



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, KIAGE, & M'INOTI JJ.A)

CIVIL APPLICATION NO. 130 OF 2017

BETWEEN

ADAN OSMAN GODANA T/A

ELDORET STANDARD BUTCHERY.....APPLICANT

AND

PUBLIC PROCURMENT ADMINISTRATIVE

REVIEW BOARD.....1ST RESPONDENT

MINISTRY OF DEFENCE.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

JOSEPH CHESIRE CHEMUNA T/A

AVENUE BUTCHERY.....4TH RESPONDENT

(Application for stay of execution of the judgment and decree of the High Court pending the lodging, hearing and determination of an intended appeal from the judgment and decree of the High Court of Kenya at Nairobi (Aburili, J.) dated 6th June, 2017

in

JR. MISC. CIVIL APPLN. NO. 622 OF 2016)

RULING OF THE COURT

The motion dated 12th June 2017 seeks, by the relevant prayer 2, an order;

“2. That pending the lodging, hearing and determination of the applicant’s intended appeal from the judgment and decree of the High Court of Kenya at Nairobi dated the 6th June, 2017, there be a stay of execution and or the second respondent be restrained from entering into a contract with the fourth respondent pursuant to the first respondent’s decision in Review Application No.

98 of 2016 as regards TENDER NO. MOD/423 (01103) 2016/2017 concerning the supply of fresh meat (beef) on bone to Eldoret based units.”

It is based on the grounds appearing on its face which are that the applicant has an arguable appeal and that if a stay is not granted pending the lodging, hearing and determination of such appeal, the same may be rendered nugatory. This latter aspect is amplified at **clause 4** of the grounds as follows;

“(a) The judgment and decree of the superior court will be effected and the decision of the first respondent in Review Application No. 98 of 2016 as regards TENDER NO. MOD/423 (01103) 2016/2017 concerning the supply of fresh meat (beef) on bone of Eldoret based units will be given effect and the intended appeal will thereby be rendered nugatory and occasioning loss and prejudice to the applicant.

(b) The applicant is apprehensive that the second respondent would enter into a contract with the fourth respondent with the imminent danger that the intended appeal will otherwise be rendered superfluous.”

In support of the application, the applicant **Adan Osman Godana** swore an affidavit on the same date in which, addressing the nugatory aspect and also asserting that the balance of convenience favoured the grant of the injunction sought, he swore at paragraphs 9 and 10 as follows;

“9. That I also verily believe that my intended appeal will be rendered nugatory if the stay is not granted as prayed for the reasons inter alia that;

(c) The judgment and decree of the superior court will be effected and the decision of the first respondent in Review Application No. 98 of 2016 as regards **TENDER NO. MOD/423 (01103) 2016/2017** concerning the supply of fresh meat (beef) on bone to Eldoret based units will be given effect and the intended appeal will thereby be rendered nugatory and occasioning loss and prejudice to the me.

(d) I am apprehensive that the second respondent would enter into a contract with the fourth respondent with the eminent (sic) danger that the intended appeal will otherwise be rendered superfluous.

10. That I also verily believe that the balance of convenience clearly weighs in my favour in this matter owing to the fact that I am still supplying fresh meat (beef) on bone to the second respondent Eldoret based Units as regards the tender in question hence there will be no prejudice to be suffered by the respondents should this honourable court permit me to continue to do so pending the lodging, hearing and determination of my intended appeal.”

We have found it necessary to highlight those averments because an applicant who seeks this Court’s intervention by way of injunction or stay pending appeal under **Rule 5 (2)(b)** must, on the authority and settled principles, demonstrate both that he has an arguable appeal and that the appeal would be rendered nugatory unless interim relief is granted. See **GITHUNGURI vs. JIMBA CREDIT CORPORATION LTD (NO. 2) [1988] KLR 838.**

Whether or not the appeal is arguable is an enquiry we need not make for the reason that while arguing the motion before us, counsel for the applicant **Mr. Masika** very properly conceded, as he had to, that should it turn out that the contract the signing and execution of which the application seeks to injunct has in fact been executed by parties excluding the applicant, then the nugatory aspect would fail, as would the entire application, for having been overtaken by events. The court cannot injunct an event that has already occurred as injunctions are by definition prospective, and never retrospective.

Now, as to whether the contract sought to be injuncted has already occurred in the sense of having been entered into, is deposed to in the replying affidavit filed by the Hon. Attorney General who is the 3rd respondent. The affidavit is sworn by one **Major Vitalis Lumbasi Muke** who is the SOII Contracts at

Defence Headquarters. In it he swore in a rather straight-forward manner as follows;

“4. That the contract in issue supplies Eldoret based units namely 9KR Battalion and the Recruit Training School which has over 2,500 recruits and who are fed at government expense through the tender in issue.

5. That pursuant to the High Court’s ruling which discharged the order which previously permitted the applicant to continue supply beef (sic) on bone to the Eldoret Based Units, the Ministry signed a supplementary contract with Avenue Butchery. Annexed hereto and marked “MVL1” is a copy of the supplementary contract.

6. That Avenue Butchery has been supplying beef on bone to the Unites since 12th June 2017.”

Those averments, which **Mr. Wanjohi** and **Mr. Lagat**, respective learned counsel for the 1st to 3rd and for the 4th respondents relied on, are entirely dispositive of the question of whether or not the application before us has been overtaken by events. It has. Indeed, having seen the said contract as exhibited, and in the absence of an answering affidavit by the applicant, to controvert it, the application is left fatally deflated and has no legs to stand on. We do in fact think that for the applicant to have persisted in arguing the application while aware that the contract had already been signed and was being executed was not only wildly ambitious, but clearly mischievous and an abuse of the process of the Court. There was nothing left to preserve and the substratum of the application had long disappeared. See **DANIEL LOMAGUL KANDIE & 2 OTHERS vs. KAMANGIA HOLDINGS LTD & 4 OTHERS [2017] eKLR.**

For the reasons we have adumbrated, this application is bereft of meat and substance, and fails. It is accordingly dismissed with costs.

Dated at Nairobi this 15th day of December, 2017.

P. N. WAKI

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JUDGE OF APPEAL

P.O. KIAGE

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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