



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, J.J.A.)

CIVIL APPLICATION NO. 20 OF 2019 (UR 14/2019)

BETWEEN

EQUATORIAL LAND HOLDINGS LIMITED .....1<sup>ST</sup> APPLICANT

KAREBE GOLD MINING LIMITED .....2<sup>ND</sup> APPLICANT

AND

CHESERET ARAP KORIR.....RESPONDENT

(Application for an injunction and/or a stay of the orders of the Environment and Land Court pending the lodging, hearing and determination of an intended appeal from the certain specified orders contained in the ruling at Eldoret (**Ombwayo, J.**) dated 1<sup>st</sup> March, 2019 in **ELC CASE NO. 127 OF 2018**)

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**RULING OF THE COURT**

[1] By a notice of motion dated 11<sup>th</sup> March, 2019, the applicants who were the plaintiffs in Civil Case No. 127 of 2018, in the Environment and Land Court (ELC) at Eldoret have come to this Court seeking to have orders made by the learned judge (Ombwayo J) in the ELC for the applicants to deposit Kshs. 2 Million in a joint interest earning account in the names of the parties advocates as security for costs and an order restraining the applicant from carrying out any activities on Land Parcel No. Nandi/Chemase/974 and Nandi Legemet/224 (herein leased properties) pending the hearing and determination of arbitration proceedings between the applicants and Cheseret Arap Korir (respondent) who is the registered owner of the leased property.

[2] The applicants and the respondent are embroiled over a dispute concerning the termination of a lease agreement between the applicants and the respondent over the leased property. The applicants filed Civil Suit No. 127 of 2018 in the ELC Court seeking, *inter alia*, an injunction to restrain the respondent from evicting them from the leased property, an order directing the respondent to submit to arbitration as provided on the lease agreement, general damages and costs of the suit.

[3] Following the motion that was filed by the applicants, the learned judge of the ELC Court issued orders, that the dispute be referred to Arbitration. The learned judge also issued interim orders that pending the determination of the arbitration proceedings the respondent be restrained: from evicting the applicants from the leased property, or selling or demolishing the applicants structures; that the applicants be ordered to deposit Kshs. 2 Million as security for costs; and that the applicants be restrained from carrying on any activity on the said leased property pending the outcome of the arbitration proceedings.

[4] The applicants' motion before us for stay of the above orders is supported by an affidavit sworn by **David May**, who is the Managing Director of the two companies. In a nut shell, it is the applicants' contention that the order issued against them by the court has made it impossible for it to carry on its business on the leased property despite the fact that the 2<sup>nd</sup> respondent hold mining licences from relevant Government ministries. The 2<sup>nd</sup> applicant was not only at risk of losing its licence but was also exposing the community in the area of the leased properties to harm or injury because there are explosive and highly poisonous chemical stored in the leased property. The applicants have also invested huge sums in the development and improvement on the leased property and have employed a large number of the local community whose employment was at risk. The applicant therefore urges the Court to stay the orders issued by the learned judge pending the hearing of an appeal that they intend to file against the ruling.

[5] The respondent has opposed the application through a replying affidavit in which he maintains that he gave the applicants notice of his

intention not to renew the lease more than a year ago and therefore the applicants have had ample notice to look for an alternative place for their business. The respondent maintains that if the applicants are allowed to resume operations, he will be greatly prejudiced as the applicants are no longer paying rent, the lease having expired.

[6] **Mr. Maganga** who argued the application on behalf of the applicants submitted that the orders issued by the trial court amounts to an eviction as it has made it impossible for the applicants to carry on any activities on the leased property; that the applicants were no longer in occupation; that there was a dam on the leased property that contain hazardous substances which require daily management. He further pointed out that there was no time frame for depositing the required security of Kshs. 2 Million.

[8] On his part, learned counsel for the respondent, **Mr Kimani**, submitted that the applicants were still in possession of the leased property; that the lease expired on 31<sup>st</sup> January, 2019; that the dispute was likely to be resolved by the ongoing arbitration proceedings; that the arbitration proceedings having been given a timeline of sixty days were due to be completed by 30<sup>th</sup> April, 2019; that the respondent stands to suffer great loss if the applicants are allowed to continue using the leased property as the applicants have not been paying any rent. Counsel therefore urged the Court not to issue the orders sought.

[9] We have carefully considered the motion before us. Being a motion under **Rule 5(2)(b)** of the **Court of Appeal Rules**, the principles of determining such an application are now clear having been well set out by this Court in various decisions. Basically the applicants must satisfy the Court that they have an arguable appeal and secondly, that the appeal will be rendered nugatory if the orders of stay that is sought is not granted.

[10] In this case, the orders issued by the ELC court were interlocutory orders pending the determination of arbitration proceedings for which the court has given a timeline of sixty days. It was not disputed by the parties that the arbitration proceedings are ongoing. In fact parties were agreed that in accordance with the timeline given by the court, the arbitration proceedings are due to be completed by 30<sup>th</sup> April, 2019.

[11] The applicants have availed a memorandum of appeal, in which they fault the learned judge for issuing the impugned orders. Although the applicants contend that they are not in occupation of the lease property, it is apparent that the learned judge did not give any orders taking away possession of the leased property from the applicants. What the court did, was to restrict the applicants from dealing with the leased property. While it is clear that the order has affected the operations of the applicants on the leased property, it is not correct as argued by the applicants that they are no longer in possession of the leased property.

[12] Moreover, nothing has been placed before this Court to show how that appeal will be rendered nugatory if the orders sought are not granted. To the contrary, it is evident to us that the intended appeal is likely to be affected by the arbitration proceedings and not the order of stay. If the arbitration proceedings are determined by 30<sup>th</sup> April as envisaged, the dispute between the parties may be resolved or a right of appeal may arise. In any case, it is not the arbitration proceedings that we are being asked to stay. We find that in regard to the motion before us, the nugatory aspect has not been satisfied. In addition, the grounds of appeal posited are frivolous as the substantive issues between the parties will be determined in the arbitration proceedings or any appeal arising therefrom.

[13] The applicants are required to satisfy both conditions of arguability and the nugatory aspect. They have failed to do so. Accordingly, this application has no merit and cannot succeed.

It is dismissed with costs.

**DATED and delivered at Eldoret this 4<sup>th</sup> day of April, 2019**

**E. M. GITHINJI**

.....

**JUDGE OF APPEAL**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

**J. MOHAMMED**

.....

**JUDGE OF APPEAL**

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

**DEPUTYT REGISTRAR.**