

iii. An injunction be issued to restrain the respondent herein, its servants, agents, employees and/or any other persons acting pursuant to its authority, from proceeding and/or continuing with any reclamation of the Indian Ocean at Makupa Creek and consequent construction on Plot No. 4106/MN/IV (suit property) or any other plot adjacent thereto pending the lodging, hearing and determination of the intended appeal against the ruling dated 24th July, 2017.

iv. An injunction be issued to restrain the respondent, its servants, agents, employees and/or any other persons acting pursuant to its authority, from using and/or operationalizing for use, the suit property being reclaimed from the Indian Ocean, at Makupa Creek for commercial or private purposes or involving third parties or other persons or in any manner proceeding with any other developments thereupon whether permanent or temporary pending the lodging, hearing and determination of the intended appeal.

2. The salient facts of this case are that the respondent who is engaged in the business of a Container Freight Station at Makupa in Mombasa County resolved to expand its cargo handling facility. To that end, it sought and obtained several development approvals from the necessary government agencies between the year 2012 and 2013. In particular, it obtained approval for the reclamation of a portion of 9 acres from the Indian Ocean to facilitate its expansion from the National Environment Management Authority and the County Government of Mombasa on 17th December, 2012 and 14th January, 2013 respectively.

3. Just as the respondent was about to commence the reclamation, the applicant vide a letter dated 27th October, 2016 suspended the approval earlier issued on the ground that the respondent had failed to comply with the some of the conditions of the approval. All the respondent's efforts to get the applicant to lift the suspension came to naught. This culminated with the respondent filing a suit in the Environment and Land Court (ELC) being E.L.C No. 391 of 2016 seeking several declaratory orders and an injunction against the suspension. However, the respondent withdrew the said suit on 9th February, 2017 after the applicant raised a preliminary objection regarding the jurisdiction of the court to entertain the suit under **Section 38** of the **Physical Planning Act**.

4. Immediately thereafter, the respondent filed Misc. Cause No. 11 of 2017 still at the ELC, this time seeking leave to apply for judicial review remedies of *certiorari* and *prohibition* against the suspension. It claimed that the applicant's decision to suspend its approval was not only in bad faith but contrary to the rules of natural justice. On 10th February, 2017 (Omollo, J.) granted the leave sought *ex parte* and directed that the said leave to operate as stay of the suspension in question.

5. Aggrieved with the leave granted and the stay order, the applicant filed an application dated 20th February, 2017 seeking *inter alia*:-

a) Order No. 2 of the orders of this court made and issued on 10th February, 2017 in these proceedings, and drawn in these terms:

“The leave so granted does operate as stay of the implementation of the respondent's suspension of approval for proposed land reclamation and construction of yard on plot No. 4106/VI/MN dated 27th October, 2016 ...”

be vacated, set aside and/or unconditional discharged forthwith.

b) The leave granted to the alleged ‘intended applicant’ to apply for the orders of certiorari and prohibition issued on 10th February, 2017 be set aside.

c) The *ex parte* Chamber Summons application dated 9th February, 2017 be struck out and/or alternatively be dismissed with costs.

d) Any Notice of Motion filed pursuant to the leave granted be similarly struck out and or in the

alternative be dismissed with costs.

6. The application was based on two grounds firstly, that the respondent had enjoined the wrong party and it ought to have instituted the proceedings against the County Government of Mombasa. Secondly, the decision sought to be challenged was made under **Section 38** of the **Physical Planning Act**. As such, there is prescribed procedure of challenging such a decision under the said Act. By dint of **Section 38(4)** the respondent ought to have first lodged an appeal against the said suspension to the Liaison Committee; any appeal from decision of the Liaison Committee lay with the National Liaison Committee under **Section 38(5)**; and finally the jurisdiction of the ELC could only be invoked at the appellate stage when an appeal from a decision of the National Liaison Committee is before it. It is clear that pursuant to **Section 9(2)** of the **Fair Administrative Action Act** that the ELC lacked jurisdiction to entertain the judicial review proceedings.

7. Naturally, the respondent opposed the application claiming that the letter dated 27th October, 2016 wasn't an enforcement notice within the meaning of **Section 38** of the **Physical Planning Act** hence the respondent wasn't obligated to follow the internal mechanism thereunder. In any event, the said letter indicated that the suspension was with immediate effect rendering the mechanism under the said Act unsuitable in the circumstances. Finally, the applicant was well suited since the letter in issue emanated from him.

8. Upon considering the rival arguments, the learned Judge (Komingoi, J.) in a ruling dated 24th July, 2017 dismissed the application. In doing so, she agreed with the respondent that the letter in question was not an enforcement notice. She also expressed thus,

“Section 13(1) of the Environment and Land Court Act (ELCA) provides that this court has both original and appellate jurisdiction to hear all disputes relating to environment and land. The court has unlimited jurisdiction over all issues. It is true that the physical planning Act provides for an appellate procedure under section 38(4) and (5). This however does not prevent and party from invoking the jurisdiction of the court in the first instance.

... I find that the respondent did not err by coming to court instead of going through the appellate procedures provided under the Physical Planning Act. I find that the court has jurisdiction to handle the matter.”

9. It is against that decision that the applicant has lodged a Notice of Appeal and filed the current application before us. The application is premised on the grounds that the intended appeal is arguable and it would be rendered nugatory in the event the orders sought are not granted.

10. In response, David Killoran, the respondent's Chief Executive Officer, deposed that an order of stay could not be issued in respect of the order dated 10th February, 2017. As it stood, the said orders had been implemented with the filing of the substantive motion and there were no threatened execution proceedings. Referring to **Section 3(2)** of the **Appellate Jurisdiction Act**, he argued that this Court has no jurisdiction to grant the injunction sought for the simple reason that it was neither sought in the judicial review proceedings nor could it be properly issued thereunder. He went on to state that the intended appeal was not arguable because there was no basis to fault the exercise of the learned Judge's discretion. Equally, the applicant had not demonstrated that the intended appeal would be rendered nugatory in the absence of the orders sought. All the applicant relied on was mere speculation and apprehension. Moreover, in the event the intended appeal succeeds, **Section 30(4)** of the **Physical Planning Act** empowers the court to compel the respondent to restore the suit property to its original condition.

11. Elaborating on the arguability of the intended appeal, Mr. Buti, learned counsel for the applicant, submitted that there was no evidence that the respondent had been exempted by the court under **Section 9(4)** of the **Fair Administrative Action Act** from following the laid down appellate procedure. Consequently, the ELC had no original jurisdiction to deal with the dispute. According to him, the intended appeal would be rendered nugatory if the respondent is allowed to continue with the reclamation and construction. There is a real likelihood that dispute would extend to third parties which would

unnecessarily complicate the matter. This is because the respondent would be required to apply for licenses from government institutions before commencing operations on the suit property. Further, importers and exporters desirous of using the facility would ultimately enter into contractual agreements with the respondent. Even if there is a possibility of restoration of the suit property to its original state in the event the appeal succeeds, such a reversal will have substantial financial implication which in the end would be met by tax payers. Besides, the completion of the said project would result in blocking the natural flow of the Indian Ocean at Makupa Creek thereby altering the geographical status of Mombasa from an Island to a Peninsular.

12. On his part, Mr. Munyao, learned counsel for the respondent, contended that there was no positive order issued by the ELC capable of being stayed. Albeit conceding that the issue of jurisdiction was arguable he maintained that the intended appeal would not be rendered nugatory. He added that the respondent had obtained the necessary approvals prior to commencing the project. Those approvals were issued only after investigations had been undertaken by the concerned authorities.

13. We have considered the application, submissions by counsel as well as the law. It is worth noting that an application under **Rule 5(2)(b)** of the Rules is distinct from an appeal to this Court. Githinji, J.A in **Equity Bank Limited vs. West Link Mbo Limited [2013] eKLR** aptly articulated the difference in the following manner: -

“I would at the outset respectively agree with the submission of the Mr. Ahmednassir, that an application under Rule 5(2) (b) is not an appeal as envisaged by Article 164(3). For purposes of judicial proceedings an appeal is broadly speaking a substantive proceedings instituted in accordance with the practice and procedure of the court by an aggrieved party against a decision of a court to a hierarchically superior court with appellate jurisdiction seeking a reconsideration and review of the decision in his favour.

...

It is trite law that in dealing with 5 (2) (b) applications the Court exercises discretion as a court of first instance and even where a similar application has been made in the High Court or other similar court under Rule 6(1) of order 42 C.P. Rules and refused, the Court in dealing with a fresh application still exercises an original independent discretion as opposed to appellate jurisdiction (Githunguri Versus Jimba Credit Corporation Ltd. (No. 2) [1988] KLR 838).

...

From the foregoing, it is clear that Rule 5 (2) (b) is a procedural innovation designed to empower the Court to entertain an interlocutory application for preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals.”
Emphasis added.

14. Accordingly, whenever this Court is faced with such an application, like in this case, it is not subject to **Section 3 (2)** of the **Appellate Jurisdiction Act** which deals with appeals. The provision stipulates: -

“For all purposes of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred by this Act, the Court of Appeal shall have, in addition to any other power, authority and jurisdiction conferred by this Act, the power, authority and jurisdiction vested in the High Court.”

However, the Court is restricted to granting the orders contemplated under **Rule 5(2)(b)** namely, stay of execution, stay of proceedings and injunction.

15. In determining an application under the said Rule, we have to satisfy ourselves that the applicant has demonstrated that it has an arguable appeal or an appeal that is not frivolous, and secondly, that if the

orders sought are not granted, the intended appeal will be rendered nugatory, if it eventually succeeds. See ***Reliance Bank Ltd. (in liquidation) vs. Norlake Investments Ltd. [2002] 1 EA 227***. The applicant is obliged to satisfy both of those principles; it is not enough to satisfy only one of them. See ***Peter Paul Mburu Ndururi vs. James Macharia Njore [2009] eKLR***.

16. Before delving into the two principles, it is instructive to consider the nature of the orders sought. The applicant seeks stay of execution of the Orders dated 10th February, 2017 and 24th July, 2017. We concur with the submissions of Mr. Munyao that the ruling dated 24th July, 2017 dismissed the applicant's application dated 20th February, 2010. Therefore, there was nothing capable of being stayed in respect of that order. Be that as it may, this still leaves the order dated 10th February, 2010 and the injunctive orders sought which we find fall for our consideration.

17. It is trite that the applicant is not obliged to establish a multiplicity of arguable grounds; even a single arguable issue will suffice. This much was stated was appreciated by this Court in ***Transouth Conveyors Ltd. vs. Kenya Revenue Authority & Another - Civil Application No. 37 of 2007 (unreported)***. Nor is it required to show that the appeal would definitely succeed or that the appeal has very high chances of succeeding. It is sufficient, if it can show that it has serious questions of law or a reasonable argument, deserving of consideration by this Court. Taking caution not to make final determinations on issues subject of the intended appeal, we are persuaded that whether the ELC had jurisdiction to entertain the judicial review proceedings in light of **Section 38** of the ***Physical Planning Act*** is arguable and merits consideration by this Court.

18. On the nugatory aspect, this Court in ***Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others [2013] eKLR*** succinctly put it-

“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.”

19. In this case, we find that unless the substratum of the intended appeal (suit property) is preserved the intended appeal would be rendered nugatory. We are alive to the fact that there is an option of the Court ordering restoration of the suit property to its original state in event the appeal succeeds. Nonetheless, we believe that the costs of doing so will be colossal taking into account that the respondent in its pleadings averred that the cost of the project was an estimate Kshs.500,000,000. Equally, we are unsure of whether the suit property would be capable of being restored to its original ecological state.

20. The totality of the above is that we find that the applicant has satisfied the twin principles which justify the exercise of this Court's discretion under **Rule 5(2) (b)** of the Rules. Consequently, we find the application has merit and issue the following order: -

a. An injunction is hereby issued restraining the respondent herein, its servants, agents, employees and/or any other persons acting pursuant to its authority, from proceeding and/or continuing with any reclamation of the Indian Ocean at Makupa Creek and consequent construction on Plot No. 4106/MN/IV (suit property) pending the lodging, hearing and determination of the intended appeal against the ruling dated 24th July, 2017.

b. An injunction is hereby issued restraining the respondent, its servants, agents, employees and/or any other persons acting pursuant to its authority, from using and/or operationalizing for use, the suit property being reclaimed from the Indian Ocean, at Makupa Creek for commercial or private purposes or involving third parties or other persons or in any manner proceeding with any other developments thereupon whether permanent or temporary pending the lodging, hearing and determination of the intended appeal.

The costs of the application shall abide the outcome of the intended appeal.

Dated and delivered at Mombasa this 2nd day of November, 2017.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

M.K. KOOME

.....

JUDGE OF APPEAL

I certify that this is a
true copy of the original

DEPUTY REGISTRAR