REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLI 303 OF 2006(UR 170/2006)

OILCOM KENYA LIMITED ……..... APPLICANT

AND

PERMANENT SECRETARY MINISTRY OF ROADS AND PUBLIC WORKS …. 1ST RESPONDENT

ATTORNEY GENERAL …….....…….....2ND RESPONDENT

(Application for injunction and or stay of execution of demolition of structures erected on LR No. 17645/2 pending hearing and final determination of an intended appeal from the order of (Hon. Lady Justice Wendo) dated 29th November, 2006 **In H.C.MISC.CIVIL APPLICATION NO. 701 OF 2006)**

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RULING OF THE COURT

This is an application by way of Notice of Motion brought under ***Rule 5(2)(b)*** and ***Rule 42*** of the Court of Appeal Rules (the Rules) in which the applicant, ***Oil Com Kenya Limited*** seeks the following orders:-

"***1. This application be certified as urgent and it be heard on a priority basis.***

2. That as against the 1st respondent an interim stay of demolition of petrol station and all structures erected on LR No.17645/2 be granted pending hearing and final determination of this application.

3. That as against the 1st respondent a stay of demolition of petrol station and all structures erected on LR No. 17645/2 be granted pending hearing and final determination of an intended appeal from the Order of Honourable Lady Justice Wendoh dated 29th November, 2006 in High Court Miscellaneous Civil Application No. 701 of 2006 (Nairobi.).

4. Costs be provided for."

The application is supported by the affidavit of ***Feisal M. Mohamed*** sworn on *30th November, 2006* and on the following grounds:-

"***1. The applicant has an arguable appeal; and;***

2. The intended appeal will be rendered nugatory unless a stay is granted.

We should state on the outset that the *Permanent Secretary Ministry of Roads and Public Works* is named as the *1st respondent* while *the Hon. Attorney General* is cited as the *2nd respondent*.

The genesis of this matter is High Court of Kenya Miscellaneous Civil Application No. 701 of 2006 in which the applicant herein took out a Chamber Summons stated to have been brought "*under the Law Reform Act Chapter 26 Order LIII 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 threat by the Respondents to demolish the Ex-parte Applicant's property known as L.R. No. 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 for Orders of Prohibition and Certiorari.

4. THAT the costs of this Application be provided for."

Briefly stated, the Chamber Summons dated *23rd October, 2006* was brought in the superior court under certificate of urgency in which the applicant, ***Oil Com Kenya Ltd.*** sought leave to apply for Judicial Review orders in form of certiorari to quash the threat and decision by the respondents to demolish the applicant's property ***LR 17645/2*** situated along Mombasa Road within Mlolongo area Mavoko township where there is constructed a petrol station. The applicant also sought orders of prohibition to prohibit the Permanent Secretary, Ministry of Public Works from demolishing the applicant's petrol station. The applicant finally sought a prayer to the effect that the grant of leave do operate as a stay.

When the applicant went to the superior court on *23rd November, 2006* the court ordered the applicant to serve the other parties. The application was then served on the other interested parties and the application was heard inter-partes although the application had been filed as an ex parte application. The learned Judge of the superior court (Wendoh, J) considered the matter and granted the applicant leave to file Judicial Review proceedings in terms of ***prayers 1 and 2*** of the Chamber Summons dated *23rd November 2006* but declined to grant an order of stay as per ***prayer 3*** of the *Chamber Summons*. 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 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 LR 17645/2 is not part of 1504/7, the issues that will be considered later at the hearing and the fact that the public interest of construction of a road will be highly 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 the foregoing, the applicant herein through its advocates, Machira & Company Advocates filed a Notice of Appeal dated *30th November, 2006* indicating its intention to appeal to this Court against part of the said ruling. It is pursuant to the notice of appeal that this application was brought under ***rule 5(2) (b)*** of this Court's Rules which provides.

"***(2) Subject to the provisions of sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution as an injunction or stay of any proceedings but the Court may –***

(b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 74 order a stay of execution; or an injunction or stay of further proceedings on such terms as the Court may think just."

When this matter came up for hearing before us on *13th December, 2006*, Mr. S. Mwenesi with Mr. A. Aden appeared for the applicant while Mr. P.O. Bosire appeared for the respondent.

Mr. Mwenesi submitted that the learned Judge misdirected herself when she refused to grant a stay *(i.e. the granting of leave to operate as a stay)* when she had acknowledged in her ruling that the applicant had the title to the plot in dispute. Mr. Mwenesi gave a brief history to this matter stating that the Minister for Public Works had given notice to remove structures encroaching on the road and that the applicant's plot was not included in the advertisement notice issued by the Minister. Mr. Mwenesi went on to submit that his client's plot situate along Mombasa Road consisted of a petrol station and offices. There were petrol tanks containing 200,000 litres of petrol. He further submitted that if a stay was not granted then the demotion would proceed which would render the intended appeal nugatory. He argued that he had established an arguable point especially in view of the fact that ***Order LIII*** of the ***Civil Procedure Rules*** provides that application be made ex parte and yet in this matter the learned Judge ordered for inter partes hearing at the leave stage.

In his submission, Mr. Bosire argued that the learned Judge was exercising a discretion and that the superior court considered public interest vis-à-vis private interest. He was of the view that the Judge's discretion was unfettered and that she exercised the same properly and gave reasons. It was Mr. Bosire's contention that an arguable case had not been made since the applicant can be compensated.

As already stated at the commencement of this ruling, the application before us was brought pursuant to ***rule 5(2)(b)*** of this Court's Rules. The jurisdiction exercisable by this Court under ***rule 5(2)(b)*** is now settled. It is original and discretionary. For the applicant to succeed, it must satisfy the twin guiding principles that the intended appeal is arguable, that is that it is not frivolous and that unless a stay or injunction is granted the appeal or intended appeal, if successful would be rendered nugatory – see ***GITHUNGURI V. JIMBA CREDIT CORPORATION LTD (No. 2) [1988] 838; J.K. INDUSTRIES LTD V. KENYA COMMERCIAL BANK LTD [1982-88] 1 KAR 1688*** and ***RELIANCE BANK LTD (IN LIQUIDATION) V. NORLAKE INVESTMENTS LIMITED – Civil Application No. 98 of 2002*** (unreported).

In this application, several points were raised as arguable points when the intended appeal comes up for hearing. For example, it was argued that the learned Judge erred when she ordered inter partes hearing at the leave stage. It was further argued that the property of the applicant was not part of the land mentioned in the Minister's notice. This was fortified by a letter from the Director of Surveys. Since we are not hearing the main appeal we must exercise caution in this ruling lest we touch on matters which are the preserve of the bench that will hear the main appeal. However, a few observations are necessary on issues which are not really contentious.

Order LIII rule 1(1) and ***(2)*** under which the Chamber Summons in the superior court was filed provides:-

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

(2) 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 affidavits 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."***

(emphasis provided)

From the foregoing it is clear that the application for leave has to be made ex parte. The learned Judge appreciated as much when in her ruling she stated inter alia:-

"***On 23rd November, 2006 when the applicant came to court, the Court ordered that the applicant serves the other parties so that the court can consider this application inter partes although this application is normally heard ex parte. The court took into account the urgency and seriousness of the matter and ordered it heard inter partes."***

It is arguable whether the superior court had discretion to order for inter partes hearing when the rules provide that the application shall be made ex parte.

The other point to be considered is whether the applicant's property was part of the area which was to be demolished. It was argued that the applicant had title to this properly. This cannot be disputed as can be seen from pages *102-105* of the record. This was also acknowledged by the learned Judge who made a finding that the applicant had a title to the suit land. The history of this property is that it was transferred to Kingwani Investments Limited and then to the Board of Trustees National Security Fund who subsequently transferred it to the applicant vide a sale agreement dated *25th October, 2005*.

It was also argued that the applicant's property did not encroach onto Mombasa road. It would appear that what had been gazetted for compulsory acquisition was *L.R. No. 1504/7*. But the applicant's property is *L.R. NO. 17645/2*. The applicant's advocates appear to have taken precaution by ensuring that their client's property was not part of what was to be demolished by the Minister's order and for that reason they made enquiries to the relevant Ministry. In a letter dated *1st August, 2006* addressed to the applicant's advocates the Ag. Director of Surveys states:-

"**VERIFICATION OF LAND REFERENCE L.R. NO. 17645/2**

– MAVOKO MINICIPALITY

Please reef to your letter *GEN/2006 of 1st August, 2006*.

Please note that the last paragraph of my letter reference ***ACI/Vol.5/31*** of *12th July, 2006* was self-explanatory summary of my letter under reference.

As a matter of clarity I confirm that parcel *L.R. No. 17645/2* does not encroach in any way to Mombasa road reserve in question.

E.M. MURAGE

For: Ag. DIRECTOR OF SURVEYS"

From the foregoing, it would appear that prima facie the applicant's plot "***does not encroach in any way to Mombasa road reserve"*** and consequently cannot be the subject of demolition taking place in Mlolongo Area.

We think we have said enough to show that the applicant's intended appeal will raise very serious issues.

What of the nugatory aspect of this matter. If stay is not granted the applicant's property with the underground tanks containing 200,000 litres of petrol will be demolished by the time the appeal comes up for hearing and should the applicant succeed such success would be rendered nugatory as there will be nothing to be salvaged.

In view of the foregoing, we are satisfied that the applicant has placed before this Court sufficient material to warrant the granting of the orders prayed for in this application. We must make it absolutely clear that this ruling relates only to the applicant's property which is ***L.R. NO. 17645/2***.

We therefore grant a stay in terms of ***prayer 3*** of the Notice of Motion dated *4th December, 2006*. Costs of the motion to be in the intended appeal.

Dated and delivered at Nairobi this 22nd day of December, 2006.

E.O. O'KUBASU

……**……**

JUDGE OF APPEAL

J.W. ONYANGO OTIENO

…….

JUDGE OF APPEAL

W.S. DEVERELL

……

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR