REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 10 OF 2007

OIL COM KENYA LIMITED .....APPELLANT

AND

THE PERMANENT SECRETARY

MINISTRY OF ROADS & PUBLIC WORKS .....1ST RESPODNENT

THE ATTORNEY GENERAL .....2ND RESPONDENT

(*Being an appeal from the Ruling and Order of High Court of Kenya at*

Nairobi (Wendoh, J.) dated 29th November, 2006

in

H.C.C. Misc. Appl. No. 701 of 2006

****

JUDGMENT OF THE COURT

The appellant herein ***Oilcom Kenya Limited,*** filed an application in the superior court dated 23rd October 2006 seeking leave to apply for Judicial Review orders in form of certiorari to quash the threat and decision of the respondents to demolish the appellant's property on plot *L.R. No. 17645/2* situated along Mombasa road within Mlolongo area, Mavoko Township where a petrol station had been constructed, and an order of prohibition to prohibit the Permanent Secretary Ministry of Public Works from demolishing the appellant's said petrol station. The appellant finally sought a prayer to the effect that the grant of such leave do operate as a stay.

The application was placed before the superior court on 23rd November 2006 for hearing ex-parte but the Judge (***Hon. Lady Justice Wendoh)*** ordered the appellant to serve it upon the other parties for hearing inter-partes. This was done and the application was heard inter-parties on 28th November 2006. The learned Judge heard and considered the matter and granted the appellant leave to file Judicial Review proceedings in terms of prayers 1 and 2 of the Chamber Summons aforesaid but declined to grant an order of stay as sought in prayer 3 of the same. In her ruling delivered on 29th November 2006, the learned Judge stated inter alia:-

"***Having considered all the above I do find that the applicant has demonstrated that they have an arguable case as they have a title to the land they have purchased. The court will grant leave to the***

applicant to bring Judicial Review Proceedings in terms of prayers 1, 2 of the chamber summons dated 23rd November 2006 (sic)

However, in view of the fact that it cannot be said with certainty that *L.R. 17645/2* ***is not part of*** *1504/7,* ***the issue that will be considered later at the hearing and the fact that the public interest of construction of a road will highly be prejudiced and the fact that the applicant can be compensated in damages , the court declines to grant an order of stay at this stage."***

Being aggrieved by this decision the appellant has lodged an appeal to this Court through a Memorandum of Appeal dated 26th January 2007 and filed in the Court registry on the same day. The Memorandum of Appeal listed 8 grounds of appeal as follows:-

1. the learned Judge exceeded her jurisdiction in converting an ex-parte application into an inter partes hearing contrary to *Order L 111 Rule 1(2)* ***of the Civil Procedure Rules***

2. The learned Judge erred in law in taking into account irrelevant factors that public interest can override private rights guaranteed under the law.

3. The learned Judge did not exercise her discretion judicially taking into consideration all circumstances surrounding the case and the fact that the application for judicial review would be rendered nugatory is successful.

4. The learned Judge misdirected herself in placing a lot of emphasis on the fact that the respondent can pay compensation to the applicant as a ground for countenancing the threatened illegality.

5. The learned Judge did not apply the correct test in declining to grant a stay and therefore erred in law.

6. The learned Judge did not consider that the 1st respondent could not demolish structures on appellants land without court or statutory sanction and therefore exercised her discretion perversely.

7. The learned Judge *(sic)* ***exercise of discretion in declining to grant stay was on the whole perverse and injudicious and the Court of Appeal has powers to interfere with the exercise of discretion in the circumstances.***

8. ***The learned Judge misdirected herself in law in taking into account the replying affidavit filed on behalf of the 1st respondent in proceedings that are prescribed as ex-parte proceedings***.

But before this appeal was filed, the appellant had made an application to this Court dated 4th December 2006 under Certificate of Urgency which sought an interim stay under ***rule 5(2)(b)*** and ***rule 42*** of the Court of Appeal Rules (the Rules); out of which a ruling was delivered by this Court on 22nd of December 2006 granting the order in terms of prayer 3 of the Notice of Motion dated 4th December 2006 which had sought

"***as against the 1st respondent a stay of demolition of the petrol station and all structures erected on*** *L.R. No. 17645/2* ***be granted pending hearing and final determination of a pending appeal from the order of Honourable Lady Justice Wendoh dated 29th November 2006 in*** *High Court Misc. Civil Application No. 701 of 2006* ***(Nairobi)".***

In this Court on 3rd July.2008 counsel for the parties addressed us on this appeal. Counsel for the appellant (***Mr. A. B. Shah leading Mr. Michael Mabea***) stated that the learned Judge was wrong in declining to grant stay after stating that the appellant had an arguable case. He stated that the plot in dispute *L.R. 17645/2* was bought by the applicant from National Social Security Fund for

Kshs.6,750,000/= and that since the purchase the appellant had obtained title to the plot and also sought and obtained authority to put up a petrol station thereon.

Counsel submitted that although the Ministry of Public Works had given to the general public a notification to remove all structures encroaching upon the A104 road reserve between Embakasi and Athi-River, a letter addressed to Messrs. Wetangula & Company Advocates by the Director of surveys and dated 12th July 2006 confirmed that parcel *L.R. No. 17645 (17645/2)* did not encroach on the road reserve as alleged and so was the conclusion in another letter dated 21st October 2006 by a different licensed surveyor, namely Digmap consultants.

Counsel submitted further that what was at stake was the maintenance of status quo since the superior court accepted the existence of a prima facie case and that since the Judge had given leave at the ex-parte stage she was bound to grant stay as well. According to him the 1st respondent has threatened to demolish the appellant's petrol station without compensation and yet no road construction had started; that although the property compulsorily acquired by the respondent was *L. R. No. 1504* which plot was far away from the appellant's plot now under threat of demolition. Counsel also stated that nowhere in the replying affidavit of the 1st respondent or the gazette notices was it shown that *L.R. No. 17645/2* was on the road reserve and that although the learned Judge found this to be the position she nevertheless declined to grant a stay

Counsel for the respondents (***Mr. Bosire***) opposed the appeal and submitted that a notice had been issued to all those who had put up structures on the road reserve; that in 1972 when the Government acquired the area now in dispute its reference number was *L.R. 1504/7* covering the corridor for dual carriage way 110m, dual corridor for service road and weighbridge expansion area (c) which is the area now in dispute. Counsel stated further that once the land was acquired for public utility it cannot be alienated.

According to him Title to *L.R. No. 17645/2* was irregularly obtained since the whole land number *1504/7* had been compulsorily acquired for the expansion of a weighbridge; hence the issue of compensation to the appellant for *L.R. 17645/2* does not arise. Counsel submitted that when the land was compulsorily acquired money for construction of the road was not available but that now it is available and the construction is on. He stated that the Judge exercised her discretion properly in granting some of the prayers in the application but refusing others and that this appeal should be dismissed with costs.

This disputed plot has a somewhat interesting history in that although according to counsel for the respondent plot number *17645/2* is part of *L.R. No. 1504/7* which was compulsorily acquired by the Government in 1972 as a road reserve or for other general public utilities including the expansion of the nearby weighbridge, His Excellency the President of the Republic of Kenya (Daniel Arap Moi then) granted a 99 years' lease over it to Makueni Holdings Limited from 1st June 1992 at a stand premium of Kshs.180,000/= and a yearly rent of Kshs.36,000/=.It is this company which sold the land to the National Social Security Fund which subdivided it into *L.R. 17645/1* and *17645/2*. The Fund sold to the appellant plot number *L. R. 17645/2* who have acquired title to it.

The proceedings subject of the present appeal commenced with a ***Miscellaneous Civil Application No. 701 of 2006*** in which the appellant took out a chamber summons stated to have been brought "***under the Law Reform Act Chapter 26 Laws of Kenya,*** *Order L111* ***of the Civil Procedure Rules and all other enabling provisions of Law"*** seeking the following orders from the superior court:-

"***1. That this Honourable Court be pleased to grant leave to the ex-parte applicant to apply for an order of certiorari to move into the High Court and to quash the decision and threats by the respondents to demolish the ex-parte applicant's property known as*** *L.R. 17645/2* ***situated along Mombasa Road within Mlolongo area, Mavoko Township and upon which the applicant has constructed a petrol station.***

2. That the Honourable Court be pleased to grant leave to the ex-parte applicant to apply for an order of prohibition directed to the Permanent Secretary Ministry of Roads and Public Works

prohibiting the said Ministry from demolishing the ex-parte applicant's aforesaid premises erected on the property known as** L.R. No. 17645/2 **situated along Mombasa Road within Mlolongo area Mavoko Township, upon which the ex-parte applicant has constructed a petrol station.

3. That grant of leave to apply for orders of prohibition and certiorari aforesaid do operate as a stay of the decision of the said Ministry of Roads and Public Works to demolish the premises erected on** L.R. No. 17645/2 **situated along Mombasa Road within Mlolongo area, Mavoko Township until the hearing and final determination of the application and certiorari.

4. That the costs of this application be provided for."

Order L111 under which the above application was made is headed "***JUDICIAL REVIEW"*** and provides as follows:-

"***1. (i) No application for an order of mandamus prohibition or certiorari shall be made unless leave therefore has been granted in accordance with this rule.***

(ii) An application for such leave as aforesaid shall be made ex-parte to a Judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavit verifying the facts relied on. The Judge may, in granting leave impose such terms as to costs and as to giving security as he thinks fit."

Sub paragraph 4 of the rule provides that:

"***The grant of leave under this rule to apply for an order of prohibition or an order of certiorari, shall, if the Judge so directs, operate as a stay of proceedings in question until the determination of the application, or until the Judge orders otherwise."***

As the Rule itself provides, the application for leave is supposed to proceed ex-parte and in our view the Judge has no discretion to conduct this application on inter-parties basis as the stage for inter-parte hearing comes under the main application by Notice of Motion filed under ***rule 3(1)*** of that order**,** see ***Republic v. Commissioner of Co-operatives*** **ex-parte Kirinyaga Tea Growers [1999] I EA 245.**

We have outlined what the learned Judge said when she declined to grant the order of stay as shown in paragraph 2 of this ruling. This is in fact the part of the ruling the appellant is aggrieved with. And as is apparent under ***Order L111 rule 1(3)*** of the Civil Procedure Rules, the order of stay is not automatic upon an order for leave to file judicial review proceedings being made. The Judge has to give specific direction on it.

However, the learned Judge having found that the appellants had an arguable case, they being the registered proprietors of the parcel in dispute; that the developments made thereon run into several millions of shillings, and that this is part of a larger plot whose lease was granted by His Excellency The President to Makueni Holdings Limited who sold it to National Social Security Fund, and as has been submitted by counsel for the respondent that the question of compensation does not arise, we are convinced this is an appropriate case where an order of stay should have been granted along with that for leave. In effect the learned Judge's own comment that:-

"***In view of the fact that it cannot be said with certainty that** L.R. No. 17645/2 **is not part of** 1504/7**, the issues that will be considered later at the hearing,"* **(**underling supplied)

went a long way to support the appellants that they had an arguable case.

In the circumstances, we allow this appeal and grant stay pursuant to prayer 3 of the application in the superior court and direct that the main application by Notice of Motion do proceed to hearing there on priority basis. However, in view of the circumstances of this case, we order that each party bear its/his own costs of this appeal.

Dated and delivered at Nairobi this 31st day of July, 2008.

P. K. TUNOI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR