IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLI NO. 284 OF 2007

ADOPT-A-LIGHT LTD…….APPLICANT

AND

THE CITY COUNCIL OF NAIROBI…..……....……RESPONDENT

(Being an application for stay of execution of certain resolutions and decisions of the respondent and injunction against certain actions of the respondent pending the hearing and determination of the intended appeal against the ruling of the High Court of Kenya

Nairobi (Wendoh, J) dated 2nd November, 2007

in

H.C.MISC. APPLICATION NO. 1110 OF 2007)

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RULING OF THE COURT

By a Chamber Summons dated 3rd October 2007 and lodged in the superior court Adopt-A-Light, the applicant before us, asked Wendoh, J for various orders the main ones being:-

" 1. An order of certiorari to remove into the High Court and quash the entire resolution passed by the City Council of Nairobi on the 3rd April 2007 affirming and approving the Policy on Private Public Partnership between the City Council of Nairobi and Advertising Companies on Advertising & Street Lighting.

4. An order of prohibition to prohibit the City Council of Nairobi from authorising by resolution or otherwise any other person or body to carry out, display and/or erect advertisements on any of the street lighting poles within the City of Nairobi in the areas allocated to the applicant pursuant to contracts entered with the City Council of Nairobi dated 28th March 2002 and 19th November 2002.

8. The grant of leave do operate as a stay of the decision of the respondent made on or about September 24, 2007 for the disconnection of power supply to the lighting poles managed by the applicant around the City of Nairobi hence the parties to revert to the status quo ante existing before such decision.

9. The grant of leave do operate as stay of the proceedings and award of Tender No. CCN/T/CE/2006/2006-2007."

Wendoh, J heard that application and by her ruling dated 2nd November, 2007 the learned Judge declined to grant leave to bring Judicial Review proceedings and directed the parties to the application to pursue first the matters between them which were already pending before various courts for determination of the issues which she, probably, thought were common to those then before her. She awarded costs to the respondent.

The applicant now comes before this Court under **Rule 5(2) (b)** of the Rules of this Court and it asks us for four main prayers, namely that:-

1. There be a stay of execution of the decision of the respondent, The City Council of Nairobi, made on or about September 24, 2007 for the disconnection of power supply to the lighting poles managed by the applicant around the City of Nairobi and the removal of light poles along Pumwani Road and the *status quo ante* existing before such decision be reverted to pending the hearing and determination of the intended appeal;

2. There be a stay of the proceedings and award of tender No.CCN/T/084/CE/2006/2006-2007 by the respondent pending the hearing and determination of the intended appeal;

3. There be a stay of the enforcement of any notices issued to the applicant's customers under the Physical Planning Act pending the hearing and determination of the intended appeal that;

4. There be a stay of implementation of the resolution passed by the City Council of Nairobi on the 3rd April 2007 affirming and approving the "Policy on Private Public Partnership between the City Council of Nairobi and Advertising Companies on Advertising & Street Lighting" pending the hearing and determination of the intended appeal;

and

5. There be a stay of execution of the decision of the Honourable Lady Justice Wendoh in H.C. Misc. Application No. 1110 of 2007 made on November 2, 2007 awarding costs to the respondent.

At the outset we think that, in essence, the applicant's application before Wendoh, J was dismissed and that being so there was really nothing in the orders of the superior court capable of being stayed save for payment of costs. See **Western College of Arts and Applied Sciences vs Oranga & Others [1976] KLR 63**.

Generally, in an application, for an order of injunction, such as this the Court can only grant such an order where an applicant has established before the Court, firstly, that the appeal intended to be filed is an arguable one, i.e. one which is not frivolous and secondly that if no order of an injunction is granted as requested, the success in the intended appeal would have been rendered nugatory. See **Githunguri vs Jimba Credit Corporation [1983] KLR 838** and **National Bank of Kenya Ltd vs Samcon Ltd [2003] KR 462.**

The draft Memorandum of Appeal annexed to the application encompasses not less than 14 grounds of appeal, the main ones being that the learned Judge erred in law in failing to appreciate that the legality or otherwise of the contract between the applicant and the respondent was a material fact on the question of grant of leave for the orders of Judicial Review and that it was misdirection on the part of the learned Judge to withhold jurisdiction over a matter on the ground that some other civil law remedies were available and had to be pursued first.

We have considered the persuasive and vigorous submissions canvassed before us by Mr Ongoya for the applicant along with the total of the material placed before us and all we can say at this stage is that we are satisfied that the intended appeal is arguable and not frivolous at all. This view was, indeed, with

respect and correctly so conceded to by Mr Adan counsel for the respondent.

The second point we have to consider is whether the appeal will be rendered nugatory unless an injunction is granted. The applicant avers that there is real and present danger that if the respondent continues implementing the decisions challenged, there is going to be massive job losses a matter it contends, is against public policy. Further, the applicant fears that the implementation of the impugned decisions will negatively impact on street lighting in the City of Nairobi and its environs and hence occasion a major set back in terms of lack of security on the roads and in the slums resulting in increased road carnage. It further fears that the beauty of the City will negatively be impacted before the intended appeal is heard and determined.

We would commend the applicant for its inherent goodness and humanism towards the welfare of the citizens of this seemingly chaotic City. However, the respondent thinks that this should not be the sole responsibility of the applicant and that these are not matters that should be considered in such an application as this. The applicant has further submitted that it has invested over Kshs. 500,000,000/- in the whole street lighting and advertisement project and that there is a perceived danger that its massive investment may go to waste unless the orders sought are granted. It is apparent that the applicant's fear lies in perceived damages which we think are capable of being quantified.

However, it has not been shown to us that the respondent if found liable would not be able to pay or honour the resultant money decree. In other words, it has not been shown that the respondent is or will be impecunious. We were also not told that the decisions and resolutions of the respondent are irreversible if the Court were to find for the applicant.

Moreover, we think that the applicant is not entirely without a remedy or some protection from the perceived damages in view of the orders granted to it on 26th November 2007 by the superior Court in HC.C.C No. 637 of 2006 (Commercial and Tax Division).

In the result we would agree with Mr Adan that this application has no merit and must fail. Accordingly we order that the application be and is hereby dismissed with the costs thereof to the respondent.

Dated and delivered at Nairobi this 8th day of February 2008.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O'KUBASU

……..

JUDGE OF APPEAL

J.W. ONYANGO OTIENO

…….……

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR