



IN THE COURT OF APPEAL AT NAIROBI

CORAM: WAKI, KIAGE & MURGOR J.J.A

CIVIL APPLICATION NO. NAI. 106 OF 2014 (UR.86/2014)

BETWEEN

KWENCH LIMITED.....APPLICANT

AND

**NAIROBI CITY COUNTY.....1ST
RESPONDENT**

**INTERIM SECRETARY NAIROBI CITY COUNTY.....2ND
RESPONDENT**

**MEDICAL OFFICER OF HEALTH NAIROBI CITY COUNTY.....3RD
RESPONDENT**

An application for stay of execution of the Judgment of the High

Court of Kenya at Nairobi by the Hon. Justice Mr. G.V Odunga dated

31st March 2014

in

JR MSC Application No 231 of 2013)

RULING OF THE COURT

By way of a Notice of Motion dated 4th July 2013, the applicant sought orders from the High Court against the respondents prohibiting each one of them, their servants, agents or employees from prosecuting or commencing criminal proceedings or taking any other action against the applicant pursuant to a notice to comply dated 14th June 2013. The notice was issued to the applicant by the Medical Officer of Health, Nairobi City County, under the Public Health Act (Cap 242 laws of Kenya) requiring the Applicant to drain rainwater which was flooding L R. No. 14790/233 and 235 in Runda Estate and to provide infrastructure to permanently drain the rain water. The motion sought a further order of certiorari to remove to the High Court and quash the same notice to comply.

The brief facts of the case are that the applicant was the registered owner of three parcels of land known as L.R. No. 5989/13, 18 and 19 (the properties). Around 1980, the applicant applied for amalgamation of the properties and their subsequent subdivision. The terms of the subdivision scheme

were in summary that the existing titles of the separate parcels were to be surrendered to the Commissioner of Lands to be replaced by a new grant; that the drainage system of all the existing buildings on the plots would be reconstructed to the satisfaction of the Medical Officer of Health of the Nairobi City Council, that the proposed roads were to be constructed to the adoptive standard including surface water drainage and street lighting; that a comprehensive surface water drainage scheme would be submitted and implemented to the satisfaction of the City Engineer; and that a drainage way leave was to be provided, as necessary. The applicant contends that it complied with all the requisite conditions as specified, and approval obtained from the City Council, whereupon grants were issued in respect of L.R. Nos. 14970/233, 234, 235, 236, 237, 238 and 239. The applicant sold L.R. No. 14970/235 to Joakim Kiarie Kamere and Gladwell Wanjiru Kiarie; and L.R. No 14970/233 to Royal Gardens Limited (the proprietors). Soon thereafter the two complained to the applicant that their premises were being flooded but the applicant denied liability since it had complied with the terms of the subdivision scheme. The proprietors then complained to the National Environmental Management Authority and to the Nairobi City Council.

On 26th April 2013 the Interim Secretary, Nairobi City County wrote to the applicant demanding that it comply with the terms and conditions of the subdivision, to which the applicant again through its advocates, responded that the terms and conditions of the subdivision had been implemented in phases in strict compliance with the requirements of the subdivision scheme, and that it was the responsibility of the Nairobi City County to remedy the problem of flooding on the premises and the adjacent properties.

On 10th May 2013 the Medical Officer of Health issued a fourteen (14) days' notice to the applicant to comply with the Public Health Act and provide infrastructure to permanently drain the properties of the flood water, failing which it would be subject to prosecution or criminal action or other action taken against it. The applicant sought a withdrawal of the notice from the 1st respondent, which notice was not withdrawn, prompting the applicant to seek prohibitory orders from the High Court.

On 31st March 2014, Odunga, J dismissed the notice of motion having found that the applicant, being the original owner of the property, could be considered the author of the nuisance as specified under the Public Health Act.

Being dissatisfied with the decision of that court, the applicant filed this application on 14th May, 2014 under **Rule 5(2)(b)** of the **Court of Appeal Rules** for orders that:-

1. *The court be pleased to stay of execution of judgment and order of the High Court in JR Misc. Application No 231 of 2013 made on 31st March 2014 with regard to recovery of costs of the suit pending the hearing and determination of the Appeal;*

2. *That the court be pleased to stay the proceedings in **Criminal Case No***

***1778A Nairobi County vs Kwench Limited** instituted pursuant to the Notice to comply dated 14th June 2013 issued to the applicant by the 1st respondent;*

3. *That the court be pleased to issue such orders as it shall deem fit to serve the ends of justice in the circumstances of the case.*

The application is premised on five grounds on its face and on a supporting affidavit sworn by **Esther Njeri Gakunju**. She deposed that in the course of the Judicial Review, and contrary to the orders of Korir, J issued on 11th July 2013 directing the parties to preserve the status quo pending the hearing and determination of the judicial review proceedings, the respondent had instituted Criminal Case No 1779A of 2013 on 24th January 2014, that the applicant has an arguable appeal; that the respondents may proceed to recover costs awarded in the Judicial Review proceedings as well as proceed to prosecute **Criminal Case No.1779 A of 2013** which would render the appeal nugatory. Finally the applicant sought the Courts' protection in the interest of justice.

When the application came up for hearing before us, there was no appearance for the respondents

though they had been duly served with the hearing notice. **Mr. J.K. Thuku** learned counsel for the applicant contended in respect of the Notice of Motion that there was an arguable appeal. He referred to the draft Memorandum of Appeal, which contends that the proceedings in the magistrate's Court were challenged on the basis of their being illegal and contrary to the law, and that there were issues before the High Court which should be determined prior to any further proceedings being taken against the applicant. Counsel concluded that the application was unopposed as there had been no opposition to the judicial review proceedings in the High Court, and the respondents did not present any evidence before the court.

We have considered the arguments, submissions and the obtaining circumstances in respect of this application. The jurisdiction exercisable by this Court under **rule 5(2) (b)** is well settled. It is now trite law that for an applicant to succeed he should show that his appeal or intended appeal is not only arguable but also that unless he is granted the orders he seeks, his appeal or intended appeal if successful, will be rendered nugatory. **David Kamau vs Savings & Loans Limited Civil Application Nai. No. 255 of 2005 (UR 158 of 2005)**

As stated earlier, the first prayer is for a stay of execution of judgment and order of the High Court in the Judicial Review application with regard to recovery of costs pending the hearing and determination of the Appeal. The second prayer is for stay of proceedings in the Criminal Case filed against the applicant.

In determining the Judicial Review application on 31st March 2014, Odunga

J stated thus:-

“What the applicant wants the Court to determine is whether there is in fact nuisance under the Act and whether the same was caused by the applicant. Having determined that a person other than the owner or occupier of the premises in question may be considered the author of the nuisance, it is my view that the rest of the issues are better determined by a magistrates court as provided under section 120 of the Public Health Act...”

In the premises it is my view and I so hold that apart from the issue whether a person other than the owner or occupier can be held to have created a nuisance under the Act, the other issues are prematurely before the Court.

It follows that the Notice of Motion is dismissed with costs to the Respondents”

The applicant urges us to find that the intended appeal is arguable and that therefore this is a proper case for an order of stay of the criminal proceedings.

Arguability does not connote success of the appeal. It would suffice if there are justifiable grounds that warrant interrogation by the Court. Several issues arise from the draft memorandum of Appeal, including:- whether any person other than the owner or occupier of the premises can be held to have caused a nuisance under

the Public Health Act; whether the other issues placed before the High Court for consideration were premature and not yet determinable; whether in the circumstances of the case, a nuisance had been committed, and whether the applicant was the author of such nuisance. In our view, these issues are not frivolous and we find that the applicant has surmounted the first hurdle.

On the second limb on whether the success of the intended appeal would be rendered nugatory if the order sought is not granted, it is our view that this aspect has not been established. The reason for this is that, having regard to the impugned ruling before us, it is questionable whether or not there is any order capable of being stayed by this Court, save for costs.

What is apparent from the ruling of the High Court under Judicial review is that, the learned judge

limited his determination to the definition of an author of a nuisance within the meaning of the Public Health Act, and whether the 3rd respondent's decision to issue an *Ex parte* Notice to the applicant as the author of the nuisance was correct, but did not go on to consider the merits of the case. He left those for determination by the magistrate's court. In the ruling, the court did not order the applicant to do or abstain from doing any act for which a stay order would be efficacious. Considering that the learned judge only gave an opinion, after which a negative order of dismissal was issued, we find that there was nothing capable of being stayed. At all events **Section 193A** of the Criminal Procedure Code addresses the issue of pending criminal and civil proceedings in the following manner:-

“Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”

On the question of the recovery of costs pending the hearing and determination of the appeal, it was not demonstrated nor is it apparent that execution for the costs will be imminent. We therefore consider the application to be premature in this regard. Additionally, the applicant has not demonstrated to us what irreparable harm will be suffered if the stay of execution in respect of the costs is not granted at this stage. This is not to say that, should there be attempts to recover such costs in the future, the applicant would be precluded from seeking such stay of execution at the opportune moment.

Accordingly, we do not find any merit in the motion dated 13th May 2014 which we hereby dismiss. We order that the costs occasioned by the application be in the appeal.

Dated and Delivered at Nairobi this 10th day of OCTOBER, 2014

P. N. WAKI

JUDGE OF APPEAL

P.O. KIAGE

JUDGE OF APPEAL

A. K. MURGOR

JUDGE OF APPEAL

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

DEPUTY REGISTRAR