



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CIVIL APPLI NO. 318 OF 2007**

**NORTHERN CONSTRUCTION COMPANY LIMITED ..... APPLICANT**

**AND**

- 1. THE ATTORNEY GENERAL**
- 2. THE KENYA ANTI CORRUPTION COMMISSION**
- 3. THE CHIEF MAGISTRATE’S COURT, MAKADARA**
- 4. MOHAMED KORIOW NUR ..... RESPONDENTS**

**(An application for stay of the proceedings arising from the ruling and order of the High Court of Kenya at Nairobi (Lady Justice Wendoh) dated 20<sup>th</sup> November, 2007**

**in**

**MISC. CIV. APPLI. NO. 800 OF 2007**

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**RULING OF THE COURT**

This is an application under **rule 5 (2) (b)** of the Court of Appeal rules for an order:

**“(a) .....**

**(b) That all proceedings in Nairobi High Court Miscellaneous Civil Application Number 800 of 2007 subsequent to the ruling and orders made on 20<sup>th</sup> November, 2007 be stayed pending the hearing and determination of the applicant’s appeal against the said decision and orders”.**

The background to the application is briefly as follows: Sometime in the year 2007, the Kenya Anti-Corruption Commission (KACC) started investigations into an alleged illegal allocation of L.R. No. 209/16441 allegedly belonging to Race Course Primary School by the Commissioner of Lands to **Dakane Abdulahi Ali**, a director of the applicant (Allotee). In the course of investigations KACC alleged that **Mohamed Koriow Nur**, (4<sup>th</sup> respondent), also a director of the applicant company gave various monies to Jeremiah Buchianga, an investigator with KACC on 14<sup>th</sup> and 15<sup>th</sup> March, 2007 as an inducement to write a good report regarding the allocation of the property to the allotee. As a result, the 4<sup>th</sup> respondent was on or about 16<sup>th</sup> March, 2007 charged in *Criminal Case No. 17 of 2007* of Chief Magistrate’s court with

three counts of offering a benefit contrary to **section 39 (3) (b)** as read with **section 48 (1)** of the *Anti Corruption and Economic Crimes Act – No. 3 of 2003*. Apparently, the 4<sup>th</sup> respondent pleaded not guilty and the case was fixed for hearing. Subsequently on 22<sup>nd</sup> March, 2007 KACC filed a Civil Suit – *Miscellaneous Application No. 186 of 2007 (O.S.)* in the High Court seeking an order for the preservation of the L.R. No. 209/16441 and an order of injunction to restrain the allottee and the applicant herein from developing or disposing of the property. On 27<sup>th</sup> July, 2007, the respondent filed *Miscellaneous Civil Application No. 800 of 2007* in the High Court seeking leave to apply for an order of *certiorari* to quash the decision to charge him in *Criminal Case No. 17 of 2007*, an order of prohibition to restrain the Chief Magistrate’s Court from hearing the case and further order of prohibition to restrain the Attorney General and KACC from proceeding with the criminal case. The 4<sup>th</sup> respondent in addition sought an order that the grant of leave do operate as a stay of all the proceedings and motions in the criminal case pending the determination of the judicial review application.

Leave was granted forthwith, but the order of stay was not granted immediately. Subsequently on 16<sup>th</sup> August, 2007 the superior court (Osiero J.) granted the order of stay of criminal proceedings pending the determination of the judicial review application. Although the application for judicial review has not been included in the record of this application, the documents filed indicate that the application for judicial review was indeed filed and that Jeremiah Kaluma Buchianga filed a replying affidavit sworn on 14<sup>th</sup> August, 2007 in opposition to the application for judicial review. While the judicial review application was pending for hearing the applicant filed a notice of motion dated 16<sup>th</sup> October, 2007 in the superior court under **Order 53 Rules 3 (2) and 3 (4)** of the *Civil Procedure Rules (CPR)* for an order:

**“(1) That Northern Construction Company Limited be admitted to these proceedings as a person directly affected on account of pleadings filed by the 2<sup>nd</sup> respondent”**. (i.e. by KACC). (Bracketed words our own).

The basis of the application was that the applicant had been adversely mentioned by KACC in the replying affidavit sworn by Jeremiah Kaluma Buchianga on 14<sup>th</sup> August, 2007.

The application was dismissed by the superior court (Wendoh J) on 20<sup>th</sup> November, 2007 in effect on the grounds that; the 4<sup>th</sup> respondent – a director and shareholder of the applicant did not deem the applicant as an affected party since he did not serve the notice of motion on the applicant pursuant to **Rule 3 (2)** of **Order 53 CPR**; that under **order 53 rule 6**, the court can only hear an interested person in opposition to the application but not in support of the application as the applicant intended to do; that the applicant was not a proper person to be joined as it was not a co-accused in the criminal case nor had it shown how it would be affected either by the decision in the criminal case or in the judicial review application; and lastly, that, KACC did not in its replying affidavit accuse the applicant of the commission of the criminal offence or allege that the 4<sup>th</sup> respondent committed the offence as the agent of the applicant.

The applicant being aggrieved by the decision of the superior court filed a notice of appeal on 28<sup>th</sup> November, 2007.

The principles upon which this Court exercises its original and unfettered discretion under **Rule 5 (2) (b)** are well settled. An applicant is required to demonstrate, firstly, that the intended appeal or appeal is arguable, i.e. it is not frivolous, and secondly, that unless the order sought is granted, the appeal, if successful, would be rendered nugatory. (See *Githunguri vs. Jimba Credit corporation (No. 2)* [1988] KLR 838 and *J. K. Industries vs. Kenya Commercial Bank Ltd. & Another* [1987] KLR 506). To succeed an applicant must establish both aspects.

The applicant has enumerated in paragraphs 17 of the supporting affidavit the arguable issues it intends to raise in the appeal.

The applicant in essence intended to be joined in the judicial review application so that it could

support the application for, *inter alia*, an order of *certiorari* to quash the decision to prosecute one of its directors (4<sup>th</sup> respondent) on corruption charges in *Criminal Case No. 17 of 2007*. The supporting affidavit to the application for joinder of the applicant in the judicial review application sworn by Asha Abdullahi makes it clear that the applicant intended to participate and make representations in the judicial review application to clear its name against the alleged insinuation that the 4<sup>th</sup> respondent had engaged in corrupt and criminal activities on behalf of and for the benefit of the applicant. Indeed, Mr. Macharia, learned counsel for the applicant submitted before us that the applicant stands to suffer negative perception that it is corrupt, that is that, it illegally acquired the land and was also subverting the cause of justice if it is not allowed to participate in the judicial review application.

The superior court in essence found that the applicant had no *locus standi* – that is, sufficient interest in the judicial review proceedings. It is evident from the affidavits and documents filed in this Court and in the superior court that the applicant has not been charged with any criminal offence in respect of the alleged illegal allocation of L.R. No. 209/16441 to Dakane Abdullahi Ali and that the subject matter of the judicial review application is not the alleged illegal allocation of land. Rather, the subject matter of the judicial review, application are the corruption charges preferred against one of the applicant’s directors which charges are personal to Dakane Abdullahi Ali and distinct from the alleged illegal allocation of land. Moreover, Jeremiah Buchianga reiterates in the replying affidavit that the property alleged to have been acquired illegally is not registered in the name of the applicant. It seems that the applicant, quite erroneously, perceives the judicial review application as an ordinary suit in which the legality or otherwise of the allocation of the property would be determined. It is trite law that judicial review is concerned with the decision making process and not with the merits of any decision. It seems from the affidavits filed by the applicant that the matters that the applicant intended to raise in the judicial review application, if joined, are extraneous to the judicial review application.

In conclusion, the applicant not being either a co-accused in the criminal case No. 17 of 2007 or the allottee of L.R. No. 209/16441 has not demonstrated that the intended appeal is indeed arguable. That being our view, it is not necessary to consider whether the intended appeal would be rendered nugatory.

In the result, we dismiss the application with costs to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

**Dated and delivered at Nairobi this 29<sup>th</sup> day of February, 2008.**

**S. E. O. BOSIRE**

.....

**JUDGE OF APPEAL**

**E. O. O’KUBASU**

.....

**JUDGE OF APPEAL**

**E. M. GITHINJI**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**