



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KOOME, ASIKE-MAKHANDIA & SICHALE, JJ.A

CIVIL APPLICATION NO. 297 OF 2019

BETWEEN

TELESOURCE COM LIMITED.....APPLICANT

AND

MUCHANGA INVESTMENT LIMITED,

HABENGA HOLDINGS LIMITED,

JINA ENTERPRISES LIMITED

DIRECTOR OF SURVEY,

DIRECTOR PHYSICAL PLANNING MINISTRY OF LANDS & HOUSING,

REGISTRAR OF TITLES MINISTRY OF LANDS & HOUSING,

CHIEF LAND REGISTRAR MINISTRY OF LANDS AND HOUSING

JOHN MUGO KAMAU

CATHERINE NGA'NG'A, FOR THE ESTATE

OF CARMILENA MBURU..... RESPONDENTS

AND

BARCLAYS BANK OF KENYA.....INTERESTED PARTY

(Being an application for stay of execution of the orders of the High Court of Kenya at Nairobi (E.O.Obaga, J) dated 24th January 2019

In

ENVIRONMENT AND LAND COURT AT NAIROBI ELC CASE NO. 1180 OF 2014)

RULING OF THE COURT

The dispute before the **Environment and Land Court (ELC)** involved a bundle of documents filed and were to be relied upon by the 4th to 7th respondents in the proceedings before the ELC. The applicant's witness **Mr. Josphat Milimu Konzolo** testified in chief and was partly cross-examined before the hearing was adjourned. However before they took off again on the 14th December 2018, the applicant raised a preliminary objection to the production of those documents claiming that they had been obtained by the Ethics and Anti-corruption Commission when it was not properly constituted. The preliminary objection was however dismissed with costs.

Aggrieved by the dismissal and intending to appeal the decision to this court, the applicant filed a notice of appeal. Subsequently the applicant filed the instant motion on notice dated 12th February 2019 seeking to stay the proceedings in the ELC pending the hearing and determination of the of intended appeal. In the grounds in support of the motion and in a supporting affidavit of **Josphert Milimu Konzolo**, it is said that the trial court erred in finding that the documents had been properly obtained; that the Commission was properly constituted at the time; that the appeal may be rendered nugatory in the absence of stay and that it shall suffer substantial loss if the documents are not expunged from the record.

The motion was opposed by the respondents on the ground that the applicant had not met the threshold for grant of stay of proceedings and that the documents had been filed by consent of all parties with the leave of the court.

We heard the motion on the 17th March 2021 on written submissions only and without appearance of the parties as a measure to contain the spread of Corona-19 Pandemic. However, it appears, the applicant did not file written submissions as directed by the Deputy Registrar of in her email to the parties.

The 1st respondent in its written submissions urged that the applicant's reliance on **Michael Sistu Mwaura v. Ethics & Anti-Corruption Commission & 4 others [2017] eKLR** was misplaced. In that case the decision to prosecute the appellant was made by the secretariat and when the Commission was not properly constituted. This court held in that case that the secretariat could not recommend the prosecution of a party in the absence of a fully constituted Commission. This was not the case here since when the documents were impounded the Commission was properly constituted and secondly, the impugned documents were filed by consent of all parties with leave of the court on the 10th July 2018.

On nugatory loss, we were urged to find that the intended appeal emanated from an interlocutory application and once the suit is finalized the same issues can be raised on appeal. The fact of the legal costs involved in the proceedings cannot by itself render the intended appeal nugatory if successful.

The principles that apply to applications of this nature are well known. For an applicant to succeed he must, first, demonstrate that the appeal, or intended appeal, as the case may be, is arguable, which is the same as saying that the appeal is not frivolous. Such an applicant must, in addition, demonstrate that the appeal would be rendered nugatory absent stay. See **Stanley Kangethe Kinyanjui v. Tony Ketter & others [2013] eKLR**.

We have perused and considered the record, the motion, rival affidavits, the submissions made and the law applicable. The main ground that the applicant will be urging in the intended appeal set out in the draft Memorandum of Appeal is that the judge erred by determining that the Ethics and Anti-Corruption Commission (EACC) was properly constituted at the time the impugned documents were seized.

We reiterate that the applicant's witness had already testified in chief and had partly been cross-examined when the applicant raised a preliminary objection on the admissibility of the documents. The preliminary objection was dismissed and an application to stay the proceedings made before the same court was subsequently dismissed which simply means that the matter must have proceeded. Thus if we were to allow the application in those circumstances we shall be acting in vain and courts do not normally act in. Secondly, we note that the ruling was as a result of preliminary objection taken by the applicant. There is no automatic right of appeal on rulings emanating from preliminary objections. See order 43 of the Civil Procedure Rules. The applicant ought therefore to have sought and obtained leave of trial or this court to commence these proceedings. It has not been demonstrated to us that indeed such leave was sought and obtained; thereby making instant proceedings clearly incompetent. Further documents sought to be impugned were introduced in the case by the consent of the parties. Given the above scenario we doubt whether the applicant can have an arguable appeal.

It is worthy repeating that it is a requirement that both limbs of arguability and the nugatory aspect be satisfied before this court can grant the orders sought. The applicant having failed to convince us that the intended appeal is arguable, it is not necessary to consider the nugatory aspect. In the result the application fails and is dismissed with costs to the respondents.

Dated and delivered at Nairobi this 7th day of May, 2021.

M. K. KOOME

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR