



IN THE COURT OF APPEAL

AT KISUMU

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

J. MOHAMMED, J.J.A.)

CIVIL APPEAL (APPLICATION) NO. 137 OF 2018

BETWEEN

KIBOS SUGAR & ALLIED INDUSTRIES LTD.....1ST APPLICANT

KIBOS POWER LIMITED.....2ND APPLICANT

KIBOS DISTILLERS LIMITED.....3RD APPLICANT

AND

BENSON AMBUTI ADEGA.....1ST RESPONDENT

ERICK OCHIENG.....2ND RESPONDENT

BETHER ATIENO OPIYO.....3RD RESPONDENT

AND

NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY.....1ST INTERESTED PARTY

COUNTY GOVERNMENT OF KISUMU.....2ND INTERESTED PARTY

(Application for a stay of the orders of the E & LC pending the lodging, hearing and

determination of an intended appeal from the ruling and order of the

E&LC of Kenya at Kisumu (Kibunja, J.) dated 31st October, 2015

in

KSM HC ELC PETITION NO. 8 OF 2018)

RULING OF THE COURT

[1] Kibos Sugar & Allied Industries Ltd, Kibos Power Ltd & Kibos Distillers Ltd (the applicants) have moved this Court under Rule 5(2)(b) of the Court Rules, section 3A & 3B of the Appellate Jurisdiction Act and Article 159 of the Constitution of Kenya. They are seeking, amongst others an order, staying further proceedings in Kisumu Environment & Land Court (E&LC) Petition No. 8 of 2018 pending the hearing and determination of an appeal that they have lodged against a ruling delivered by the E&LC (**Kibunja, J**) on 31st October 2018.

The applicant also seeks a stay of execution of the order of 31st October 2018 pending the hearing of the appeal.

[2] In E&LC Petition No. 8 of 2018, **Benson Ambuti Atega, Erick Ochieng and Bether Atieno Opiyo** (herein 1st 2nd and 3rd respondents) are the petitioners. The petition was filed on 25th October 2018 in the E&LC under the Environmental Management and Coordination Act, 1999, (EMCA) and also under the Constitution for protection of fundamental rights and freedoms.

[3] The orders sought in the petition included declarations: that the 1st 2nd and 3rd respondents' right to a clean and healthy environment as guaranteed under Article 42 and 43 of the Constitution has been violated by the actions of the applicants; that the issuance of an Environmental Impact Assessment (EIA) license to the 1st applicant by the County Government of Kisumu (now the 2nd Interested Party and hereinafter referred to as the County Government) on the basis of an environmental project report only without an EIA study of the construction of 1650 TCD Factory, was unconstitutional, illegal and a contravention of the EMCA and Regulations made thereunder; and that the variation of the EIA license and subsequent transfer of the EIA license from the 1st applicant to the 2nd applicant was unconstitutional, illegal and contravention of EMCA.

[4] In addition, the 1st 2nd and 3rd respondents sought an order of certiorari to quash and cancel the EIA licenses of the applicants; a permanent injunction restraining the respondents from continuing with the operations of their factory and or milling sugar cane at the factory site in Kibos Area; an order of environmental restoration and compensatory damages.

[5] Filed simultaneously with the petition was a Notice of Motion dated 25th October 2018 in which the Petitioners sought, amongst others, an order suspending the EIA Licenses issued to each of the applicants, as well as a prohibitory injunction and or an environmental restoration order stopping the applicants from continuing with the operations of their factories and milling sugar cane at their factory site in Kibos area, pending the hearing of the petition.

[6] In the ruling of 31st October, 2018, the E&LC adjourned the hearing of the Notice of Motion but gave interim orders suspending EIA licenses of the three applicants, and also issued a prohibitory injunction stopping the three applicants from in any way continuing with the operations at the factories and or milling sugarcane pending the hearing of the application. This is the order that the applicants intend to appeal against. On the 7th of November 2018, the applicant's motion was fully argued before us and we reserved our ruling but issued an interim order suspending the order of 31st October 2018 pending delivery of our ruling.

[7] In support of their motion, the applicants are relying on grounds stated on the motion and an affidavit sworn by one **Joyce Awino Opondo** who is the applicants' Group Corporate Affairs Manager. They also rely on the annexures to the affidavit and the authorities filed by the applicants. In arguing the motion, learned counsel **Mr. Ochieng Oduol** who led **Mr. R. Olel** and **Mr. W. Gichaba** submitted that the applicant had met the conditions for granting orders under Rule 5(2)(b) of the Court Rules as laid down in **Stanley Kang'ethe Kinyanjui - V- Tony Ketter & 5 others [2013] eKLR**. Counsel argued that the intended appeal was arguable as there is an issue of jurisdiction that ought to have been determined by the E&LC before issuing any orders.

[8] Counsel argued that the respondents' petition raised issues concerning the EIA licenses that had been issued to the applicants under EMCA; that the orders issued by E&LC on 31st October, 2018 had the effect of suspending the applicants' EIA licenses by stopping the operations of the three applicants; that EMCA has adequate dispute resolution mechanism provisions for issues concerning licenses issued under that Act; that in particular, section 129 (1) of EMCA provides for disputes involving licenses issued under the EMCA to be addressed in the National Environment Tribunal (NET); that it is only after the NET tribunal has dealt with the matter that an appeal may be referred to the E&LC; that the respondents had not exhausted the machinery provided under EMCA before resorting to the E&LC; and that there was therefore an arguable issue regarding the jurisdiction of the E&LC.

[9] In addition, counsel contended that the applicants had a triable issue regarding the violation of their right to fair hearing under Article 50; that considering the gravity of the matter, the learned judge did not give the applicants opportunity to be heard nor did he consider the replying affidavit that had been filed before the interim orders were made. In regard to the nugatory aspect, counsel argued that the effect of the interim orders was the closure of the applicants' three factories; that the applicants stand to suffer irreparable loss as they have invested over 50 billion.

[10] Counsel pointed out that there was also substantial loss and inconvenience likely to be suffered by third parties. This includes over 1500 workers employed in the factories whose jobs were now on the line; sugarcane farmers who have nowhere to take their produce due to contracts entered into with the applicants; and the County Government that has been receiving substantial payments by way of taxes from the applicants. Further loss and inconvenience will be suffered by the general public as a result of the cutoff of power generation from the factory plants which has been supplying schools in the area and public street lights. On the other hand, it was argued that the respondents were not likely to suffer any prejudice if the orders sought by the applicants are granted.

[11] **Mr Wabwoto** represented the National Environment Authority who is the 1st interested party. He supported the applicants' motion arguing that there was an arguable issue intended to be raised in the appeal regarding jurisdiction of the E&LC, as section 129 (1) of EMCA actually gives jurisdiction to the NET tribunal and not the E&LC. Counsel relied on **Joseph Owino Muchesia & Another v. National Environment Authority & Another [2014] eKLR**.

[12] **Mr. Jared Salla** represented the County Government. He supported the application wholly adopting the submissions that were made on behalf of the applicant. He pointed out that the applicants were not only the biggest employer in the county, but also the largest tax payer and ratepayer to the County Government; hence the closure of the applicant's factory would have serious repercussions on the economy of the county of Kisumu. Counsel reiterated that the applicants do have an arguable appeal as they were denied a right to be heard, and furthermore the E&LC did not give considered reasons for granting the prohibitory orders.

[13] **Mr Salla** argued that the respondents' notice of motion that was before the E&LC was premature as the respondents disregarded the procedure provided under the EMCA; that the procedure required that any complaint be reported to the NEMA Public Complaints Committee first and thereafter if necessary, parties could appeal to the NEMA tribunal; and that it is only after that the E&LC could come in by way of an appeal. The Court was urged that where a legislative instrument provides the procedure for disposing off a legal issue, the Constitution should not be prematurely invoked. In this regard, the case of **Joseph Owino Muchesia & another v National Environment Management Authority & Another** (supra) was relied upon. Finally, the counsel for the County Government submitted that the respondents' petition that is before the E&LC is bad in law, vexatious and an abuse of the court process.

[14] **Mr. Jude Ragot** represented the 1st, 2nd and 3rd respondents He relied on his replying affidavit sworn on 7th November 2018 and a list of authorities that he filed. Counsel strenuously opposed the application. He argued that the applicants had misunderstood the principle of arguability as they had gone outside the grounds that they had indicated in the memorandum of appeal; that the issue of jurisdiction was not raised in any of the grounds; and that the appeal by the applicants did not raise any arguable issues.

[15] **Mr. Ragot** further submitted that the respondents' petition set out particulars of infringement of constitutional rights such as right to a clean and healthy environment, and right to public participation, and that these being constitutional issues, the E&LC, a superior Court had express jurisdiction to deal with the matter. Counsel argued that the case of **Joseph Owino Muchesia & Another v. National Environment Authority & Another** (supra) that was relied on by the applicants and the interested parties was actually in favour of the 1st, 2nd and 3rd respondents as it confirms that jurisdiction is vested in the E&LC.

[16] In regard to the alleged violation of right to fair hearing, counsel dismissed the same maintaining that the applicants had opportunity to be heard as they were served and did appear before the E&LC; and that the learned judge exercised his discretion in issuing the interim orders after the issue of the interim orders was argued. Counsel accused the applicants of exhibiting lack of candour and deliberately attempting to mislead the court.

[17] **Mr Ragot** asserted that the interim orders were properly issued as the applicants' factories were operating illegally and were polluting the environment including pouring effluent into neighboring rivers; that the applicants' did not relate any alleged loss to the appeal; and that in order to properly apply the nugatory aspect test, any alleged loss must be related to the appeal. He urged the court to dismiss the application arguing that the 1st, 2nd & 3rd respondents would be prejudiced if the same was allowed.

[18] In reply to the respondents' submissions, **Mr Ochieng Oduol** pointed out that ground number 4 in the memorandum of appeal raised the issue of jurisdiction. He maintained that the 1st, 2nd & 3rd respondents had failed to appreciate the import of an EIA license; that such a license is only issued for an intended project; and that in the case of the applicants, the EIA licenses were issued in 2005. Counsel also drew the court's attention to section 13 of the Environment and Land Court Act that provides exclusive jurisdiction to the E&LC at original and appellate level. He argued that any infringement regarding the EIA was subject to due process and not closure of the factory.

[19] We have carefully considered the motion before us, the affidavit in support and in reply, the submissions made by counsel, and the authorities cited. The application being one under Rule 5(2) (b) of the Court Rules, the principles upon which such an application may be granted have been reiterated in several decisions cited in **Stanley Kangethe Kinjui v. Tony Ketter & 5 others** (supra). In summary, the jurisdiction is a discretionary jurisdiction which though wide must be exercised judicially depending on the circumstances of a particular case; that in exercising the discretion, the court must be satisfied that two factors are established, that is that the applicant has an arguable appeal and that unless the orders sought are issued, the appeal may be rendered nugatory.

[20] In this case, it is clear that the respondents have filed a petition that is yet to be heard. The court has however issued an order of interim injunction which has the effect of shutting down the applicants' operations. It is not for us at this stage to determine whether the respondents have a *prima facie* case to justify the issuance of the injunction. Suffice to note that the applicants have filed a notice of appeal against the interim order issued by the E&LC. However, we hasten to add that the interim order has expired by efflux-ion of time. The applicant has also filed a draft memorandum of appeal that raises six (6) grounds. One of the grounds raises the issue of jurisdiction and this is clearly an arguable issue. As stated in **Stanley Kangethe Kinjui v. Tony Ketter & 5 others** (supra) a single ground is sufficient and it need not be one that must succeed. For good measure we add that there is also an arguable ground regarding violation of right to fair hearing.

[21] As regards the nugatory aspect, in **Reliance Bank Ltd v. Norlake Investment Ltd [2002] 1EA 227**, this Court stated as follows in defining when an appeal may be rendered nugatory:

“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”.

[22] Thus, the focus is on the order sought to be stayed. In the present case, the interim order that was issued on 31st October 2018 has the effect of shutting down the applicants' factories. It is clear that if this situation remains, the applicants will suffer substantial financial loss. The applicants have also indicated that there are other third party beneficiaries, including the second interested party who stands to suffer irreparably as a result of those orders. Considering that the respondents' petition is yet to be heard and that as of now the allegations made by the respondents are yet to be established, and it being common knowledge that there are many persons employed in the factories and many farmers who depend on the factories for their produce, the closing down of the applicants' factories is an action that has grave consequences. The applicants are carrying out commercial enterprises in which they have invested a colossal sum. The loss incurred by the suspension of the applicants' licenses may have irreversible effects on their business and this would render their appeal nugatory even if they were to eventually succeed.

[23] In addition, the applicants have sought an order to stay further proceedings in the E&LC pending the hearing and determination of their intended appeal. We have considered whether it would be expedient to stay further proceedings in the E&LC. Nevertheless, we do note that the impugned order of the E&LC was an interim order pending the inter parte hearing of the respondents' motion. Given that the motion was certified urgent and that there are allegations of a health hazard being caused by pollution and emission of raw and dangerous effluent

allegedly from the applicants' factories, an order staying the proceedings in the E&LC pending the hearing of the appeal, would be prejudicial to the respondents. We think that it would be more prudent, just and expeditious for the proceedings in the E&LC to proceed more so because the issues raised in this appeal particularly the issue of jurisdiction have not been heard and determined by the trial court. This is of course without prejudice to the applicants' right to proceed with the intended appeal against the impugned ruling.

[24] The upshot of the above is that we allow the applicants' motion only to the extent of issuing an order staying execution of the order issued by the E&LC on 31st October 2018 pending the inter partes hearing of the respondent's notice of motion dated 25th October, 2018, in ELC Petition No. 8 of 2018. We order that costs of this application shall be in the intended appeal.

Those shall be the orders of the Court.

DATED and delivered at Kisumu this 7th day of December, 2018.

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.

DEPUTY REGISTRAR