IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, VISRAM & NYAMU, JJ.A.)

CIVIL APPLICATION NO. NAI 300 OF 2010 (UR.211/2010)

BETWEEN

KENYA PIPELINE COMPANY LIMITED.....APPLICANT

AND

STANLEY MUNGA GITHUNGURI .....RESPONDENT

(An application for stay of execution pending the lodging and determination of an intended appeal against the ruling and orders of the High Court of Kenya at Nairobi (Okwengu, J.) dated 10th December, 2010

in

H.C.C.C.NO.395 OF 2010)

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RULING OF THE COURT

This is an application based on Rule ***5(2)(b)*** of the Court's Rules. The application seeks one substantive order in the following terms:-

"That an order of stay of execution be issued staying the ruling and order made in Nairobi High Court ELC No.395 of 2010 by Hon Lady Justice H.M. Okwengu pending the hearing and determination of the intended appeal as against the said ruling."

The facts leading to the grant of the challenged order is that the respondent filed suit in the superior court and at the same time filed an application seeking an injunction against the applicant restraining the applicant, its employees, agents and contractors from excavating, digging or laying any new pipes or pipeline pending the hearing and determination of the suit. The injunction was granted on the basis that the applicant had no fresh easement over the respondent's property LR12389 at Karen which would enable it to lay a second pipeline. The bone of contention between the two parties is the extent of the easement. However it is common ground that in 1991 the applicant did acquire an easement over the respondents land as described above for a consideration of Kshs.150,000. In this regard the applicant contends that the area covered by the easement as per the agreement is 0.222 hectares and also that the

easement contains a variety of rights which inter-alia cover the laying of an additional pipeline without the need for a fresh easement being registered. However, it is the respondent's case that the registered easement does not cover the laying of an additional pipeline but the applicants are unilaterally carrying out the works relating to the additional pipeline and that on 10th September 2003 the applicant by itself, employees, inspectors and/or servants in breach of the terms and conditions of the easement and in utter disregard of the terms of the agreement unlawfully pulled down the plaintiffs gate and took it away exposing the plaintiffs property to danger, vandalism, theft and insecurity and because of this the respondent sought an injunctive order against the laying of any new pipe and an award of damages.

Mr Magut, learned counsel for the applicant submitted that the registered easement covered the works which are being restrained, that an additional pipeline was within the ambit of the registered easement; that the respondents claim in the superior court included a prayer for damages and therefore even under the very well known principles concerning grant of injunctions in ***Giella v Cassman Brown*** case, an injunction order should not have been granted by the court; that the works being undertaken had considerable stake in terms of the public interest involved in that the pipeline was intended to serve Kenya, Uganda and the Great Lakes region as a whole and that it was a multi billion project and therefore the Court should have leaned in favour of upholding the public interest taking into account that the applicant had also entered into construction contracts with third parties.

Mr Otieno F.W., learned counsel for the respondent submitted in the main, that there was no easement in respect of the additional pipeline; that if at all there was an easement it did not give the applicant the right to expose the respondent's land to vandalism, theft, trespass or to a denial of peaceful enjoyment of his property; that an unregistered easement was not enforceable in law; that the fact that the applicant was a State corporation providing services to the East African region could not justify the violation of the respondent's fundamental rights, which are safeguarded by the Constitution; that a negative order cannot be restrained; that the superior court order took into account the fact that the threat to life could not be compensated in damages and that the applicant had failed to demonstrate any good reason for the removal of the respondent's gates and fences constructed to safeguard his right of privacy although the applicant had been given keys to the gate by the respondent and unlimited access to the property using the keys; that the court's order only preserves the status quo ***ante*** and in this regard the keys were handed over to the applicant by the respondents lawyers vide a letter dated 19th January 2011 and consequently it is not clear why the applicant would seek the orders set out in the application; that despite injunctive orders issued against the applicant on 16th December, 2010, the applicants had in disobedience of the orders proceeded to place at least one pipe on the land, and dug a trench across it as a result of which the respondent had commenced contempt proceedings against the applicant and finally that if the orders sought were granted the respondent would suffer great prejudice as the applicant would proceed to excavate the land, place a pipeline without any supporting insurance cover and without a registered easement and therefore the substratum of the pending suit would be defeated.

At the outset we deem it necessary to set out the terms of the order granted by the superior court. The order states:

1. That leave be and is hereby granted to the applicant to erect a fence and a gate for entry and exit into the easement area.

2. That the applicant is hereby ordered to avail keys to the respondent for access to the premises.

3. That upon the applicant erecting the gate and fence the respondent shall be restrained by itself its servants, agents, or employees from removing or destroying the gate and fence pending the hearing and determination of this suit.

4. That an injunction shall further issue restraining, the respondent, its servants, agents, employees or contractors from excavating, digging or laying any new pipes or pipeline, pending the hearing and determination of the suit."

It is not denied that the respondent has already complied with orders 1 and 2. Consequently this Court

cannot undo what has already been done because what has been sought is a prohibitory injunction. As regards order (3) above, the respondent has conceded that it has or is in the process of enforcing an alleged breach and that, contempt proceedings are pending in the superior court. Again, this Court would have no reason to intervene in a matter that is awaiting determination by a competent court. However as regards order (4) above, even from its wording it is clear that it is a pure injunctive order which this Court has the power stay in terms of ***rule 5(2)(b)*** of this Court's rules. It follows therefore that our attention shall be focused on order 4 only.

It is trite that for an application under ***rule 5(2) (b)*** to succeed, the applicant has to satisfy the Court that the appeal is arguable, that is, it is not frivolous and that if the order were not granted, the appeal, were it to eventually succeed, would be rendered nugatory – see ***Reliance Bank Ltd vs Norlake Investments Ltd*** [*2002*] **E.A. 227**.

Turning to the first requirement we think that the intended appeal as per the draft memorandum cannot be said to be frivolous in that the issue of the existence of an easement and its ambit is a fairly arguable one.

As regards the second requirement however, whether the applicant has been able to satisfy it does involve an elaborate analysis. At the outset we consider that a balancing act on our part would assist us. It is not denied that the project being undertaken by the applicant is a multi-billion contract which extends to the Great Lakes Region area and therefore the project does have a substantial public interest element. On the other hand the respondent is an individual land owner who has inter-alia sought damages in the pending suit in which the superior court has in the interim period given injunctive relief. To our mind, even by using this yardstick and striking a balance between the two claims it is obvious that the carrying out of the multi billion contract has a bigger weight than the respondent's claim. This in turn, means that in terms of the ratio deci dendi in the ***Norlake case supra***, since the respondent has the alternative of damages being awarded if it succeeds in the superior court, a refusal to grant a stay would cause the applicant such hardship as would be out of proportion to that which is likely to be suffered by the respondent. In view of the foregoing, we think that the applicant has met the two requirements for the grant of the orders sought under prayer 4. However with the advent of the overriding objective it is clear that the Court must swing its gates wide open in terms of being broadminded on the issue of justice in the context of the circumstances before it. Thus, one of the principal aims of the overriding objective is to approach the exercise of power or discretion under any proviso or rule, with a sense of balance or proportionality. In the circumstances of this matter, the question we pose is – what does the principle of proportionality entail. It is apparent that whereas the respondent's injury if any could easily be compensated in damages (the value of the admitted easement is approximately kshs.150,000) the position of the applicant in terms of the harm to the public interest, should the laying of the pipeline or delay thereof occur in both monetary terms and the public good would be colossal by any standard. This in turn means we must apply or invoke the principle of proportionality so as to avoid any injustice in the circumstances before us. Thus the principle of proportionality includes dealing with the matter in a way that is proportionate. This in turn means taking into account:-

i. the amount of money involved. In this case it is apparent that it is a multi billion contract.

ii. the importance of the case. It is quite clear to us that it is a public interest case.

iii. the complexity of the issues. The issue here is the extent of the easement and the effect of registration or non registration and a claim based on trespass.

iv. the financial position of each party. The applicant is a State Corporation undertaking a multi billion contract involving more than one nation whereas the respondent is an individual who has inter-alia claimed damages which the applicant as a State Corporation may be expected to satisfy, and at the other end of the scale the respondent might find it difficult to compensate the State corporation for damages which might arise from delay or stalling of a multi billion project in his hands whereas the value of the easement as mentioned above would be kshs.150,000.

It is useful to note that the above analysis reveals that the ingredients of proportionality include the size of

the claim, importance of the case, complexity of issues and the financial position of each party.

Where the conflicting claims are so disproportionate as in the matter before us the Court must endevour to achieve a proper balance by leaning in favour of proportionality. In this regard it is important to note that the respondent is one out of hundreds of landowners through which the pipeline is to pass or has already passed. Surely a sense of balance reveals that whereas the rights of a single owner are important, the right approach would be to devise a way of accommodating them and allowing the works to proceed.

As the respondent does not deny that the value of the easement is as mentioned above and in view of the fact that his other claim is that of trespass, the combined value of his claim is not anywhere near the value of the pipeline project in monetary terms. For this reason the balance tilts in favour of the project.

With the above in view, we have come to the inescapable conclusion that in the circumstances of this case, it would be just to restrain the orders given in ***Order (4)*** of the superior court ruling as reproduced above. The order is accordingly restrained pending the hearing of the appeal.

For the avoidance of doubt, we hereby grant an order staying order 4 of the orders dated 16th December 2010 until the hearing and the determination of the intended appeal.

We further order that the costs of this application be in the appeal.

DATED and delivered at Nairobi this 18th Day of March 2011.

P.N. WAKI

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR