



IN THE COURT OF APPEAL

AT KISUMU

CIVIL APPLICATION NO.27 OF 2017

(CORAM: MUSINGA, GATEMBU, MURGOR, JJA)

BETWEEN

BUSIA SUGAR INDUSTRIES LIMITED.....APPELLANT

AND

WEST KENYA SUGAR COMPANY LIMITED.....1<sup>ST</sup> RESPONDENT

AGRICULTURAL FOOD AND FISHERIES BOARD.....2<sup>ND</sup> RESPONDENT

NATIONAL ENVIROMENTAL MANAGEMENT AUTHORITY.....3<sup>RD</sup> RESPONDENT

An Application under Rule 5(2) b of the Court of Appeal Rules for stay of the execution of the Judgment and decree of the decision of the Environment and Land Court at Bungoma (Mukunya, J) delivered on 10<sup>th</sup> March, 2017 pending the lodging, hearing and final determination of an intended appeal in

ENVIRONMENT AND LAND COURT BUNGOMA

CONSTITUTIONAL PETITION NO. 6 OF 2016

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RULING OF THE COURT

- 1. In its application dated 16<sup>th</sup> March 2017, the applicant, Busia Sugar Industries Limited seeks an order of stay of execution of the judgment and decree of the Environment and Land Court at Busia delivered on 10<sup>th</sup> March 2017 pending the hearing and determination of its appeal against that judgment.
- 2. The applicant has constructed a sugar factory in Busia which it says is complete and due to commence testing prior to commissioning. West Kenya Sugar Company Limited, the 1<sup>st</sup> respondent, says that the applicant did not undertake an environment impact assessment and neither did it apply for a licence from National Environmental Management Authority, (NEMA) the 3<sup>rd</sup> respondent, prior to constructing the factory but was nonetheless fraudulently granted one that was purportedly transferred Africa Polysacks Limited.
- 3. The 1<sup>st</sup> respondent petitioned the Environment and Land Court at Bungoma for declarations that the registration of the applicant as a miller by Agricultural Food and Fisheries Board, (the Agriculture and Food Authority) the 2<sup>nd</sup> respondent and the subsequent start of the sugar factory by the applicant in Busia is unconstitutional and violates the 1<sup>st</sup> respondent’s constitutional right; a declaration that the issuance of Environment Impact Assessment licence to the applicant was illegal and irregular and did not follow the laid down procedure; and a permanent injunction to restrain the applicant from constructing a sugar factory on the land parcel known as Title Number Bukhayo/Ebusibwao/927 in Busia.
- 4. In a judgment delivered on 10<sup>th</sup> March 2017, the Environment and Land Court allowed the 1<sup>st</sup> respondent’s petition to the extent that it ordered the applicant to forthwith “stop its activities in the factory” and directed the applicant to apply for the necessary licenses as required by law.
- 5. The applicant has now moved this Court under Rule 5(2)(b) of the Rules of the Court seeking a stay of that judgment pending the hearing

and determination of its appeal.

6. Learned counsel for the applicant Mr. Bwire submitted before us that the applicant has already filed before this Court at Kisumu Civil Appeal No. 35 of 2017 challenging the judgment of the lower court; that the applicant has an arguable appeal which will be rendered nugatory unless we grant the orders sought; that the question whether the lower court had jurisdiction over the matter is one of the issues that will be canvassed on appeal; that there is also a question whether the learned trial Judge was right in holding that the matter before him was not res judicata, given other litigation allegedly concerning the same matter.

7. Counsel pointed out that the applicant has incurred huge financial resources in constructing the factory which is ready and awaiting commissioning and that temporary orders of stay of execution of the judgment granted by the lower court were due to expire on 10<sup>th</sup> April 2017.

8. Learned counsel for the 3<sup>rd</sup> respondent, Mr. Wabwoto, did not oppose the application, saying that under Section 65(1) of the Environment Management and Act, it was within the mandate of the 3<sup>rd</sup> respondent to transfer a licence provided it related to the same project and the same site.

9. Opposing the application, learned counsel Mr. Kibe Mungai for the 1<sup>st</sup> respondent referred to the replying affidavit of Solomon Odera and submitted that the nature of the order by the lower court, is not one that is capable of being stayed; that the intended appeal is frivolous as the learned Judge undoubtedly had jurisdiction; that it was clearly demonstrated that the certificate of registration issued to the applicant was based on fraud and misrepresentation; that there is public interest to be safeguarded as the applicant's factory has been constructed on the banks of a river which will compromise the safety of water supply to Busia; that the 3<sup>rd</sup> respondent was not able to explain before the lower court how a licence issued to a different entity went to the applicant. Counsel stressed that all the court did was to order the applicant to comply with the law by applying for the requisite licences with the necessary authorities and the question of the appeal being rendered nugatory does not arise. Counsel submitted that to grant the order for stay that the applicant seeks would be tantamount to condoning an illegality.

10. Learned counsel for the 2<sup>nd</sup> respondent, Mr. Mutubwa, in opposition to the application submitted that the orders granted by the lower court are negative orders not capable of being stayed; that as against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, the 1<sup>st</sup> respondent's petition in the lower court was dismissed; that the intended appeal is frivolous as the lower court had jurisdiction to address the constitutional issues that were raised before it; that the Judge was also right in rejecting the argument that the matters raised before him were res judicata as they were not matters on which the National Environment Tribunal could determine. Counsel urged that the intended appeal will not be rendered nugatory as all the applicant is required to do is submit its application for licenses to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents for consideration.

11. We have considered the application and submissions by counsel. In an application of this nature, an applicant should demonstrate that he has an arguable appeal and that if the orders sought are not granted the appeal will be rendered nugatory. In **Ishmael Kagunyi Thande v Housing Finance of Kenya Ltd Civil Application No. Nai 157 of 2006** this Court stated:

**“The jurisdiction of the court under rule 5(2)(b) is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. These principles are now well settled. For an applicant to succeed he must not only show his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of the appeal will be rendered nugatory.”**

12. As regards the question whether the applicant has established an arguable appeal, we are unable to conclude, at this point, that the applicant's appeal is frivolous. The applicant says that it will argue on appeal that it was not demonstrated that the 1<sup>st</sup> respondent's constitutional rights were violated; that the matter should have been one for the National Environment Tribunal; that there was other litigation on the basis of which the plea of res judicata should have been upheld. Mindful, as we are, that an arguable appeal is not one that must necessarily succeed, (See **Dennis Mogambi Mong'are vs. Attorney General & others [2012] eKLR**), we think the intended appeal is arguable.

13. As to whether the intended appeal will be rendered nugatory unless we grant the orders sought, we are alive to the objective behind Rule 5(2)(b) of the Rules of this Court. As stated by Githinji, JA in **Equity Bank Limited v West Link Mbo Limited Civil Application No. Nai 78 of 2011**, the object is the ***“preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals”***.

14. In this case, what the lower court did was to order the applicant to stop its activities in the factory and directed it to apply for licences in accordance with the law. In effect, the court ordered the applicant to maintain the status quo in the factory as it applies for licences. There is therefore merit in the argument by counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents that the order is not one that lends itself to an order for stay, at least to the extent that the applicant was ordered to halt activities in the factory. We are therefore not satisfied that the applicant has demonstrated that the intended appeal will be rendered nugatory and for that reason decline to grant the order sought in the applicant's application dated 16<sup>th</sup> March 2017.

15. That said, we think, and counsel were all in agreement, that the substantive appeal is one that should be disposed of as a matter of urgency. To that end, we direct that Kisumu Civil Appeal No. 35 of 2017 be fixed for mention before the Presiding Judge, Court of Appeal, Kisumu, as a matter of urgency for purposes of giving directions regarding the early hearing and disposal of that appeal.

16. The costs of the application shall abide by the outcome of Kisumu Civil Appeal No. 35 of 2017.

Orders accordingly.

**Dated and delivered at Kisumu this 28<sup>th</sup> day of September, 2017.**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**