



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, OKWENGU & M'INOTI J.J.A.)

CIVIL APPLICATION NO. 99 OF 2019

BETWEEN

KAROLYNE MWATHA MBURU.....1ST APPLICANT

MARGARET WAIRIMU MUCHAU.....2ND APPLICANT

SIMON MBUGUA.....3RD APPLICANT

(OFFICIALS OF LORESHO SOUTH RESIDENTS' ASSOCIATION)

AND

ATHI WATER SERVICES BOARD.....1ST RESPONDENT

WATER RESOURCES AUTHORITY.....2ND RESPONDENT

(Application for stay of execution pending the hearing and determination of an intended appeal from the ruling and order of the Environment and Land Court at Nairobi (Eboso, J.) dated 13th March 2019 in ELCC No. 306 of 2018)

RULING OF THE COURT

On 13th March 2019 the *Environment and Land Court* at *Nairobi (Eboso, J.)* dismissed with costs an application for an injunction by the applicants, suing as officials of a society known as *Loresho South Residents' Association (the Association)*. The applicants were aggrieved and after lodging a notice of appeal, filed the motion on notice now before us in which they seek, pending the hearing and determination of their intended appeal, an order of injunction to restrain the respondents from trespassing or interfering with some 22 properties comprised in **Title Numbers Nairobi/Block 90/560 and Nairobi/Block 90/2** consecutively to **Nairobi/Block 90/22 (the suit property)** situate in **Loresho South Estate**. They also seek an order of stay of further proceedings in the Environment and Land Court.

The background to the application is that on 3rd July 2018, the applicants applied for injunction to restrain the respondents from trespassing, entering or interfering with the suit property. They averred that the respondents were poised to trespass into the suit property and lay pipes for a donor-funded public water project, without following the procedure set out under the *Water Act*. They further pleaded that there was no riparian reserve on the suit property; that they had not consented to the entry by the respondents; that the respondents had not paid compensation; and that the imminent entry was therefore illegal and in violation of their right to property.

The respondents opposed the application contending that the Association had no *locus standi* to sue because the suit property was not registered in its name and the applicants had not shown any authority to sue on behalf of the registered owners of the suit property. The 1st respondent explained that it was set up by statute to, among other things, develop national public water works for bulk water supply in Nairobi, Kiambu and Muranga Counties and that it was implementing a *Vision 2030* project to supply water to **Kabete, Uthiru and Karen** which was funded jointly by the *Government of Kenya, the European Union* and the *German Dar Bank*.

The respondents added that they had engaged the applicants and that the entry into the suit property was to mark the riparian reserve along the **Kibagare River**, and did not entail any appropriation of private land. They also contended that the laying of the pipelines was an overriding interest under **section 28** of the *Land Act*; that the relevant leases authorized the Government to enter into the suit property and lay service lines; that the water project in question was intended to actualize the right to water guaranteed by **Article 23** of the Constitution; and that the public interest in the completion of the project far outweighed the applicant's rights, which would be vindicated by

compensation.

In dismissing the application, the learned judge held that the applicants had failed to establish a *prima facie case* and that in any event an award of damages would be an adequate remedy. Even on balance of convenience, the learned judge found that it tilted in favour of refusing to stop the public water project.

In support of the application before us, **Mr. Kirimi**, learned counsel for the applicants, submitted that the intended appeal was arguable because the learned judge erred in holding that the applicants had no *locus standi* in the matter, yet the respondents had been engaging with the Association rather than the individual property owners. It was contended that the Association, which was duly registered, could sue through its officials, the applicants, and that the learned judge had further erred by holding that the applicants had not established a *prima facie case* whilst violation of their right to property guaranteed by **Article 40** of the Constitution was imminent. The applicants added that without following the procedure prescribed by **section 89** of the **Water Act**, the respondents could not validly enter into the suit property to lay the pipes. Although learned counsel admitted that the respondents had already entered into the suit property and had started laying the pipes and further that the applicants had received the relevant forms for compensation, he maintained that the respondents should be prohibited by injunction from carrying out the project before paying compensation to the applicants.

On whether the appeal would be rendered nugatory if it succeeded in the absence of an injunction, the applicants submitted that without compensation first paid, they stood to suffer irreparable damage if the respondents continued with the laying of the water pipes.

The 1st and 2nd respondents, represented respectively by **Ms. Mwinzi** and **Mr. Lakicha**, learned counsel, opposed the application. They maintained that the applicants' intended appeal was not arguable because they did not comply with **Order 1 Rule 13** of the **Civil Procedure Rules** and therefore did not have capacity to sue on behalf of the owners of the suit property. They further submitted that the entry into the suit property was not illegal because **clause 10** in the leases to the properties allowed the Government to enter the suit property for the purposes of laying water mains, service pipes and drains. Finally the respondents submitted that the applicants had not established any basis for an order of stay of the proceedings in the trial court and that their claim, being essentially for compensation, would not be rendered nugatory should their appeal succeed.

The respondents relied on the decisions of this Court in **Said Ahmed v. Manasseh Denga & Another [2019] eKLR** and **David Morton Silverstein v. Atsango Chesoni [2002] eKLR** and that of the High Court in **Paul Gitonga Wanjau v. Gathuthi Tea Factory Co Ltd & 2 Others [2016] eKLR** and submitted that the burden was on the applicants to demonstrate that the intended appeal would be rendered nugatory, which they had failed to do. They added that consideration of the hardships that the respective parties stood to suffer militated against award of an injunction because a critical public water project would stall. They relied on the decisions of this Court in **Joseph Wainina Kinyanjui & Another v. Kenya National Highways Authority [2018] eKLR** and that of the High Court in **Peter K. Waweru v. Republic [2006] eKLR** in support of the proposition that a project in public interest should not be frustrated.

We have carefully considered the judgment of the trial court, the draft memorandum of appeal, submissions by learned counsel, and the authorities that they cited. To be entitled to the remedies that the applicants have applied for under **rule 5(2) (b)** of the **Court of Appeal Rules**, it is trite that they must satisfy two tests. First, they must show that the intended appeal is arguable. Second, they must show that unless we grant the orders they have sought, their intended appeal will be rendered nugatory if it ultimately succeeds. (See **J. K. Industries Ltd v Kenya Commercial Bank Ltd [1982-88] 1KLR 1088**).

These two tests must be satisfied and it is not enough to satisfy only one. (See **David Morton Silverstein v. Atsango Chesoni** (supra)).

An arguable appeal is not one, which must ultimately succeed. It is merely one, which is not frivolous, an appeal that raises a *bona fide* issue that deserves to be argued fully before the Court (See **Joseph Gitahi Gacheu & Another v Pioneer Holdings (A) Ltd & Another, CA No. 124 of 2008**). To establish an arguable appeal, the applicant is not obliged to establish a multiplicity of issues. It will suffice if they demonstrate even one *bona fide* issue. (See **Damji Pragji Mandaria v. Sara Lee Household & Body Care (K) Ltd, CA No. Nai. 345 of 2004**).

As for whether or not an intended appeal will be rendered nugatory, that will depend on the peculiar circumstances of each case. (See **David Morton Silverstein v. Atsango Chesoni** (supra)). The concern in this consideration is to ensure that if the appeal ultimately succeeds, it will not have been rendered into a pyrrhic victory because of the irreversible occurrence of what the appeal was intended to stop and where an award of damages will not be a sufficient remedy. (See **Kenya Airports Authority v. Mitu-Bell Welfare Society & Another, CA No. 114 of 2013**).

Bearing the foregoing principles in mind, we are satisfied that the applicants' draft memorandum of appeal raises arguable issues such as whether the Association could sustain the suit and whether the respondents followed the procedure prescribed by the Water Act. We do not intend to say more in that regard to avoid preempting the issues or embarrassing the bench that ultimately hears the appeal. (See **Stanley Kangethe Kinyanjui v. Tony Keter & 5 Others, CA. No. 31 of 2012**).

As regards the nugatory test, we are not satisfied that the appeal will be rendered a mere paper victory if it succeeds. The applicants' main concern is compensation by the respondents. It is common ground that the respondents have commenced the process of determining the amount of compensation due to the applicants. The dispute in this appeal therefore boils down to one purely of monetary award or compensation. We do not see how, in the circumstances, it can be argued that the appeal will be rendered nugatory if it succeeds. The burden was upon the applicants to demonstrate cogently how their intended appeal will be rendered nugatory, which, with respect, they have failed to do. As the Court reiterated in **Stanley Kangethe Kinyanjui v. Tony Keter & 5 Others** (supra):

“Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.” (Emphasis added).

Ultimately the applicants have failed to satisfy the second test. For that reason, this application is hereby dismissed. Costs of the application will abide the outcome of the intended appeal. It is so ordered.

Dated and delivered at Nairobi this 22nd day of November, 2019

W. KARANJA

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR