Equitorial Land Holdings v Korir (Civil Appeal (Application) 177 of 2020) [2022] KECA 1303 (KLR) (2 December 2022) (Ruling)

Neutral citation: [2022] KECA 1303 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL (APPLICATION) 177 OF 2020

HM OKWENGU, HA OMONDI & JM MATIVO, JJA

DECEMBER 2, 2022

BETWEEN

EQUITORIAL LAND HOLDINGS ..... APPLICANT

AND

CHESERET ARAP KORIR ..... RESPONDENT

(Being an application for an injunction pending the hearing and determination of an appeal from a Ruling of the Environmental and Land Court at Eldoret (Kibunja, J.) dated 26th February, 2020 in ELC Misc. Application No. 15 of 2019)

RULING

1. The application dated July 28, 2020 supported by the affidavit dated July 28, 2020 is brought pursuant to Rules 5 (2) (b) of the *Court of Appeal Rules 2010*, and seeks that pending the hearing and determination of this application as well as the appeal, orders do issue restraining the respondent whether by themselves, their servants, employees, assigns, relatives and/or agents from disposing, selling, transferring, taking possession or in any way dealing with the suit properties LR Nos Nandi/ Chemase/974 and Nandi/Legemet/ 224; and costs be provided.

2. The application is opposed vide a Relying Affidavit dated August 7, 2020.

3. Our first concern was whether the applicant had obtained leave to appeal so as to clothe this Court with jurisdiction to deal with the matter. A perusal of the record did not disclose an affirmative position, and a reading of Section 10 of the *Arbitration Act* leaves no doubt that the Act only permits two instances where the court can intervene in arbitration matters. The first instance is where the Act expressly provides for or permits the intervention of the court, and the parties have expressly provided for such intervention in their agreement. The second instance is in the public interest, where substantial injustice is likely to be occasioned even though a matter is not provided for in the Act. However, the Act cannot reasonably be construed as ousting the inherent power of the court to do justice especially. As

the Supreme Court observed in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators - Kenya Branch (Interested Party)* [2019] eKLR (the Nyutu case) this judicial intervention can only be countenanced in exceptional instances. The Apex court expressed itself as follows:

> "(72) Furthermore, considering that there is no express bar to appeals under Section 35, we are of the opinion that an unfair determination by the High Court should not be absolutely immune from the appellate review. As such, in exceptional circumstances, the Court of Appeal ought to have residual jurisdiction to enquire into such unfairness. However, such jurisdiction should be carefully exercised so as not to open a floodgate of appeals thus undermining the very essence of arbitration. In stating so, we agree with the High Court of Singapore in AKN and another (supra) that circumscribed appeals may be allowed to address process failures as opposed to the merits of the arbitral award itself. We say so because we have no doubt that obvious injustices by the High Court should not be left to subsist because of the 'no Court intervention' principle. (Emphasis added)"

4. As the apex court stated in the above case, a right of appeal is not automatic but is a creation of statute. It follows that the jurisdiction to grant an injunction or orders of stay as sought in the application before us can only be excised where the right of appeal exists. In addition, an applicant must show that the intended appeal is arguable. The applicant seems to be acutely aware about the restrictions imposed by the *Arbitration Act*. He seeks to appeal, not as of right, but riding on the *Nyutu* case (supra). The Supreme Court cautioned that circumscribed appeals may only be allowed to address process, failures as opposed to merits of the arbitral award.

5. In any event, the leave of this Court was not sought and obtained in accordance with Section 39 (3) of the *Arbitration Act* which provides:_

> "3. Notwithstanding Sections 10 and 35 an appeal shall lie to the Court of Appeal against a decision of the High Court under subsection (2)-
>
> a. if the parties have so agreed that an appeal shall lie prior to the delivery of the arbitral award; or
>
> b. the Court of Appeal, being of the opinion that a point of law of general importance is involved the determination of which will substantially affect the rights of one or more of the parties, grants leave to appeal, and on such appeal the Court of Appeal may exercise any of the powers which the High Court could have exercised under subsection (2)."

The applicant has failed to demonstrate that it falls within these two instances, as a matter of fact the appeal is focused specifically on matters related to merits of the arbitral award, and we cannot take upon ourselves a jurisdiction that we do not have.

6. The background to this matter is that the parties entered into an agreement to lease the suit properties for 10 years, which lease was renewable for a further 10 years, 6 months before expiry of the lease. On July 3, 2018 the applicant issued a notice of renewal of lease for a further 10 years which the respondent rejected to and asked the applicant to vacate the suit properties. The matter was referred to arbitration

and the final award dated April 30, 2019 was delivered to the effect that the lease was validly renewed for a further term for 10 years form January 22, 2020.

7. The respondent then filed an application to set aside the award; and pursuant to a ruling delivered by the ELC Court on February 26, 2020 the arbitral award was set aside. The upshot of this ruling was in effect to leave the applicant exposed to eviction by the respondent from the suit properties.

8. Aggrieved by the said ruling the applicant claims that it sought and was granted a 90 day injunction restraining the respondent from interfering with possession of the suit properties but these orders lapsed on August 5, 2020. The applicant has since filed an appeal, which is yet to be heard, hence the prayer for stay of execution against the impugned ruling.

9. The applicant explains that its offices rest on the two suit properties as well as tailing dams which contain highly poisonous chemicals such as cyanide which are used for or result from mining activities which were carried out by the applicant on the properties, that it has put in place measures and equipment to manage the tailing dams so as to ensure that the cyanide does not escape to the surrounding community and immediate water sources, and is apprehensive about the looming eviction, which it says will result in grave environmental and health consequences which would cause immense environmental damage and risk harm, injury or even death for members of surrounding community.

10. That the Department of Mining in the Ministry of Petroleum and Mining has recommended that in light of the harmful chemicals situated in the suit properties, the decommissioning of the mine requires a period of 5 years to remove the waste product and soil samples be tested for any residual toxins, and for neutralization where necessary; so in the interest of justice and the safety of the community surrounding the two properties the orders sought be granted. That the appeal will be rendered nugatory unless the prayers sought for are granted and that the respondent will not suffer any prejudice if orders sought are granted, and applicant is willing to deposit security.

11. Thus on the nugatory aspect, it is stated that the environment will suffer irreparable and irreversible harm if orders sought for are not granted.

12. The respondent in opposing the application argues that the applicant is guilty of delay in bringing this application, coming to court 7 days before lapse of the stay orders of May 7, 2020; that the applicant has not satisfied the threshold that it has an arguable appeal, and that the application will be rendered nugatory if the orders sought for are not granted.

13. The respondent contends that the Applicant has no arguable appeal, as the Arbitral award was essentially set aside because the future lease had not been registered as required by Section 61 (2) of the *Land Act* No 6 of 2012; and the intended appeal is frivolous and not arguable and is a waste of this Court's time.

14. Further, that nothing shall be rendered as the applicant has vacated the suit property and demolished all structures thereon, and even acquired another property; that in any event, the applicant has failed to demonstrate manifest injustice occasioned to it, as it had been granted 90 days to take all legal and statutory steps to mitigate the danger and give vacant possession or move to court for further orders.

15. The respondent points out that the only thing remaining in the suit parcels is the tailing dam which occupies a small portion of land and this falls under supervision of NEMA, and the respondent as the owner of the land and other stakeholders will supervise the decommissioning of the dam, which will not stop him from occupying the rest of the land as the dam occupies just a small portion; and by granting the application the respondent will be greatly prejudiced as the applicant has been mining and occupying the suit property without consideration.

16. 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.

    (see *Stanley Kangethe Kinyanjui v Tony Keter & 5 Others*[2013] eKLR)

17. 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 (See also *Meso Multipurpose Society Limited v Luore Nyoiro Company Limited & 2 Others* [2020] eKLR, *Equity Bank Limited v West Link Mbo Limited* [2013] Eklr & *Board of Trustees of NSSF v Caroline Wanjiru Karori* [2020] eKLR.

18. The applicant contends that the court went outside the purview of Section 35 of the *Arbitration Act* No 4 of 1995 in setting aside an arbitral award. In this Court's view, without saying anything more that may embarrass the bench hearing the appeal, the applicant has failed to demonstrate that leave to appeal has been granted or that it meets what is contemplated under Section 39 of the *Arbitration Act* as to render the appeal arguable. We are thus not satisfied that that the appeal is arguable.

19. On the appeal being rendered nugatory, 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.

20. The term nugatory has to be given its full meaning. In the *Stanley Kangethe* case (*supra*), it was held that whether or not an appeal will be rendered nugatory depends on whether the status of the subject matter sought to be stayed is reversible, or if not reversible whether damages will be an adequate remedy for the aggrieved party.

21. 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 in equal footing in so far as is practicable."

22. The applicant had stated that its appeal will be rendered nugatory if the orders sought for are not granted. The applicant seems to have withheld the fact from this court that it has since vacated the suit properties and has purchased another property to run its operations as averred by the respondent in his replying affidavit, which assertions have not been refuted by the applicant.

23. The applicant's other contention is the fact that the dam would need decommissioning as it contains hazardous waste. This argument stands on quicksand as it is on record that the applicant has since vacated the suit property and demolished any structures thereon save the dam and the respondent has undertaken that together with other stakeholders, NEMA included, to oversee the decommissioning of the mine to its logical conclusion, so the applicant need not be on the suit property.

24. From the foregoing the applicant has not shown that indeed it has an arguable appeal, or how its appeal would be rendered nugatory. The application must therefore fail for want of satisfying the twin conditions in an application under 5(2) (b). The Notice of Motion dated July 28, 2020 is accordingly dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF DECEMBER, 2022.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR