



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civil Appli. Nai 12 of 2007 (UR. 10/2007)

REPUBLIC APPLICANT

AND

1. KENYA WILDLIFE SERVICE
2. THE PUBLIC PROCUREMENT COMPLAINTS
REVIEW AND APPEALS BOARD

3. MARA LANDMARK LIMITED RESPONDENTS

(Application for a temporary injunction and stay pending the determination of an intended appeal from the ruling and order of the High Court of Kenya at Nairobi (Lady Justice Aluoch) dated 28th December, 2006

in

MISC. CIVIL APPL. NO. 772 OF 2006)

RULING OF THE COURT

This is an application under **Rule 5 (2) (b)** of the Court of Appeal Rules for orders that:

“(a) The 1st respondent and the interested party be restrained from signing any lease in respect of the Meru Mulika and Fig Tree sites in Meru National Park, the subject matter of tender No. KWS/HQS/82/2005 – 2006 issued by the Kenya Wildlife Service and the subject of proceedings in High Court Miscellaneous Civil Application No. 772 of 2006 (“The Judicial Review Suit”) pending the determination of an intended appeal from the ruling and order of the High Court of Kenya at Nairobi (Lady Justice Aluoch dated 28th December, 2006.

(a)

(b)”.

The brief background to the application is as follows.

The first respondent **KENYA WILDLIFE SERVICE** (KWS) is a corporate body established under the provisions of

the Wildlife (*Conservation and Management*) Act, Cap 376 Laws of Kenya and is registered as lessee from the Government of Kenya of the land known as MERU NATIONAL PARK. On 11th October, 2006 KWS awarded tender No. KWS/HQS/82/2005-2006 to Mara Landmark Limited (Mara), the interested party herein, for the lease, development and management of Meru Mulika Lodge and Fig Tree tented camp both located on respective portions of the Meru National Park.

On 1st November, 2006 **TOURISM PROMOTION SERVICES LTD** (TPS), the applicant herein, filed an appeal (*Civil application No. 52 of 2006*) before The Public Procurement Complaints Review and Appeals Board (Appeals Board) against the decision of KWS. A preliminary objection was raised at the hearing of the appeal to the effect that as TPS had not tendered for the lease, it had no *locus standi* to file the appeal. The preliminary objection was upheld on 30th November, 2006 and the appeal was dismissed.

On 28th November, 2006, TPS filed an ex parte application in the High Court at Nairobi being *Miscellaneous Civil Application No. 772 of 2006* under certificate of urgency seeking ex parte, leave to apply for an order of certiorari to remove into the High Court and quash the decision of KWS to award the tender to Mara; an order of certiorari to remove into the High Court and quash the decision of the Appeals Board dated 30th November, 2006 declining to hear the substantive appeal; an order of prohibition to prohibit KWS from signing any contract in relation to the lease of Meru Mulika and Fig Tree Camp sites without giving formal notice to all participants in the three incomplete tender processes and an order of mandamus directed at KWS requiring KWS to re-tender for the award of the lease and management of Meru Mulika and Fig Tree sites in accordance with the provisions of the Public Procurement Regulations.

The applicants sought a concomitant order in the said application that:

“leave so granted by this Honourable Court for the Applicant to seek orders of certiorari, prohibition and mandamus do, operate as a stay of the proceedings in question, namely the signing and or implementation of any contract for the lease and management of Meru Mulika and Fig Tree sites, and of any operations thereunder, pending the hearing and determination of the judicial review proceedings”.

The ex parte application was heard by Aluoch J on the same day. The learned Judge granted leave to file the judicial review application but ordered that:

“The matter of stay be argued inter partes on 29th December, 2006 at 9.00 a.m.”.

The application for stay was however heard by Wendoh J and dismissed on 23rd January, 2007 on the ground that the court lacked jurisdiction to grant an order of stay after an order granting leave has been made. The learned Judge relied on ***R vs. Commissioner of Cooperatives and another*** [1999] 1 EA 245 and ***Shah & Another vs. Resident Magistrate Nairobi & Another*** [2000] 1 EA 208 for the principle that a judge must decide at the stage of granting leave whether or not such a grant shall act as a stay and has no power to separate the application for leave and the application that such leave should operate as a stay. On 24th January, 2007 the applicant filed a Notice of Appeal against the ruling of Aluoch J.

The present application was filed on 25th January, 2007. In the meantime, the applicant filed the substantive application for judicial review which application was fixed to come for mention for fixing a hearing date on 12th February, 2007.

The principles upon which this Court exercises its original jurisdiction to grant a stay of execution; stay of proceedings or an order of injunction under **rule 5 (2) (b)** Court of Appeal Rules are firmly established. The applicant in order to deserve an exercise of discretion in its/his favour should satisfy the court that the intended appeal or appeal is not frivolous, and that unless the application is granted, the intended appeal or appeal would be rendered nugatory.

As regards the first condition, the Notice of Appeal states that the applicant:

“intends to appeal to the Court of Appeal against such part of the said ruling and order as decides that the prayer for stay as sought by the applicant should be adjourned for hearing, inter partes on 29th December, 2006”.

In addition, the draft memorandum of appeal shows that the main ground of appeal is that the learned Judge erred, by separating the issuance of leave and that of stay to the detriment of the appellants.

Lastly, Damaris Angulu, the Company Secretary of the applicant, deposes in paragraph 15 of the supporting

affidavit that there are fundamental legal grounds to the challenge of the order of the superior court splitting the leave and stay portions of the application.

In view of the two decisions of this Court in **R vs. Commissioner of Cooperatives & Another** (supra) and **Shah & Another vs. Resident Magistrate Nairobi** (supra) relied on by Wendoh J, we would, with respect, readily agree that the point of law to be raised in the intended appeal is indeed arguable.

The second condition is fraught with difficulties. Damaris Angulu, deposes in paragraph 14 of the supporting affidavit that unless KWS and Mara are restrained from signing the lease of the two suit premises, the subject matter of the appeal will be overtaken by events and rendered academic and of no effect.

Both the application and the supporting affidavit show that the applicant is seeking an order of injunction to restrain KWS and Mara from signing any lease in respect of the two properties. Nevertheless, Mr. Monari, learned counsel for the applicant clarified at the hearing of the application that the application is not for an injunction but, for an order of stay of any further proceedings by KWS – a stay which restrains KWS and Mara from entering into a contractual relationship. He explained further, that the applicant is asking for an “*injunctive stay*” normally granted under **rule 5 (2) (b)** and not the stay given in judicial review proceedings.

In the first place, the relief which the applicant seeks, that is, “*injunctive stay*” is ambiguous. Secondly, it is conceded that an agreement for lease was in fact signed by KWS and Mara on 6th December, 2006 albeit the terms of the lease had not been agreed and the lease has not been executed or registered. Thirdly, the purpose of the appeal is to correct the procedural error committed by Aluoch J. Thus, if the intended appeal succeeds, the effect will be to order the hearing of the application that the leave do operate as a stay of the signing and implementation of any contract for the lease which application was not heard by Aluoch J.

The application was however, subsequently heard by Wendoh J. and dismissed on the ground that the court had no jurisdiction to entertain the application. The applicant’s counsel has intimated that the applicant does not intend to appeal against the ruling of Wendoh J. dismissing the application. It follows that the application that leave do operate as a stay has already been heard and determined and that unless the decision of Wendoh J. is set aside, the appeal, if successful will not be efficacious.

Moreover, it would appear to us that in the event that the appeal is allowed, the hearing of the application for stay long after the determination of the application for leave would be inconsistent with the decision of this Court in **R vs. Commissioner of Cooperatives & Another** and **Shah & Another vs. Resident Magistrate Nairobi** (supra). In addition, it seems to us that by the time the intended appeal is heard and determined, the substantive motion for judicial review which has already been filed will have already been determined thereby rendering the appeal ineffectual.

Lastly, it would appear to us that we have no jurisdiction to grant any order for injunction or stay in the terms sought or at all for the reason that Aluoch J. neither granted nor refused the application for stay. The superior court has not therefore ordered any of the parties to do anything or refrain from doing anything. There is therefore, no positive and enforceable order made by the superior court which can be the subject matter of the application for injunction or stay. Prima facie, the superior court has not ordered any party to sign the lease. The application for injunction or stay is apparently extraneous to the orders made by the superior court. (See **Western College of Arts & Applied Sciences vs. Oranga & Others** [1976] KLR 63.

For those reasons, the application has no merit. It is dismissed with costs to the two respondents and the interested party.

Dated and delivered at Nairobi this 15th day of February, 2007.

S. E. O. BOSIRE

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR