REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: O'KUBASU, GITHINJI & ONYANGO OTIENO, JJ.A.)

CIVIL APPLICATION NO. NAI. 217 OF 2010 (UR. 156/2010)

BETWEEN

WILDLIFE LODGES LIMITED.....APPLICANT

AND

NAROK COUNTY COUNCIL.....1ST RESPONDENT
THE PERMANENT SECRETARY MINISTRY OF LOCAL GOVERNMENT.....2ND RESPONDENT
THE DISTRICT LANDS REGISTRAR, NAROK DISTRICT.....3RD RESPONDENT
WILDERNESS LODGES LIMITED..... 4TH RESPONDENT

(Application for stay of the order of the High Court of Kenya at Nairobi (Gacheche, J.) pending the hearing and determination of the intended appeal dated 16th September, 2010
in

H.C.MISC.CIVIL APPLICATION NO. 1350 OF 2003)
****

RULING OF THE COURT

The applicant, ***WILDLIFE LODGES LIMITED*** brings this application by way of Notice of Motion expressed as having been brought ***"Under Rule 5(2)(b)*** of the ***Court of Appeal Rules, Rules 47(1) & (2)*** of the Court of Appeal and the Inherent Powers of this Honourable Court and all enabling provisions of Law." The orders sought by the applicant are:-

"1. THAT this Honourable Court be pleased to grant an order of stay of the orders granted by the Honourable Lady Justice Gacheche on 16th September, 2010 in High Court Misc. Civil Application No. 1350 of 2010 pending the hearing and determination of an intended appeal by the applicant herein.

2. THAT there be a stay of the proceedings in HCCC Misc. Application No. 1350 of 2003 pending the hearing and determination of the intended appeal.

3. THAT this Honourable Court be pleased to issue such further orders or other relief as this Honourable Court may deem fit and just to grant.

4. THAT costs of and incidental to this Application be costs in the intended appeal."

The application, which is supported by the affidavit of ***PAN LIANXUE*** (who described himself as *"a Director of the Applicant"*) is brought on the following grounds:-

"a) THAT on 16th September, 2010 Wilderness Lodges Limited applied in the Superior Court and obtained an order purporting to stay a consent order which had been entered into by all the parties in HCCC Misc No. 1350 of 2003 even though the said Wilderness Lodges Limited was not a party in the said HCCC Misc No. 1350 of 2003.

b) THAT in view of the fact that Wilderness Lodges Limited was not a party to the said suit, it did not have the locus standi to argue any application in the said suit other than an application for its joinder as an interested party in the suit. Wilderness Lodges Limited did not therefore have any *locus standi* ***to file an application against orders already issued in the suit before it was enjoined as a party to the suit.***

c) THAT in its application by way of Notice of Motion dated 16th September, 2010, upon which the learned judge, Honourable Lady Justice Gacheche, issued the order appealed against, Wilderness Lodges Limited admitted that it had not been enjoined in the suit.

d) THAT in its application by way of Notice of Motion dated 16th September, 2010, upon which the learned Judge, Honourable Lady Justice Gacheche, issued the order appealed against, the Advocates for Wilderness Lodges Limited purported to have filed the same on behalf of the 2nd Defendant. There is no 2nd Defendant in HCCC Misc. No. 1350 of 2003 and on that ground alone, the learned Judge should not have entertained the said application.

e) THAT at all material times the 2nd Respondent in HCCC Misc.No. 1350 of 2003 has been the Permanent Secretary, Ministry of Local Government, who is a party to the Consent Order against which the learned judge issued a stay order in favour of Wilderness Lodges Limited. The 2nd Respondent aforesaid, represented by the office of the Attorney General has not applied for a stay of the consent order dated 25th August, 2010.

f) THAT the learned judge failed to take into account the submissions of the parties to the consent order present at the hearing and the said order of stay granted by Hon. Gacheche was given despite protests by counsel for the applicant herein.

g) THAT the learned Judge, the Honourable Lady Justice Gacheche did not record the submissions by either of the counsels present before her.

h) THAT the order given by the learned judge was to operate for more than 14 days thus rendering the said order an illegality an a nullity as it offends the provisions of the Civil Procedure Rules.

i) THAT the order granted by the Honourable Lady Justice Gacheche is not in tandem with the record and the application before her.

j) THAT the effect of the said stay order given by Hon. Justice Gacheche is to paralise *(sic)* ***the operations of Wildlife Lodges Limited the Applicant in that the lease in issue cannot be not in tandem with the record and the application before her.***

k) THAT the applicant has an arguable appeal;

l) THAT unless the orders sought herein are granted the intended appeal shall be rendered nugatory."

The application came up for hearing before us on *8th March, 2010* when Mr. James Nyiha appeared for the applicant while Mr. S.M. Mwenesi, together with Mr. Mwangi, appeared for the 1st respondent. Mr. Menge, appeared for the 2nd and 3rd respondents. Mr. G. Oraro, teaming up with Mr. W. Amoko and Mr. Kinuthia appeared for the 4th respondent.

The factual background to this application is that by a letter dated *19th August, 2010* the Deputy Registrar of the High Court was requested to record a consent order. Since that letter is what has triggered this application, we think it appropriate to reproduce it hereunder:

"19th August, 2010

The Deputy Registrar,
High Court of Kenya,
Civil Side,
***NAIROBI**.*

Dear Sir,

RE: HIGH COURT MISC. CIVIL APPLICATION NO. 1350 OF 2003
***REPUBLIC VS. THE COUNTY COUNCIL OF NAROK, THE PERMANENT SECRETARY, MINISTRY OF LOCAL GOVERNMENT, THE DISTRICT LANDS REGISTRAR, NAROK DISTRICT, EX PARTE WILDLIFE LODGES LIMITED**.*

Kindly record the following consent order.

"By consent of the parties herein this matter be and is hereby marked as settled in the following terms:-

1. That the consent letter dated 9th July, 2010 and filed on 21st July, 2010 be and is hereby withdrawn and the Court Order issued on 23rd July, 2010 be and is hereby set aside with no orders as to costs.

2. An order of certiorari be and is hereby granted to the applicant directed to the Permanent Secretary, Ministry of Local Government removing into this Honourable Court and quashing the decision of 18th September, 2003 authorising the County Council of Narok to execute and register the Lease Agreement dated 25th September, 2003 between County Council of Narok and Wilderness Lodges Limited over all that parcel of land known as NAROK/CIS-MARA/KOYAKI 3 on which land the Council has erected buildings known as KEEKOROK LODGE situated in the Masai Mara Game Reserve.

3. An Order of Certiorari be and is hereby granted to the applicant directed to County Council of Narok removing into this Honourable Court and quashing the Lease Agreement dated 25th September, 2003 between County Council of Narok and Wilderness Lodges Limited over all that parcel of land known as NAROK/CIS-MARA/KOYAKI 3 in favour of Wilderness Lodges Limited in the Masai Mara Game Reserve.

4. An Order of Certiorari be and is hereby granted to the applicant directed to the District Land Registrar, Narok removing into this Honourable Court and quashing his decision of 25th September, 2003 to register the Lease Agreement dated 25th September, 2003 between County Council of Narok and Wilderness Lodges Limited over all that parcel of land known as NAROK/CIS-MARA/KOYAKI 3 in the Masai Mara Game Reserve.

5. An order of certiorari be and is hereby granted to the applicant removing into this Honourable Court and quashing, the decision of the District Land Registrar of 25th September, 2003 to register as entry number 4 a Surrender of Lease under Section 64 of the Registered Lands Act.

6. An Order of certiorari be and is hereby granted to the applicant removing into this Honourable Court and quashing the registration of entry number 4 made under Section 64 of the Registered Lands Act in respect of all that parcel of land known as NAROK/CIS-MARA/KOYAKI 3 in the Masai Mara Game Reserve.

7. An order of Mandamus be and is hereby granted to the applicant directed to the County Council of Narok compelling the Clerk and the Chairman of the County Council of Narok to execute the seal and further variation of Lease effective from 28th August, 2001 for 33 years over that parcel of land known as NAROK/CIS-MARA/KOYAKI 3 in the Masai Mara Game Reserve in favour of Wildlife Lodges Limited and the Commissioner of Lands (in accordance with Section 53 of the Trust Land Act) do execute the same and thereafter the said Lease be registered at the District Land Registry, Narok.

8. An order of Mandamus be and is hereby granted to the Applicant directed to the District Land Registrar, Narok compelling him to register the Further Variation of Lease freed and discharged from all encumbrances effective from 28th August, 2001 for 33 years between County Council of Narok and Wildlife Lodges Limited over all that parcel of Land known as NAROK/CIS-MARA/KOYAKI 3.

9. That the Applicant and the 1st Respondent do bear their own costs.

10. THAT the applicant do pay the costs of the 2nd and 3rd respondents.

We are yours faithfully,

NYIHA, MUKOMA & COMPANY
ADVOCATES FOR THE APPLICANT

MOMANYI & ASSOCIATES
ADVOCATES FOR THE 1ST RESPONDENT

C.N. MENGE
PRINCIPAL LITIGATION COUNSEL
FOR THE 2ND AND 3RD RESPONDENT"

Pursuant to the foregoing, Mr. Amoko (appearing for 1st interested party) appeared before Gacheche, J. on *16th September, 2010* seeking the setting aside of certain orders arising from the consent order. It would appear that the application was made ex parte although the record shows that Mr. Kalove held brief for Mr. Nyiha for the ex parte applicants. The learned judge is recorded as having stated as follows:-

"Application of 16th September, 2010 is hereby certified urgent in view of the fact that the applicant claims that orders which he wishes to have set aside affect him drastically despite the fact that he was not a party to the proceedings.

I have considered the application ex parte at this instance and in my view, it is clear that the orders which he seeks to have set aside, affect him, despite the fact that he was not a party to the consent order.

I do in the circumstances allow the application in terms of prayer 2, or by an interim order pending the hearing of this application inter-parte on 23rd November, 2010. Notice to issue."

That is the order that the applicant herein wishes to appeal against, but before the hearing and

determination of that appeal the applicant seeks the orders of stay of that order and a stay of proceedings in the H.C.C.Misc. Application No. 1350 of 2003. That is why the applicant now brings this application under ***Rule 5(2)(b)*** of this Court's Rules.

In his submissions, Mr. Nyiha argued that as there was a valid consent order between the applicant, 1st, 2nd and 3rd respondents, the 4th respondent not having been a party to the proceedings had no *loci standi* to apply for the orders sought in the ex parte application before Gacheche, J. Mr. Nyiha went on to emphasize that their intended appeal was not frivolous and in support of that, Mr. Nyiha sought to rely on the draft Memorandum of Appeal.

Mr. Mwenesi supported the application stating that there is an arguable point as to whether a party who is not a party in the main proceedings can obtain substantive orders which paralyse the proceedings.

On his part, Mr. Menge associated himself with the submissions of Mr. Mwenesi.

In opposing the application, Mr. Oraro pointed out that under ***Order LIII*** of the Civil Procedure Rules, the notice should have been served on all the interested parties. In the present case, so argued Mr. Oraro, the consent was directed at the 4th respondent who was not a party to the proceedings. In Mr. Oraro's view, the Deputy Registrar acted contrary to law when he recorded the consent filed in court. He pointed out that the learned judge had given dates to the parties for hearing inter partes. It was further submitted that the consent order introduced other reliefs which had not been part of the original notice of motion.

Learned counsel appearing for the parties buttressed their submissions with relevant authorities.

On our part we have put the submissions made on behalf of the parties on the scales. It is trite law that the jurisdiction of this Court under ***rule 5(2)(b)*** of the Rules is both original and discretionary. It is also trite that for an applicant to succeed, he should show that his appeal or intended appeal is not only arguable but also that unless the order sought is granted the intended appeal or appeal if successful, the success will be rendered nugatory. In ***BOB MORGAN SYSTEMS LTD. & ANOTHER V. JONES [2004] 1 KLR 194*** at p. 196 this Court stated:-

"The powers of the Court under rule 5(2)(b), aforesaid, are specific. The Court will grant a stay or an injunction, as the case may be if satisfied, firstly, that the applicant has demonstrated that his appeal or intended appeal is arguable; and secondly, that unless a stay or injunction is granted his appeal or intended appeal, if successful, will be rendered nugatory."

We have given a brief factual background to this matter and it is apparent that what has given rise to the application for stay is an ex parte order given by Gacheche, J. on *16th September, 2010*.

The impugned order was an ex parte temporary order albeit given for a duration of 2 months. It was to expire on *23rd November, 2010*. Although the present application was filed on *23rd September, 2010*; it was not heard until *8th March, 2011* long after the stipulated life of the order. We are informed from the bar that the application was not heard inter partes in the superior court on *23rd November, 2010* as the applicant preferred to prosecute this application. We are further informed that the superior court has been mentioning the application and extending the ex parte order awaiting the outcome of this application. If the application pending in the superior court is heard inter partes, the impugned exparte order would lapse. The usual practice is for a party aggrieved by a temporary exparte order to apply to the same court for setting aside the exparte order. The applicant did not do so. Alternatively, the applicant could oppose the pending application on the same grounds he intends to raise in the appeal. Until the superior court determines the pending application in favour of the 4th respondent, it cannot be said that there is a conclusive decision which can be the basis of a competent appeal.

In view of the foregoing, and assuming but without finally deciding that the appeal is not frivolous we are left to consider whether a stay would be the best way in promoting overriding objectives of litigation as per ***sections 3A*** and ***3B*** of the Appellate Jurisdiction Act. If we were to grant this application as prayed,

then it would mean that the parties would have to wait for the final determination of the intended appeal while the matter remains pending in the superior court. It is our view that the dispute herein could easily be brought to an end if the applicant had gone back to the superior court way back on *23rd November, 2010* as directed by the learned judge and challenged the learned judge's ex parte order of *16th September, 2010*. The parties would have had the opportunity to state their respective positions and any dissatisfied party would then have come to this Court once and for all rather than the piece meal procedure that the applicant appears to have preferred.

In view of the foregoing, we are not satisfied that this is a proper case in which to grant the stay orders sought by the applicant. Accordingly, we decline to grant the reliefs sought. As regards costs, we order that each party shall pay its own costs. It is so ordered.

Dated and delivered at NAIROBI this 8th day of April, 2011.

E.O. O'KUBASU
.....
JUDGE OF APPEAL

E.M. GITHINJI
.....
JUDGE OF APPEAL

J.W. ONYANGO OTIENO
.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR