



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL AT MALINDI**  
**CIVIL APPLICATION NO. 12 OF 2014 (UR 10/2014)**

**(CORAM: OKWENGU, MAKHANDIA & SICHALE JJ.A)**

**BETWEEN**

**LAGOON DEVELOPMENT LIMITED.....APPLICANT**

**AND**

**BEIJING INDUSTRIAL DESIGNING AND RESEARCH INSTITUTE...RESPONDENT**

*(An application for an injunction pending the hearing and determination of the appeal against the ruling of the High Court of Kenya at Malindi (Angote, J.) dated 30<sup>th</sup>, May 2014*

*In*

*H.C.C.C. No. 2 of 2014)*

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**RULING OF THE COURT**

[1] What is before us is a Notice of Motion brought under **section 3A** and **3B** of the Appellate Jurisdiction Act and **Rules 5(2)(b)** of this Court's Rules seeking an order of injunction. The application has been brought by **Lagoon Development Limited** (hereinafter referred to as "the applicant"), who was the plaintiff in the suit in the High Court at Malindi. The applicant had sued **Beijing Industrial Designing and Research Institute** (hereinafter referred to as "the respondent"). The suit related to a contract for building works pursuant to which the applicant engaged the respondent as a contractor in a construction known as *Maudharini Development Project* situated in Kilifi on LR No. 12889/265 ("**the suit property**"). The contract provided for arbitration in the event of any disagreement.

[2] By a letter dated 19<sup>th</sup> January 2014, the applicant being dissatisfied with the respondent's services and due notice having been given, terminated the contract and asked the respondent to relinquish control of the site. The respondent however, failed to relinquish the site and instead begun dismantling machinery, tools and equipment and removing materials and goods from the site. This led to the applicant's suit in which the applicant sought interlocutory orders restraining the respondent from entering the project site, dismantling machinery, tools and equipment and removing the materials from the site and disrupting the work at the site pending the hearing and determination of the dispute through arbitration as provided in the contract. Filed contemporaneously with the suit was a Notice of Motion in which the applicant sought

interim orders pending the reference of the dispute to arbitration.

[3] On the 21<sup>st</sup> January 2014, the High Court (**Meoli, J.**) granted interim ex-parte orders restraining the respondent from any sort of access or interference with the project pending *inter-parties* hearing of the applicant's motion which was fixed for 3<sup>rd</sup> February 2014.

[4] On 30<sup>th</sup> January 2014, the respondent filed a Notice of Motion seeking orders that the applicant be restrained from handing over or appointing another contractor to take over the construction or from using the respondent's equipment, machinery plants or materials on the project site. This application was certified urgent and interim orders issued on the same date, restraining the applicant and its agents from appointing, engaging or handing over the site to another person or contractor or continuing with any further construction or development pending the *inter partes* hearing which was also fixed for 3<sup>rd</sup> February 2014.

[5] The two applications were heard together and in a ruling delivered on 30<sup>th</sup> May 2014, the High Court (**Angote, J.**) found in favour of the respondent stating in part as follows:

***“ ... I will agree with the defendant's submissions that the interim measure of protection of the subject matter herein is to maintain the status quo pending the outcome of the arbitration proceedings.***

***The continued construction of the subject matter by a different contractor has the effect of changing its nature to the extent that the arbitration proceedings may be compromised.***

...

***The most appropriate way of preserving evidence and maintaining a status quo pending arbitration is by way (sic) granting the orders as proposed in the defendant's application. Construction works should stop pending determination of the dispute by an arbitrator***

***In the circumstances and for the reasons I have given above I dismiss the plaintiff's application dated 20<sup>th</sup> January, 2014, and allow the defendant's application dated 30<sup>th</sup> January 2014 ...”***

Thus the learned Judge issued orders effectively restraining the applicant from appointing, handing over or engaging another contractor, and from using the respondent's materials at the project site, pending the hearing and determination of the dispute through an arbitration process.

[6] Being dissatisfied, the applicant filed a notice of appeal and has now moved this Court seeking orders as follows:

- i. ***An injunction be granted restraining the respondent, its servants, agents or employees from executing or enforcing the order in Malindi HCCC No. 2 of 2014 LAGOON DEVELOPMENT LIMITED v BEIJING INDUSTRIAL DESIGNING AND RESERACHING INSTITUTE and the said Order be stayed pending the determination of the intended appeal against the whole Ruling and Order delivered by the High Court on 30th May 2014.***
- ii. ***The status quo ante pursuant to the Orders granted prior to 30<sup>th</sup> May 2014 do prevail.***
- iii. ***The court be at liberty to make any further orders in the interests of justice.***
- iv. ***Costs be in the cause.***

[7] The applicant's motion is supported by an affidavit sworn by its director **Ashton Towler**. A draft memorandum of appeal has also been exhibited. In a nutshell, it is contended that the orders issued in favour of the respondent are not effective as interim orders since the contract works on the site had advanced significantly from the time of the termination of the contract; that the defective works done by the respondent had been repaired, leaving no physical evidence of the defects on the project site; that the ruling dated 30<sup>th</sup> May 2014 is unclear, excessive and interfered with other third party arrangements; that the scope of the order needed clarification as the applicant's contract with the respondent only related to four (4) houses, and there were other contractors at the site engaged by the applicant under separate contracts; and that the applicant did not have full possession of the whole site but there were other contractors and entities whose right of access and egress to the property should not be interfered with.

[8] The applicant maintained that it was likely to suffer irreparable loss and damage if the ruling was implemented as failure on its part to complete the project would lead to homeowners rescinding their agreements and suing for refunds of deposits in excess of Kshs.231 million that they had paid, as well as payment of damages; and that the applicant will be exposed to damages and losses for breaches of contract from suppliers, other contractors and financial institutions. Conversely, the applicant pointed out that the respondent stood to suffer no loss or damage as any works done, materials, and equipment, had been recorded and measured after the termination of the contract.

[9] Further, that there was in actual fact no pending arbitration process to justify interim protection; that the contract barred commencement of any arbitration process before an attempt being made by the parties to settle such dispute or difference amicably; and that the Judge erred in stopping all construction works pending the determination of the dispute by arbitration as the respondent did not have sole possession or full control of the site. The applicant denied having hired another contractor to replace the respondent and explained that the works on site continued with those contractors already on the site prior to the termination of the contract.

[10] Finally, the applicant argued that the contract with the respondent was due to expire on 12<sup>th</sup> March 2014, and that the enforcement of the ruling in question has led to confusion regarding access, ongoing works and ownership of temporary buildings, materials and equipment, and was likely to result in obstruction to other works un related to the contract in issue.

[11]The application is opposed by the respondent through a replying affidavit sworn on 18<sup>th</sup> June 2014 by **Dai Lu**, the respondent's Project Manager. The respondent argues that the applicant's motion lacks merit as the applicant has not demonstrated that it has an arguable appeal which may be rendered nugatory if the orders sought are not granted. Further that the process of unlawful termination of the contract was started by the applicant's letter dated 7<sup>th</sup> January 2014 which alleged poor quality of works by the respondent, and the alleged failure to adequately secure the site, hence the need to have the interim measure of protection granted by the superior court sustained pending arbitration. The respondent maintains that it is a reputable company with a known physical address in China and is capable of making any such payments which may be found to be due to the applicant.

[12] We have considered the motion and the submissions made in support and in opposition thereto. Basically the applicant is seeking orders of stay of execution pending an intended appeal. As was stated by this Court, (differently constituted), in **Chris Munga N. Bichage v Richard Nyagaka Tongi & 2 others [2013] eKLR:**

*“The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.”*

[13] Therefore the issue for our determination is whether or not the applicant has demonstrated that the

intended appeal is arguable. If so, whether the appeal will be rendered nugatory if the stay orders are not granted.

[14] The applicant has annexed to its supporting affidavit a draft memorandum of appeal that shows it intends to raise 24 grounds of appeal. Some of the issues intended to be raised include the fact that the contract between the applicant and the respondent was only in respect to 4 houses or units on approximately one acre piece of land out of a total of 21 houses/units on a 150 acre piece of land; that the respondent's work was only related to the structural aspects and plaster works on those 4 houses/units; that there were other persons on the site working on the houses/units such as suppliers and contractors who are third parties adversely affected by the ruling dated 30<sup>th</sup> May, 2014 as the orders issued were not specific or limited to the 4 houses, but stopped all construction works pending the determination of the dispute by arbitration; that no arbitration having been initiated in accordance with the contract the orders issued stopping all works pending arbitration were illegal. In addition the applicant contends that the learned Judge (**Angote, J.**) who is a Judge in the Environment and Land Division of the High Court had no jurisdiction to deal with the issues in the applicant's suit that were anchored on contractual relationship and not a land dispute. In our view, the issues raised in the memorandum of appeal are clearly arguable and it matters not that the applicant may not be successful in persuading the appellate court of the veracity of the argument. Needless to state that the applicant has satisfied the first requirement.

[15] On the question as to whether the appeal if successful would be rendered nugatory unless stay of execution is granted to the applicant, we note from the prayers in the applicant's motion that the order sought by the applicant is in effect a mandatory injunction allowing the applicant to hand over the work to contractor other than the respondent and to use the materials and equipment left by the respondent at the project site. In addition, although the order sought is an interlocutory order pending the hearing and determination of the intended appeal, once the work is handed over to another contractor and the work is done, there is an element of finality such that the order is not of an interlocutory nature.

[16] Indeed, the applicant has stated that since it terminated the contract, "*the works on site have advanced significantly, and all defective works by the respondent have since been repaired. In other words-there is no physical evidence on site to be preserved*" to justify the granting of an interim order of injunction. Further, there were no ongoing works under the contract at the time of termination which could be stopped. If that be the case, then the applicant's good faith is questionable. For it would appear that after the applicant terminated the contract and obtained temporary interim orders on 21<sup>st</sup> January 2014, restraining the respondent from any sort of access or interference with the project, the applicant repaired the works that the respondent was alleged not to have satisfactorily performed, and continued with works even on the 4 houses. That is to say that despite any orders that were in force then, the applicant repaired the work it deemed defective on the 4 houses/units and has continued the work with other contractors. This means that the applicant did not use the order issued in its favour as an interim measure of protection to protect evidence or preserve the *status quo* pending the inter parte hearing of its application or resolution of the dispute, but took advantage of the orders to continue to exercise its rights under the contract specifically clause 38.5 of the contract that allegedly gave it rights to rectify any defects and to use all temporary buildings, equipment, goods and materials on site for completion of the works.

[17]The applicant's motion dated 20<sup>th</sup> January 2014, was a motion brought *inter alia* under **section 7(1)** of the Arbitration Act 1995. It sought in the first place temporary orders of interim injunction pending the inter parte hearing of the motion, and upon hearing the motion, interlocutory orders pending reference and determination of the dispute by way of arbitration under clause 45 of the contract. It is interesting that the applicant in its affidavit sworn in support of the motion before us, has made it clear that there is no pending arbitration. If that be the case, then on what basis would the court reinstate the *status quo ante* prior to the order of 30<sup>th</sup> May 2014?

[18] The *status quo ante* was that the interim measure of protection was provided "pending arbitration" with a view to resolution of the dispute. Therefore, the interim injunction was anchored on the anticipated arbitral process. That being the position, it defeats logic for the applicant to now seek orders to have the

*status quo ante* prior to the orders granted on 30<sup>th</sup> May 2014 reinstated, and in the same breath assert that there is no pending arbitration.

[19] We note though that either party was at liberty to initiate the arbitration process and that none appears to have done so. In that event, the applicant who initiated the proceedings must take responsibility for this failure. It cannot rely on its own activity to sabotage proceedings which itself initiated. The applicant is seeking orders of interlocutory injunction which is an equitable remedy. He who comes to equity must do so with clean hands. It is evident that the order sought by the applicant in the motion is not to preserve evidence or *status quo* but to allow the applicant to continue with the works to the prejudice of the respondent. That is simply an abuse of the Court's process. Moreover, the applicant has stated that works done, materials, equipment and temporary buildings, were recorded and measured by the quantity surveyor and architect after a joint inspection was carried out, following the termination of the contract. There is therefore nothing that would render the intended appeal nugatory.

[20] We conclude that although the applicant has an arguable appeal and has shown that it may suffer some loss if the orders made on 30<sup>th</sup> May 2014 are not stayed, the applicant has not demonstrated that the loss is irreparable and more importantly that its appeal would be rendered nugatory. Thus although the applicant has demonstrated that the appeal is arguable, it has failed to satisfy the second limb as it has not shown that the appeal will be rendered nugatory if the orders sought are not granted.

Accordingly we dismiss the application with costs.

**Dated and delivered at Malindi this 10<sup>th</sup> day of October. 2014**

**H. M. OKWENGU**

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**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**