



Western v Pasha

Court of Appeal, at Nairobi September 7, 2000

Gicheru, Bosire & O’Kubasu JJ A

Civil Application No NAI 254 of 2000

(An application for an injunction in an intended appeal from a ruling of the High Court of Kenya at Nairobi (Khamoni J) dated 16th August, 2000 in HCCS No 1199 of 2000)

Environmental law - conservation agreement - application to enforce a conservation agreement which has been breached - consideration by court.

Injunction - interim injunction - to enforce a conservation agreement not to carry out mining - matters the court will consider.

The applicant filed an application under rule 5 (2) (b) of the Court of Appeal Rules for an interim injunction restraining the respondent from carrying on any mining activities on, among other property, a parcel of land known as Kajiado/Ole Kasasa/593, pending the determination of the intended appeal.

The applicant’s suit before the Superior Court was based on a written agreement executed by both parties in which the respondent, the registered owner of the parcels of land, agreed to preserve the land and to ensure no mining activity was carried out. However, in breach, it was averred, he had permitted mining activity to be carried out.

It was contended for the respondent that because the subject property of the conservation agreement was not demarcated on the ground, it was not possible to say whether there was breach, even though it was admitted

that some mining was going on.

Held:

1. In an application under rule 5(2)(b) of the Court of Appeal Rules, the court is guided by two basic principles:

a) The applicant must show that his appeal or intended appeal is arguable, and;

b) Unless an injunction or stay as the case may be is granted, his appeal or intended appeal will be rendered nugatory.

2. Prima facie, there was no clear record to show whether or not the applicant's application before the High Court was argued. Therefore, the applicant had an arguable appeal.

3. In view of the admission that some mining activity was going on and considering that the activity might spread to the area covered by the agreement, unless a stay was granted, the appellant's appeal may be rendered nugatory.

Application granted.

Cases

No cases referred to.

Statutes

1. Court of Appeal Rules (cap 9 Sub Leg) rule 5 (2)(b)

2. Civil Procedure Rules (cap 21 Sub Leg) order XXXIX rule 1

Advocates

Mr Quadros for the Applicant

Mr Agina for the Respondent

September 7, 2000, the following Ruling of the Court was delivered.

This is an application under rule 5(2)(5) of The Court of Appeal Rules

(The Rules) by David Western, a Wildlife Conservationist, for an interim injunction restraining Ishmael Kokayia Pasha, the respondent, his agents,

servants or any other person acting on his behalf from carrying on any mining activities on among other property a parcel of land known as Kajiado/Ole Kasasi/593, pending the determination of an intended appeal against the ruling and order of Khamoni J given on 16th August 2000 whereby he declined to grant an interim injunction in favour of the applicant as plaintiff in High Court Civil Case No 1199 of 2000.

In an application under rule 5(2)(b) of the Rules the Court is guided by two basic principles, the first being that the applicant must show that his appeal or intended appeal is arguable, and, second, that unless an injunction or stay as the case may be, is granted his appeal or intended appeal will be rendered nugatory.

The applicant's suit before the superior court is based on a written agreement which was duly executed by both parties herein in which the respondent, as the registered owner of the aforesaid parcels of land, agreed to preserve the same in their predominant condition, and in particular to ensure that no mining activity was carried out thereon. In his plaint which was filed in the Superior Court on 28th July, 2000, he avers, inter alia, that the respondent in breach of the aforesaid agreement has permitted the mining of building stones in part of parcel No Kajiado/Ole Kasasi/593, and prays that he be restrained from continuing to do so. Pending hearing and determination of the aforesaid suit the applicant moved the superior court by Chamber Summons under O 39 rule 1 of the Civil Procedure Rules for an interlocutory injunction with a view to preserving the status quo. That application was posted to come for hearing before Khamoni J who when the application was called, indicated that he was minded to grant the orders sought. However, after asking a few explanatory questions he changed his mind and without hearing either party on the merits of the application, proceeded to give his ruling declining to grant the injunction.

The applicant now laments that his application was perfunctorily dismissed, that he should have but was not granted any opportunity of arguing it before the trial court and that had he been granted the opportunity of doing so, he would have demonstrated that indeed the respondent has breached the conservation agreement. On that ground his counsel Ms Quadros submitted before us that his intended appeal is arguable and that unless we grant the interim injunction the intended appeal will be rendered nugatory, as the vegetation on the suit land is likely to be irretrievably destroyed.

Mr Agina for the respondent urged the view that because the subject property of the conservation agreement is not demarcated on the ground it may not be possible to say whether or not there has been breach of the agreement.

We have looked at the proceedings of the court below and prima facie, there is no clear record to show whether or not the applicant's application before that court was argued. We are therefore of the view that the applicant's intended appeal is arguable. Mr Agina conceded that some mining activity is going on on parcel No Kajiado/Ole Kasasi/593, but denied the activity is on the portion which is included in the conservation agreement. In view of that admission and considering that the activity might inadvertently or otherwise extend to the area covered by the said agreement we are of the view that unless we grant the injunction, the appellant's appeal may be rendered nugatory.

In the result, we allow the applicant's application dated 28th August 2000, and grant order in terms of the prayers in the application. The costs of the application to be in the intended appeal.