



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: KOOME, ASIKE-MAKHANDIA & MUSINGA, JJ.A.)

CIVIL APPLICATION NO. E004 OF 2020

BETWEEN

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....APPLICANT

AND

KM (Minor Suing Through Mother and Bestfriend SKS.....1ST RESPONDENT

IRENE AKINYI ODHIAMBO.....2ND RESPONDENT

MILLICENT ACHIENG AWAKA.....3RD RESPONDENT

ELIZABETH FRANCISCA MWAILU.....4TH RESPONDENT

ELIAS OCHIENG.....5TH RESPONDENT

JACKSON OSEYA.....6TH RESPONDENT

HAMISI MWAMERO.....7TH RESPONDENT

DANIEL OCHIENG OGOLA.....8TH RESPONDENT

MARGARET AKINYI.....9TH RESPONDENT

CENTRE FOR JUSTICE GOVERNANCE AND ENVIRONMENTAL ACTION

(Suing On Their Own Behalf And On Behalf of All the Residents of

OWINO-UHURU VILLAGE IN MIKINDANI,

CHANGAMWE AREA MOMBASA10TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....11TH RESPONDENT

THE CS, MINISTRY OF ENVIRONMENT,

WATER AND NATURAL RESOURCES.....12TH RESPONDENT

THE CS, MINISTRY OF HEALTH.....13TH RESPONDENT

THE NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY.....14TH RESPONDENT

THE COUNTY GOVERNMENT OF MOMBASA.....15TH RESPONDENT

THE EXPORT PROCESSING ZONES AUTHORITY.....16TH RESPONDENT

METAL REFINERY (EPZ) LIMITED.....17TH RESPONDENT

PENGUIN PAPER AND BOOK COMPANY LIMITED.....18TH RESPONDENT

(Being an application for stay of execution and stay of further proceedings pending the hearing and determination of an appeal from the judgment of the Environment and Land Court of Kenya at Mombasa (A. Omollo, J.) dated 16th July, 2020

in

E.L.C Petition No. 1 of 2016.)

RULING OF THE COURT

1. By way of a constitutional petition dated 20th February 2016, the 1st to 9th respondents through an organization known as Centre for Justice Governance and Environmental Action, the 10th respondent, on their own behalf and on behalf of fellow residents of Owino-Uhuru village in Changamwe Division, Mikindani area of Mombasa County, (*“the petitioners”*) sued the applicant as well as the 11th to 17th respondents for environmental pollution that was said to have killed more than 20 people and caused various serious illness and ailments to many residents of the said area

2. Following a protracted hearing where all the parties were heard and expert evidence adduced, the trial court (**Omollo, J.**) established that the petitioners had proved that the applicant and the 11th to 17th respondents had violated various constitutional rights of the petitioners, among them; the right to clean and healthy environment; right to the highest attainable standard of health and right to clean and safe water; and right to life.

3. Consequently, the trial court, in a judgment delivered on 16th July 2020, awarded **Kshs.1.3 Billion** as damages for personal injury and loss of life to the 1st to 9th respondents and persons claiming through them, payable by the applicant, the 12th, 13th, 15th, 16th and 17th respondents as follows:-

(a) *“the applicant - 40% (of the Kshs.1.3 Billion)*

(b) *the 12th respondent - 10%*

(c) *the 13th respondent -10%*

(d) *the 15th respondent -10%*

(e) *the 16th respondent -25%*

(f) *the 17th respondent -5%”*

4. The trial court ordered that the total judgment sum be paid within 90 days from the date of judgment, in default execution to issue. The court further directed that the applicant together with the 12th, 13th, 15th, 16 and 17th respondents shall within 120 days from the date of the judgment clean-up the soil, water and remove any waste or harmful material deposited within the area occupied by the petitioners, in default, the sum of **Kshs.700,000,000** to become due and payable to the 10th respondent for purposes of coordinating the soil/environmental clean-up exercise.

5. Being aggrieved by the said judgment, the applicant filed a notice of appeal on 23rd July 2020. Subsequently, the applicant filed an application under **rule 5(2)(b)** of this Court’s Rules seeking stay of execution of the entire judgment pending hearing and determination of the intended appeal.

6. In an affidavit sworn in support of the application by **Mamo B. Mamo**, the Director General of the applicant, he states, *inter alia*, that the applicant’s intended appeal raises weighty issues of public environmental litigation, class action suits and environmental law principles. As per the draft memorandum of appeal annexed to the supporting affidavit, the grounds of the intended appeal include: that the trial court misconstrued the doctrine of *“strict or absolute liability”* in finding the applicant 40% culpable; that the trial court erred in misapplying the principle of *“the Polluter pays”*; and in awarding the judgment sums aforesaid. The applicant therefore contends that it has an arguable appeal.

7. The applicant argues that the period granted by the trial court to pay the huge judgment sum and undertake the clean-up exercise is too short, considering that it is a State Corporation that relies on the National Treasury for funding and operates within the budgetary financial year cycle of the Government of Kenya, and is therefore unable to raise the 40% of the Kshs.1.3 Billion within 90 days; that it is therefore exposed to execution, which if undertaken, would cripple its operations.

8. Further, if the clean-up is not undertaken within the period of 120 days from 16th July 2020, the sum of Kshs.700,000,000 would be payable to the 10th respondent, failing which execution may ensue. The petitioners’ advocates have already filed a bill of costs and taken a

date for taxation, which is an indicator of preparation for execution, the applicant added.

9. Lastly, the applicant argued that unless stay of execution is granted, the intended appeal will be rendered nugatory.

10. Although on 27th October 2020 parties were duly notified that this application, which had been certified urgent, would be disposed of by way of submissions due to the Covid-19 Pandemic that has affected the normal court operations, and in that regard were required to electronically file and serve their respective submissions within two days, as at 4th November 2020 when the application was considered none of them had put in their submissions.

11. The principles that guide this Court in its consideration of applications made under **rule 5(2) (b)** of the **Court of Appeal Rules** are well settled. An applicant must firstly demonstrate that the appeal or intended appeal is arguable; and secondly, that unless the Court grants the orders sought, the appeal, if successful, shall be rendered nugatory. See **Benson Khatenge Wafula v Director of Public Prosecutions; Ethics and Anti-Corruption & 2 Others [2020] eKLR.**

12. An arguable appeal is not one that must succeed. It is one that is not frivolous and raises at least a single bona fide point worth of consideration by the Court. See **Co-operative Bank of Kenya Ltd v Banking Insurance of Finance Union (Kenya) [2015] eKLR.**

13. We have perused the draft memorandum of appeal. We are satisfied that the intended appeal is arguable. We need not say more for now, lest we embarrass the bench that shall eventually hear the appeal.

14. On the nugatory aspect, if execution is undertaken and the intended appeal succeeds, we think it will be impossible to recover the huge judgment sum that may have been paid to the petitioners. None of them swore an affidavit to state that they are capable of refunding any part of the judgment sum in the event that it is paid out and the appeal is successful. We therefore believe that the intended appeal shall be rendered nugatory unless the orders sought are granted.

15. Consequently, we grant stay of execution of the entire judgment pending hearing and determination of the appeal. Each party shall bear its own costs of the application.

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

M. K. KOOME

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

D. K. MUSINGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

signed

DEPUTY REGISTRAR