



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KIAGE & MURGOR J.J.A.)

CIVIL APPLICATION NO. NAI 44 OF 2018

BETWEEN

KENYA NATIONAL HIGHWAY AUTHORITY.....APPLICANT

AND

TANGERINE INVESTMENTS LIMITED.....RESPONDENT

(Being an application for stay of execution pending the hearing and determination of an intended appeal against the judgment and orders of the High Court at Milimani (Odunga, J.) delivered 24th October 2017 in JUDICIAL REVIEW APPLICATION No. 348 of 2016)

RULING OF THE COURT

By a Notice of Motion dated 21st February, 2021, brought under **sections 3A and 3B** of the **Appellate Jurisdiction Act** and **rule 5 (2) (b)** of the **Court of Appeal rules**, the applicants, sought orders for stay of execution and implementation of the judgment dated 24th October 2017 (*Odunga, J.*) pending the hearing and determination of the intended appeal.

In the judgment, the learned judge allowed the respondent's judicial review application wherein the respondent had claimed that the applicant's decision to remove illegal encroachments consisting of an anonymous billboard that the respondent had erected on the road reserve of the Southern By-pass Bridge/overpass situated on the Mombasa Road (A104) next to Airtel Ole Sereni was procedurally and substantively unconstitutional and was in breach of the rules of natural justice.

In response, the applicant asserted that it had removed the structures that were illegal encroachments erected on both sides of the road reserve after failing to determine the owner to whom a notice pursuant to **section 49(4)** of the **Kenya Roads Act** was to have been issued.

The learned judge granted the respondent the prerogative orders of mandamus to compel the applicant unconditionally to re-install the billboards to their initial state and position, together with the panels, equipment or advertisements belonging to the respondent. The applicant was aggrieved by the decision of the court and intends to appeal against the judgment. In the meantime it has brought this motion seeking to stay execution of the orders of the trial court.

The motion is brought on the grounds on its face supported by the sworn affidavit of **Engineer Symon Mutia Ngatia**, the applicant's deputy Director, Roads and Corridor Management where it was contended that the respondent has an arguable appeal for reasons in the main that the learned judge failed to appreciate that the areas on both sides of the Mombasa Road were road reserves and that prior to construction of the structure, the permission of the Kenya National Highways Authority ought to have been sought and obtained; that the respondent has failed to demonstrate that it had applied for and obtained the permission of the applicant before constructing the encroaching billboard. That further, the learned judge's directive that the applicant to reinstate the billboard to its initial state and position had the effect of compelling the applicant to violate the law.

Despite both parties having been served with the hearing notice, the respondent did not file any replying affidavit, and neither party filed written submissions.

Be that as it may, in so far as applications filed under **rule 5 (2) (b)** of this Court's rules are concerned, the threshold requirements to be satisfied as exemplified in the case of **Republic vs Kenya Anti-Corruption Commission & 2 others [2009] eKLR**, are that;

“The Court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the Court that first,

that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the Court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds the results or success could be rendered nugatory.”

In addressing the question of whether the intended appeal is arguable, the applicant’s case is that the learned judge granted the prerogative orders sought without taking into account the fact that the respondent had not obtained any permission to construct the billboard, and therefore, since it was not known to whom the billboard belonged, the owner could not be notified of the applicant’s decision pursuant to **section 49(4)** of the **Kenya Roads Act**. In our view, this is an arguable issue.

With respect to whether the intended appeal would be rendered nugatory in the event it were to succeed, the judgment ordered that the applicant reinstate the billboard to its position and state, together with the panels, equipment or advertisements belonging to the respondent. A reconstruction in the manner ordered would render the appeal nugatory as in the event the appeal were to succeed, it would have to be brought down again which would amount to imprudent use of time and resources. Expediency would demand that any reconstruction, if need be, await the final determination of the intended appeal.

Accordingly, the two limbs having been satisfied, the Notice of Motion dated 21st February 2021 succeeds, and is hereby allowed. Costs in the intended appeal.

It is so ordered

Dated and delivered at Nairobi this 9th day of July, 2021.

R. N. NAMBUYE

.....

JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR