respondent filed a replying affidavit sworn by Kenneth Gitonga Mbae, the 1st respondent's Managing Director. According to him, the application is unfounded and a non-starter as there were no orders on execution issued against the 1st respondent hence there is nothing to stay. It was noted that in the ruling sought to be appealed from, the learned trial judge upheld the preliminary objection and struck out the petition. Therefore, according to the deponent, this application does not give any sufficient cause to grant an order for stay of execution as no orders pertaining to execution were issued against the applicants.
9. It was disclosed that this application was filed during the pendency of a similar application for stay in the High Court which was based on the same ground which application was pending delivery of the ruling before the High Court on February 23, 2022. In the deponent's view, this action amounts to forum shopping and is an abuse of the court process since what the applicants seek by this application is to halt the process which they themselves have initiated before the High Court.
10. In response to the application the deponent set out the steps that were taken by the 1st respondent to ensure that the project complied with the environmental standards. It was averred that the specific concerns raised by the applicants regarding the impact of the project on the environment were well addressed in the EIA report and the license was issued in full consideration of the potential impact and the corresponding mitigation measures. According to the deponent, the 1st respondent is not only aware of the possible danger areas including those highlighted by the applicants and identified the steps it needs to put in place to mitigate against these dangers but has in place a demonstrable action plan for the prevention and management of possible accidents during the project cycle and will significantly scale down any potential danger to both the community and environment.
11. It was therefore averred that the applicants have failed to demonstrate that they stand to suffer any loss whatsoever if the stay of execution of the decree is not granted and to prove the nature of loss that they are likely to suffer should an order of stay be denied. To the contrary, it was averred that the 1st



respondent stands to suffer substantial and irreparable loss as it has been almost two years since the 2nd respondent issued the 1st respondent with the environmental impact assessment license on December 10, 2019 hence halting the construction would cause the 1st respondent irreparable financial loss as an investor.

12. The court was therefore urged to dismiss the instant application with costs to the 1st respondent.
13. In support of the application, the applicants filed written submissions and relied on *Githunguri Jimba Corporation Limited* [1988] KLR 838 and *Reliance Bank Ltd (In Liquidation) v Norlake Investments Ltd*, Civil Application Number Nai 93/02 (UR) on the principles applicable in an application for stay pending appeal and identified them as: Whether the applicant herein has an arguable appeal with good prospects of success and whether the appeal will be rendered nugatory if the orders sought are not granted.

It was submitted that the applicants have filed a notice of appeal intending to appeal the decision of the court dated July 30, 2021. Based on the case of *Kenya Tea Growers Association & Another vs Kenya Planters & Agricultural Workers Union* Civil Application Nai No 72 of 2001, it was submitted that the applicant need not show that such an appeal is likely to succeed since it is enough for him to show that there is at least one issue upon which the court should pronounce its decision. In this case it was submitted that an example of one arguable point of law contained in the draft memorandum of appeal is that the learned judge erred in law and in fact in holding that petitioners were in the wrong forum and should have pursued the alternative mechanisms, to wit, National Environment Tribunal, or the Complaints Committee; this effectively denied the applicants access to justice under article 48 of the *Constitution of Kenya 2010*.

14. Regarding the second limb, it was submitted based on *Reliance Bank Limited vs Norlake Investments Limited* [2002] 1 EA 227 that the term 'nugatory' does not only mean worthless, futile, or invalid but also means trifling. As such, the issue before the court is whether the intended appeal will be rendered futile or a mere academic exercise if the order for stay of proceedings is not granted. In this case it was submitted that it is evident that if an order of the proceedings is not granted, the orders of the High Court will be detrimental to the applicant herein, that is, by violation of the right to a clean and healthy environment as shown by the court in *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR. The violation, it was submitted would not only affect the applicants herein, but the public in general. In this regard the applicants relied on the case of *Absalom Dora vs Jaibo Transporters* [2013] eKLR and contended that the respondents will not suffer any prejudice if the orders sought in this application are granted.
15. On behalf of the respondents, it was submitted that there is no order that was issued on the 30th of July 2021 against which an order of stay may be issued since the High Court neither ordered the parties to do anything or refrain from doing anything, but simply informed the parties that it had no ability to hear and determine the matter as it lacked jurisdiction. The respondents relied on *Western College of Arts and Applied Sciences vs Oranqa* 19761 KLR 63 *Peter Anyang' Nyong'o & 2 others v Minister for Finance & another* 120071 eKLR and *RFS v JDS* [2013] eKLR and *Mombasa Seaport Duty Free Ltd vs Kenya Ports Authority*- Civil Application No Nai 242 of 2006 (unreported). It was submitted that in the absence of a memorandum of appeal, the applicants have not shown to this court that they have an arguable appeal with reasonable prospects for success. In this regard, they relied on *Gideon Sitelu Konchella v Daima Bank Ltd* [2013] eKLR citing *Mobil BKitale Service Station vs Mobil Oil(K) Ltd and Another* (20041 eKLR).
16. On the issue of substantial loss, the respondents relied on the case of *Kenya Women Microfinance Ltd vs Martha Wanaari Kamau* (20201 eKLR and submitted that evidence has not been tabled before



this court to enable the court make a determination on whether or not there would be substantial loss on the part of the applicants. It was therefore submitted that the application is an abuse of court process, misconceived and shows complete ignorance of the law and ought to be dismissed with costs to the 1st respondent.

17. We have considered the application, the submissions both written and oral and the law. Before dealing with the merits of the application, it was disclosed by the respondents that this application was filed during the pendency of a similar application before the High court. This allegation was not denied by the applicants. Whereas the law permits a party who has sought stay of execution before the High Court to invoke this court's original jurisdiction under rule 5(2)(b) of the *Court of Appeal Rules*, to simultaneously file similar applications before the High court and this court may be deemed to be an abuse of the court process. To do so amounts to playing lottery with the process of the court and may turn the courts into a circus if the High court were to grant such an application and this court were to decline the same and vice versa. In our respectful view, a party should choose one forum at a time to ventilate his grievance.
18. The principles that guide consideration of an application of this nature are old hat. For an applicant to succeed he must, firstly demonstrate that the appeal, or intended appeal, as the case may be, is arguable, which is the same as saying that the same is not frivolous. The applicant must in addition show that the appeal would be rendered nugatory absent stay.
19. We have seen the intended grounds of appeal as disclosed in the supporting affidavit. In our respectful view, the demonstration of an arguable appeal may be by the memorandum of appeal, where such memorandum has been filed or by way of draft memorandum of appeal or by simply setting out such grounds in the supporting affidavit. Accordingly, we disagree with the argument by the respondents that the absence of a memorandum of appeal renders the application unmerited.
20. In this case the applicant intends to argue that the learned trial judge erred in striking out the petition on ground of lack of jurisdiction, notwithstanding the fact that the issues raised were in respect of alleged violations of the applicants' rights. This is not an idle ground, and we find that it is arguable. This Court in *Stanley Kang'ethe v Tony Keter & 5 others* [2013] eKLR elaborated on this issue as follows:
 - “vi) On whether the appeal is arguable, it is sufficient if a single *bonafide* arguable ground of appeal is raised.
See *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 themselves the court; one which is not frivolous. See *Joseph Gitahi Gachau & Another v Pioneer Holdings (A) Ltd & 2 others*, Civil Application No 124 of 2008.”
21. On the nugatory aspect, which an applicant must also demonstrate, what the learned trial judge did was to simply strike out the petition based on the preliminary objection taken by the respondent. Whereas no positive order was granted by the learned trial judge that would justify the grant of an order of stay, that does not bar an applicant seeking an order of injunction or an interim preservation order as sought in the present application.
22. The 1st respondent has averred that the environmental impact assessment licence that was issued to it was conditional on certain steps being taken to mitigate against the apprehensions raised by the applicants. This means that in the event that the 1st respondent violates the said conditions, the licence



is liable to cancellation. In the circumstances, we are unable to agree with the applicants that unless the stay, injunction or a preservation order is granted the applicants' intended appeal will be rendered nugatory.

23. In the premises we find that the applicants have failed to satisfy us that the considerations necessary for this court to grant the orders sought herein have been met.
24. Consequently, we find no merit in the motion dated December 20, 2021 which we hereby dismiss but with no order as to costs, the matter being a public interest case.
25. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 16TH DAY OF DECEMBER, 2022.

S. GATEMBU KAIRU (FCI Arb.)

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE

I certify that this is a true copy of the original

signed

DEPUTY REGISTRAR

