



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLI NO. 255 OF 2007

DAKANE ABDULLAHI ALI APPLICANT

AND

KENYA ANTI CORRUPTION COMMISSION 1ST RESPONDENT

JUDITH MARILYN OKUNGU 2ND RESPONDENT

NORTHERN CONSTRUCTION CO. LTD..... 3RD RESPONDENT

(Application for stay of further proceedings of the High Court of Kenya

Nairobi (Visram, J.)

dated 16th October, 2007

in

H.C.MISC.CIVIL APPLICATION NO. 186 OF 2007)

RULING OF THE COURT

Dakane Abdullahi Ali, the applicant, has moved this Court under *rule 5(2)(b)* of the Court of Appeal Rules, principally for an order that the proceedings in *High Court Miscellaneous Civil Application No. 186 of 2007* allegedly pending before the superior court, “*or any other proceedings between the parties herein*” be stayed pending the hearing and final determination of his intended appeal.

The applicant’s intended appeal is against the decision of Visram, J. dated *16th October, 2007*. The subject matter of proceedings before Visram J. is land known as *LR. No. 209/16441 I.R. 100691*, situated in Nairobi. *Kenya Anti Corruption Commission (the Commission)* the 1st respondent, alleged in the above proceedings that the land had been allotted to the City Council of Nairobi for the benefit of Racecourse Primary School, a public educational institution. It is averred in a supporting affidavit to those proceedings that *Judith Marilyn Okungu*, the 2nd respondent, who was then Commissioner of Lands, corruptly used her office and allotted the land to the 2nd respondent. Her action, it is alleged, was an economic crime which entitled the 1st respondent to approach the superior court under *Section 56* of the *Anti-Corruption and Economic Crimes Act, No. 3 of 2003*, for an order preserving the property.

The 1st respondent approached the superior court by way of an Originating Motion, and in that motion only **section 56**, aforesaid is cited as the enabling provision. The motion was heard ex parte on 23rd March, 2007 and the superior court granted a preservation order to remain in force for six months from that date.

Section 56, above, provides as follows:-

“On an ex-parte application by the commission, the High Court may make an order prohibiting the transfer or disposal of or either dealing with property on evidence that the property was acquired as a result of corrupt conduct.”

On the basis of the wording of that section the applicant and **Northern Construction Company Ltd.** who were the 2nd and 3rd respondents respectively, in the ex parte application, took out a motion on notice seeking two main orders; firstly, that the name of the 3rd respondent be struck out from the proceedings before that court and secondly, that “*the Originating Summons*” (sic) dated 21st March, 2007 be struck out with costs to the 2nd and 3rd respondents. Several grounds were proffered in support thereof, among them, that the originating motion has no basis in law; there was non-compliance with the provisions of **Section 56**; the High Court had no jurisdiction in law to issue an ex parte prohibiting order solely on the basis of issues raised in the Originating Motion; the joinder of 2nd respondent who had no dealings and relationship with the suit property was mala fide ab initio which joinder was a gross abuse of the court process and that there was neither evidential nor legal basis for the proceedings.

In his submissions before the superior court, Mr. Ahmed Nassir Abdullahi, restricted himself to four broad issues. Firstly, whether the Originating Motion was a suit, and if not whether that court had jurisdiction to issue a prohibitory order by way of injunction. Secondly, whether first respondent in the Originating Motion was sued in her official or private capacity and if in her official capacity, whether the requisite notices had been served prior to commencing the proceedings. Thirdly, whether **Section 7(1)(h)** of the Act, creates a condition precedent before proceedings are commenced under **section 56**. Lastly, whether **Sections 8** and **136** of the Government Lands Act, and **Section 3A** of the Government Proceedings Act invalidated the proceedings. These also, are mainly the issues he ventilated before us. In addition he submitted that Visram J. having earlier ruled that certain issues raised in the applicant’s notice of motion needed viva voce evidence, erred in making a determination of those issues without viva voce evidence.

Visram J dismissed that application, and in doing so he held, among other things, that the second respondent was sued in her private capacity and that determination of the motion could only be based, principally on law and procedure, as many of the issues which were raised in the application needed *viva voce* evidence. Besides, the learned Judge held that **section 56**, aforesaid was independent of **section 7 (1) (h)** of the same Act and created a new procedure which entails that the Commission can originate proceedings under that *section* and obtain *ex parte* injunctive orders on the strength of that application without the filing of a substantive suit. He also held that although the 2nd respondent was at the material time of the application a public servant the proceedings against her could not be regarded as proceedings against the government.

The applicant was dissatisfied with the decision and accordingly filed a notice of appeal dated 16th October, 2007 declaring his intention of appealing against the whole of the decision. It was on the basis of that notice of appeal that the application before us was filed.

The jurisdiction of this Court in applications of the nature as the one before us is donated by **rule 5(2) (b)** of the Court of Appeal Rules. The jurisdiction is original and discretionary. The discretion the court exercises is judicial and like all judicial discretionary jurisdictions it is exercised on the basis of evidence and sound legal principles. In exercise of that discretion two principles guide the court. Firstly, for an applicant to succeed he is obliged to show that his appeal or intended appeal is arguable, or differently put that it is not frivolous. Secondly, that unless he is granted a stay or injunction as the case may be his appeal or intended appeal if successful will be rendered nugatory. These principles are now well settled.

The appellant's intended appeal arises from an order of the superior court whose life it would appear is spent. The applicant by his application to the superior court dated 29th March, 2007, was seeking among other orders, an order vacating the *ex parte* order of that court made on 23rd March, 2007. The *ex parte* order was to remain in force for six months from that date with liberty to the Commission in whose favour it was made, to apply for the extension of its life. No application had been made for the extension of the order. When this application was argued before us, Mr. Kimani for the Commission intimated that he intended to file that application but whether or not he will eventually do so is a matter of conjecture as there was no explanation given for the delay in filing it. The preservation order is said to have lapsed on 22nd September, 2007, over one and half months before the application before us was argued.

Mr. Ahmed Nassir Abdullahi, in reply, tried to clarify that the applicant was not concerned with stay of proceedings regarding the preservation order, but the entire proceedings relating to the suit property.

Section 56, aforesaid does not state what should happen after an application to discharge or vary a preservation order has been dismissed as happened in this case. It would appear to us that the absence of clear provisions in that regard was the basis for Mr. Abdullahi's submission that **section 56** should be read with **section 7(1)(h)(i)** which provides that:

"7(1) The Commission shall have the following functions:-

(a) -----

(b) to investigate the extent of liability for the loss of or damage to any public property and –

(c) (i) to institute civil proceedings against any person for the recovery of such property or for compensation;"

On the basis of this provision learned counsel submitted that a suit is a precondition to filing an application for a preservation order. *Prima facie* it is reasonable to conclude that an application under **section 56** should not precede an action for the recovery of property. A preservation order must of necessity be intended to preserve the property pending something, and in a case like this one, pending the determination of a pending action. In saying this we have not lost sight of the provisions of **OIV rule 1** of the Civil Procedure Rules, which provides, that:

"IV r 1. Every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be prescribed."

Nor have we lost sight of the definition in the Civil Procedure Act of the term "**Suit**", namely:

"..... all Civil proceedings commenced in any manner prescribed."

Mr. Kimani, for the Commission, citing some English and local authorities urged the view that since **Section 56** provides for the filing of an application, that was the manner prescribed and it should not be held to be improper. While we agree with him that in appropriate cases a statute may specifically provide for the mode of approaching the court, the court is obligated to give a purposeful interpretation of the section to give effect to the intention of the legislature. It is arguable in this matter whether Parliament intended, either that an application under **Section 56** precede the filing of a suit or otherwise, or whether it intended that an application under that section without more would suffice. If the last option were to be adopted it would, in our view, lead to an absurd result. A preservation order would remain in force indefinitely through repeated extensions and that will clearly be unjust to the person against whom the order was made.

Having come to the conclusion, that it is arguable whether Parliament intended that an application under **Section 56** precede the filing of recovery proceedings of designated property, we do not consider it necessary to consider the other arguments raised on behalf of the applicant. Those other issues go to the merits or otherwise of the intended appeal and we eschew any attempt to express an opinion on them as

doing so might encroach on the jurisdiction of the bench which will hear the said appeal. For purposes of an application under rule 5(2)(b) above, this Court has held time and again that one arguable point suffices.

The next point we need to consider is whether unless we grant the applicant a stay, his intended appeal, if successful, will be rendered nugatory. This matter is peculiar. We earlier stated that **Section 56**, does not state what action the Commission should take after the preservation order is made other than applying for the extension of the said order, at the expiry of the six months duration. We are aware that there are criminal proceedings pending against the applicant. It cannot be said that the preservation order was given to preserve the subject property pending the conclusion of those criminal proceedings. The wording of **Section 56** does not permit such a robust interpretation. Preservation orders are normally given in civil proceedings, and the application the Commission filed was of a civil rather than criminal nature. A preservation order is in the nature of an injunction to stop dealings in property, which is the subject matter of civil proceedings. So if there is no clear provision regarding the next step in the proceedings, the order might remain in force indefinitely through repeated extensions. The Commission has not demonstrated that it intends to file recovery proceedings. The criminal proceedings are not such proceedings, otherwise Parliament would not have enacted **Section 7(1)(h)(i)** to provide for the commencement of recovery civil proceedings.

The upshot of the foregoing is that there are no pending proceedings capable of being stayed. Besides, the Commission having not taken any steps to have the preservation order extended any application which might be filed hereafter as Mr. Kimani intimated in absence of any explanation for the delay in making the application, it might create the impression that its action in making the original application was in bad faith and an abuse of the process of the court unless of course the Commission comes up with a plausible explanation for the long delay.

In the result, this application fails, and is dismissed but with no order as to costs.

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

S.E.O. BOSIRE

.....

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