



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, J.J.A.)

CIVIL APPLICATION NO. 47 OF 2016 (UR 40/16) CONSOLIDATED WITH

CIVIL APPLICATION NO. 44 OF 2016)

BETWEEN

CHINA ROAD & BRIDGE CORPORATION (K) LTD.....APPLICANT

AND

AFRICAN GAS & OIL CO LTD.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

KENYA RAILWAYS CORPORATION.....3RD RESPONDENT

NATIONAL LAND COMMISSION.....4TH RESPONDENT

(Application for stay of execution pending the hearing and determination of an intended appeal against the ruling and order of the High Court of Kenya at Mombasa (Omollo, J.) dated 21st July 2016

in

ELC Const. Petitions Nos. 170 & 171 of 2016)

RULING OF THE COURT

China Road and Bridge Corporation (K) Ltd (China Road) and Kenya Railways Corporation (Kenya Railways) are aggrieved by the ruling and order of the Environment and Land Court (ELC) at Mombasa (Omollo, J.) dated 21st July 2016 and have evinced their intention to appeal against the same by lodging notices of appeal on 27th July 2016 and 25th July 2016 respectively. In the meantime, they have filed two applications, namely Civil Application No 44 of 2016 and Civil Application No. 47 of 2016, praying for stay of execution of the orders of the ELC pending the filing, hearing, and determination of their intended appeals. On 3rd November 2016 we directed, with the consent of the parties, that the two applications, which were between the same parties, on related subject matter, and arising from the same ruling, be consolidated and Application No. 47 to serve as the running file.

The brief background to the application before us is as follows. On 24th June 2016, a firm known as **Miritini Free Port Ltd (Miritini Free Port)** and the 1st respondent, **African Gas & Oil Company Ltd, (African Gas)** filed in the ELC against China Road and the **Attorney General**, Kenya Railways and the **National Land Commission (NLC)** two separate petitions, being **Petition No. 170 of 2016** and **Petition No. 171 of 2016**. In the petitions they prayed for similar remedies, namely, a declaration that their right to property and fair administrative action had been violated; an order for immediate payment of compensation for their compulsorily acquired properties and or payment of interest at commercial rates until payment in full; and an order of injunction to restrain China Road and Kenya Railways from carrying on any construction works on their properties until payment of full compensation. Miritini Free Port averred that it was the registered proprietor of the property known as **LR NO.MN/VI/4805** situate in Miritini, Mombasa County, measuring in area approximately **91.09 hectares**, while African Gas pleaded that it was the proprietor of **LR NO. MN/VI/4838** comprising seven parcels of land, namely **NOS. MN/VI1515, MN/VI/1763, MNVI/1674, MN/VI/1789, MN/VI/3690, MN/VI/4734, and MN/VI/4810**. The latter parcels are similarly situate in Miritini and measure in area approximately **41.27 hectares**. For convenience we shall refer to all those properties as **“the suit properties.”** The two petitioners further averred that the Government of Kenya in January 2015 identified the suit properties for compulsory acquisition for two major development projects, namely **Mombasa Port Area Development Project - Mombasa Southern Bypass and Kipevu New Terminal Link Road** and the **Mombasa – Nairobi Standard Gauge Railway**. As regards Miritini Free Port, it was averred that the NLC subsequently awarded it Kshs **1,475,486,485/-** as fair and reasonable compensation for the land and improvements thereon. For African Gas, it was averred that it was awarded **Kshs 159,913,977/-** for the land and **Kshs 360,000,000/-** for interruption of its business. Subsequently, the two petitioners further averred, the applicant moved into the suit properties and commenced construction works for the railway without first compensating them, thus occasioning them loss and damage.

Contemporaneously with the petitions they filed motions seeking conservatory orders to stop China Road, the Attorney General, Kenya Railways and NLC from entering, remaining or undertaking construction works on the suit properties pending the hearing and determination of the petitions. On the same day, i.e. 24th June 2016 the learned judge issued, *ex parte*, conservatory orders as prayed, pending the hearing and determination of the motion. By two applications dated 30th June 2016 and 1st July 2016, Kenya Railways and China Road respectively applied to set aside the *ex parte* conservatory orders, which they complained had brought the railway project to a standstill. They also prayed for an order compelling the petitioners to give undertaking as to damages. The Attorney General and NLC respectively filed grounds of opposition and a replying affidavit to oppose the applications for conservatory orders.

The case advanced against the conservatory orders was that in cases of urgent necessity, the 4th respondent was empowered by **section 120(2)** of the **Land Act** to take possession of compulsorily acquired land before compensation; that the petitioners were duly notified that due to urgent necessity, possession of the suit properties would be taken before compensation; that the urgent necessity was borne of the commercial contracts and financing agreements which had strict timelines; that the conservatory orders were occasioning massive daily losses of **US\$ 376,000** on account of idle equipment and mobilized workforce of 1,600 personnel; and that about 70% of the works on the suit properties were already completed.

China Road, the Attorney General, and Kenya Railways further contended that the works already undertaken and the expensive equipment on site risked deterioration and vandalization as a result of the conservatory orders; that upon being compulsorily acquired, the suit properties immediately vested in the National Government; that the petitioners’ claim was thereafter for the awarded compensation rather than the suit properties; that the orders were not serving any useful legal purpose towards the enforcement of the petitioners’ claims; that the continuation of the orders was not in public interest; that huge amounts of public funds had already been expended on the project including consultancies, mobilization of human resources and plant and machinery, whose total costs was over **Kshs 480 billion**; that the conservatory orders were delaying the project and were likely to induce breach of contract, resulting in imposition of high penalties and huge financial losses; and that any damage that the petitioners were likely to suffer would be adequately compensated by award of damages.

On its part, the NLC contended that it had only made a preliminary award in favour of African Gas because the County Government of Mombasa had challenged the legality of the grant of the suit properties in favour of it. After conducting a review under **Article 68(v)** of the Constitution to determine the legitimacy of the its ownership of the suit properties, NLC rendered a preliminary determination that was subject to ratifications in plenary, which was yet to take place. In those circumstances NLC claimed that there was still an ownership dispute over the suit properties and therefore compensation could not be paid immediately. The NLC also argued that it had invoked section 120(2) of the Land Act to take immediate possession of the suit properties while waiting for the National Treasury to complete the budget process and release of the compensation funds.

Omollo, J. heard all the three applications together and the parties agreed that the outcome of the application in respect of Petition No. 171 of 2016 would apply *mutatis mutandis* to Petition No. 170 of 2016. By the impugned ruling the learned judge made the following orders, which have aggrieved China Road and Kenya Railways:

(i) “pending the hearing and determination of this petition and petition No 170 of 2016, the respondents do deposit the total sum of Kshs.519,913,977.00 awarded in respect of this petition and the sum of Kshs 1,475,486 awarded in the petition No 170 of 2016 in an escrow interest earning account to be opened in the joint names of the advocates for the petitioner, the 2nd respondent and the 3rd Respondent within 21 days from the date of this ruling.

(ii) The conservatory orders granted by this court on 24th June 2016 are confirmed to remain in force until the monies are disbursed in accordance with order (i) above. Upon compliance of the orders, the respondents shall be at liberty to continue to undertake constructions work and activities thereon as appropriate.

(iii) Should there be a default to comply in terms of order (i) above, there shall remain in force the conservatory orders pending the hearing and determination of the petition.”

Prosecuting the application for stay of execution, **Mr. Ndegwa**, learned counsel for China Road submitted that the intended appeal was not only arguable, but had overwhelming chances of succeeding. He relied on the 22 grounds of appeal set out in China Road’s draft Memorandum of Appeal and contended that the learned judge erred in granting conservatory orders when the petitioners’ claim was for monetary compensation and interest which could be easily and adequately compensated in monetary terms; that upon compulsory acquisition of the suit property title to the same passed to the National Government and all that the two petitioners were entitled to was the awarded values of the suit properties rather than the suit properties themselves; that the learned judge disregarded or did not pay adequate regard to public interest; and that the learned judge failed to address the question of how losses occasioned by the conservatory orders would be recovered when she failed to make an order for undertaking on damages.

Turning to whether the intended appeal would be rendered nugatory if it succeeded in the absence of an order of stay of execution, learned counsel submitted that indeed it would. He contended that China Road was already suffering colossal loses, which it would not be able to recover from the petitioners. It was urged too that China Road was paying for materials, machinery, plant and equipment and labour, yet no work was being done. The court was faulted for failing to order the petitioners to give an undertaking on damages without giving any reasons why it could not make such an order.

Mr. Miller, learned counsel for Kenya Railways supported the application for stay of execution and adopted the submissions made on behalf of China Road. He added that the appeal was arguable because the Africa Gas’ ownership of the suit properties was contested and had not been determined with finality by NLC. It was also contended that the court had utterly failed to consider or address the issue of public interest before granting the conservatory orders. Counsel concluded by submitting that the conservatory orders were likely to lead to breach of contract on the part of the Kenya Railways, which would render the intended appeal nugatory if it succeeded without an order of stay of execution.

Mr. Mutinda, learned state counsel for the Attorney General, and **Mr. Mbutia**, learned counsel, for the

NLC associated themselves with the submissions in favour of an order of stay of execution, adding that the learned judge made an order for deposit of money without any party applying for it and without giving the parties and an opportunity to address the court on the issue. It was also contended that the NLC had validly notified Africa Gas and Miritini Free Port that the possession of the suit properties would be taken immediately pending payment of compensation, which was allowed by the Land Act in cases of urgent necessity. Lastly it was contended that the petitioners whose claim was for a liquidated amount and interest did not deserve conservatory orders as they could be adequately compensated by payment of the claimed sum and interest.

Mr. Busiega, learned counsel for Africa Gas and Miritini Free Port, opposed the application, relying on replying affidavits sworn on 5th August 2016 by **Mr. John Mwella**, the legal officer of Africa Gas. Counsel contended that the learned judge had properly exercised her discretion in granting the conservatory orders and that the intended appeal was therefore not arguable.

In the event the appeal was to succeed, counsel submitted, the same would not be rendered nugatory because the China Road and Kenya Railways were merely ordered to deposit the sums in dispute in an escrow interest earning account.

Lastly learned counsel submitted that China Road and Kenya Railways were not suffering any losses because they had continued construction of the railway in violation of the court order. It was contended that the two had come to court with dirty hands and were not deserving of the remedy sought.

Counsel referred to copies of photographs allegedly taken on 4th August 2016, which were annexed to the affidavit, as evidence of continuing works in breach of the court order.

Before we consider the application, it is important first to address the last point taken by African Gas regarding violation of the conservatory orders, which China Road and Kenya Railways have denied. Of the 6 photos that were annexed to the affidavit sworn on behalf of African gas, 4 show only construction equipment with no person on site. It is difficult to tell from those photos whether indeed there is any construction work going on. The other two photos have in addition to the machinery and equipment, a group of people standing by. African Gas states that the court allowed China Road and Kenya Railways access to the site to secure some of the equipment. It is not stated whether these photos were taken during the securing of the equipment or not.

Granted, in addition, that we do not have before us evidence of any initiatives taken by African Gas suggestive of contempt of court on the part of China Road and Kenya Railways, we are unable to make any finding of violation of the orders as to disentitle China Road and Kenya Railways to the equitable and discretionary remedy they have sought before us. (See **Titus Gicharu Mwangi v. Mary Nyambura & Another, CA. No. Nai. 162 of 2013 (UR 111/2013)** and **David Kamau Gakuru v. National Industrial Credit Bank Ltd, CA No. 84 of 2001**).

To entitle China Road and Kenya Railways to the order of stay of execution that they have sought, they must satisfy two conditions. First they must demonstrate that their intended appeal is arguable. Second, they must satisfy us that if we do not grant stay of execution and their appeal eventually succeeds, the same will be rendered nugatory. (**Jaribu Holdings Ltd v. Kenya Commercial Bank Ltd, CA. No. 314 of 2007**). They must satisfy both of those conditions; it is not enough to satisfy only one, subject to the obvious fact that where the court finds that there is no arguable appeal, it is unnecessary to consider the second condition because there is no appeal capable of being rendered nugatory. (**Kenya Ports Authority v. James Nderitu Gachagua t/a Jagar Consultants, CA. No. Nai. 181 of 1998**).

An arguable appeal is not one that must necessarily succeed when the appeal is ultimately heard and determined. It is merely an appeal that raises even one *bona fide* issue that is deserving of full consideration by the Court. (**Kenya Railways Corporation v. Edermann Properties Ltd, CA. No. Nai. 176 of 2012**). For that precise reason, an applicant for an order of stay of execution is not called upon to show a multiplicity of arguable points. Even one will suffice for purposes of **rule 5(2)(b)** of the **Court of Appeal Rules**. (**Kenya Tea Growers Association & Another v. Kenya Planters & Agricultural Workers**

Union, CA. No. Nai. 72 of 2001).

Having carefully considered, the ruling of the learned judge and the draft grounds of appeal, we are satisfied that the intended appeal is not frivolous. It raises several legitimate and arguable points such as whether the title to the compulsorily acquired properties had passed from the petitioners; whether due to urgency the applicants were entitled under the Land Act to take possession of the suit properties before payment of compensation; whether in view of the fact that the petitioners' claims were for a liquidated sum with interest, injunctive conservatory orders were justified; whether African Gas' title to the suit properties was fully and finally established; whether in the circumstances it was entitled to immediate compensation; whether the order to deposit the sums in question was issued without being sought and without affording the parties an opportunity to be heard on the issue; whether an order for undertaking on damages ought to have been made; among others. We are constrained not to say more in this regard lest we appear to prejudge the issues, prejudice any party of the parties, or embarrass the bench that will ultimately hear the appeal. (See Central Bank of Kenya Deposit Protection Fund Board v. Uhuru Highway Development Ltd & Others, CA. No. 95 of 1999).

As regards the second condition, what will render an appeal nugatory will depend on the circumstances of each case. (David Morton Silverstein v Atsango Chesoni, CA No. Nai. 189 of 2001). In Kenya Airports Authority v. Mitu-Bell Welfare Society & Another, CA No. 114 of 2013 (UR 77/2013) this Court explained that the purpose of inquiring into whether the intended appeal, if successful will be rendered nugatory is:

“to obviate the spectre of a meritorious appeal, when successful, being rendered academic, the apprehended harm, loss or prejudice having come to pass in the intervening period. Our stay of execution jurisdiction is meant to avoid such defeatist eventualities in deserving cases.”

In this case China Road and Kenya Railways contend that the conservatory orders are occasioning massive losses and unless they are stayed, by the time the appeal is heard and determined a lot of damage will have been occasioned which the petitioners cannot make good. As far as the losses are concerned, the petitioners did not seriously dispute the averments by China Road and Kenya Railways. They merely invoked what they alleged to be violation of the conservatory orders, which we have addressed above.

In a number of cases, this Court has stated that when confronted by an application such as the one before us, it must weigh the respective hardship that each party stands to suffer, and that the issue is not merely the ability of a party to pay or not to pay a particular sum of money. (See Oraro & Rachier Advocates v. Co-operative Bank of Kenya Ltd, CA No. Nai. 358 of 1999; Reliance Bank Ltd v. Norlake Investments Ltd [2002] 1 EA 232; Nation Media Group & 2 Others v. John Joseph Kamotho & 3 Others, CA. No. 108 of 2006 and Erwen Electronics Ltd & 3 Others v. Radio Africa Ltd & Another, CA. No. Nai. 82 of 2011).

We are ultimately satisfied that China Road and Kenya Railways have satisfied the two conditions for an order of stay of execution under rule 5(2)(b). Accordingly we allow the application and stay execution of the ruling and order of the ELC dated 21st July 2016. Costs of this application will abide the outcome of the intended appeal, which should be filed within 30 days, from today. It is so ordered.

Dated and delivered at Mombasa this 25th day of November, 2016

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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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