



Tullow Oil Plc & 3 others v PS, Ministry of Energy & 15 others (Civil Application 1 of 2020) [2020] KESC 49 (KLR) (30 April 2020) (Ruling)

Tullow Oil PLC & 3 others v PS Ministry of Energy & 15 others [2020] eKLR

Neutral citation: [2020] KESC 49 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
CIVIL APPLICATION 1 OF 2020**

PM MWILU, DCJ & V-P, MK IBRAHIM, SC WANJALA, NS NDUNGU & I LENAOLA, SCJJ

APRIL 30, 2020

BETWEEN

**TULLOW OIL PLC 1ST APPLICANT
AFRICA OIL TURKANA LTD 2ND APPLICANT
AFRICA OIL KENYA BV 3RD APPLICANT
ANGUS MCCOSS 4TH APPLICANT**

AND

**PS, MINISTRY OF ENERGY 1ST RESPONDENT
MINISTER OF ENERGY KENYA 2ND RESPONDENT
DEVELOPMENT KENYA 3RD RESPONDENT
NATIONAL OIL CORPORATION OF KENYA 4TH RESPONDENT
MANAGEMENT AUTHORITY 5TH RESPONDENT
GEOTHERMAL DEVELOPMENT COMPANY 6TH RESPONDENT
CENTRIC ENERGY CORPORATION 7TH RESPONDENT
PLATFORM RESOURCES INC 8TH RESPONDENT
0903658 BC LTD 9TH RESPONDENT
ALEC EDWARD ROBINSON 10TH RESPONDENT
SUMMAYYA ATHMAN (MD NOCK 11TH RESPONDENT
PATRIC MWAURA NYOIKE 12TH RESPONDENT
EDWARD KINGS ONYANCHA MAINA 13TH RESPONDENT**



CORPORATION	14 TH RESPONDENT
INTERSTATE PETROLEUM CO LTD	15 TH RESPONDENT
MAOSA KENGARA MONENA	16 TH RESPONDENT

(Being an Application to recall, rectify, set aside, nullify and void the Ruling of Supreme Court delivered on 8th May 2019)

Supreme Court disallows an application to set aside orders for the withdrawal of a notice of appeal.

The main issue for determination was whether an interlocutory application which was about the filing of a notice of appeal could be made before a petition of appeal or reference had been filed at the Supreme Court. The Supreme Court held that the Supreme Court Rules 2020 amended the Supreme Court Rules 2011. Under rule 31 of the Supreme Court Rules 2020, an interlocutory application was incapable of being originated before a petition of appeal or reference was filed before the court. There was no petition of appeal filed in order to authenticate the substantive issues that the court would deal with later.

Reported by Beryl Ikamari

Civil Practice and Procedure - interlocutory application - procedural rule under which an application was made - where there was no rule of procedure which allowed the applicant to obtain the orders it sought - effect of failure to indicate the rule under which an application was made.

Civil Practice and Procedure - interlocutory application - filing of an interlocutory application at the Supreme Court - where a notice of appeal had effectively been struck out - whether an interlocutory application, which was about the filing of the notice of appeal, could be made before a petition of appeal or reference had been filed at the Supreme Court - Supreme Court Rules 2020, rule 31.

Brief facts

On May 8, 2019, the court allowed an application that sought orders that a notice of appeal dated August 8, 2016 be deemed as withdrawn or alternatively struck out. Thereafter, applicant sought orders for the setting aside and nullification of that ruling on various grounds including that it was *ultra vires* and obtained through fraud and misrepresentation. The respondents did not file a response to the application.

Issues

- i. What was the effect of failure to indicate the rule of procedure under which an application was made?
- ii. What was the effect of there being no specific rule in the Supreme Court Rules, which provided for the orders sought in an application?
- iii. Whether an interlocutory application which was about the filing of a notice of appeal could be made before a petition of appeal or reference had been filed at the Supreme Court.

Held

1. Where an application was unopposed and the court saw merit in it, the application should be allowed without much ado. However, the application before the court was fraught with all manner of difficulties.
2. A party approaching any court had to indicate with a measure of precision what procedure it was invoking in doing so. The applicant sought orders to recall, set aside, rescind, nullify and void the ruling issued on May 8, 2019 but it did not cite any rule in the Supreme Court Rules 2011. That was an anomaly. Additionally, no specific rule provided for the orders that the applicant sought.
3. The Supreme Court Rules 2020 amended the Supreme Court Rules 2011. Under rule 31 of the Supreme Court Rules 2020, an interlocutory application was incapable of being originated before a petition of appeal or reference was filed before the court. There was no petition of appeal filed in order to authenticate the substantive issues that the court would deal with later.



4. Considering that the court struck out the notice of appeal, its jurisdiction to handle the application was in question. The applicant failed to address that question on jurisdiction.
5. The application was scandalous and devoid of merit and granting it would only placate a dissatisfied litigant who misunderstood the real reason his notice of appeal was struck out.
6. Litigation, however painful, had to come to an end. The applicant was flogging a dead horse and he ought to busy himself with other ventures of use to him.

Application dismissed with no order as to costs.

Citations

Statutes

None referred to

Advocates

None mentioned

RULING

A. Introduction

1. On 8th May 2019, this Court delivered a Ruling in which we allowed a Notice of Motion dated 28th February 2018 by Tullow Oil PLC, Africa Oil Turkana Limited, African Oil Kenya Limited and Angus McCoss seeking orders that the present Applicant's Notice of Appeal dated 8th August 2016 be deemed as withdrawn and in the alternative that the same be struck out. In effect, we terminated the Applicant's attempt at filing an appeal before this Court.

B. The Application

2. Before us now is a Notice of Motion dated 13th January 2020 by the Applicant, who was the 16th Respondent in Eldoret C.A. No.376 of 2014, C.A. No.18 of 2015 and C.A. No.45 of 2015, as consolidated. The Motion is expressed to be brought under Sections 1A, 1B, 3A and 100 of the Civil Procedure Act, Cap.21, Section 3 of the Supreme Court Act as well as Articles 1,2, 3(1), 10, 19-23, 27, 40, 47, 48, 50, 156(6), 159(2) (d), 166(2)(c), 259 and 260 of the Constitution.
3. The Applicant prays that the Ruling aforesaid be "recalled, set aside, rescinded, nullified and voided ab initio" with attendant costs and in unnecessarily verbose and largely incoherent grounds set out in the body of the Motion, the Applicant has termed the Ruling ultra vires, reckless, inept, partisan, prejudicial, unethical and vexatious. He has also claimed that the same was obtained "at the behest of the incurable and irredeemable, deceitful and fraudulent concealment and misrepresentation of material facts ... peddled by ..." Counsel for Tullow Oil PLC. In addition, the Applicant has alleged that the Ruling contains patent accidental slip errors and mistakes. Numerous scandalous allegations are also made against both Counsel and his client, Tullow Oil PLC, which we consider wholly irrelevant in the determination of the Motion before us.
4. In his Affidavit in support of the Motion, the Applicant has largely dwelt on contested issues of fact leading to the stillborn attempt at filing his appeal and since those matters are irrelevant to any consideration of his Motion, we deem it unnecessary to reproduce them.
5. In any event, in his submissions filed on 25th February 2020, the Applicant, upon reproducing the dates pleadings were filed in the superior Courts below (in great detail) as well as dates for appearances by parties before those Courts and orders issued, has repeated the allegations of deceitful, fraudulent concealment and misrepresentation of material fact by Tullow Oil PLC and it's Counsel. All other



matters raised have absolutely no relevance to the determination of the Motion before us. They are with respect, a rumbling narration of facts and statutes that are difficult to comprehend and are of no use to us.

C. Response To The Application

6. From the record, although served, none of the Respondents to the Application have filed any replying affidavits nor submissions. The Deputy Registrar, having given them sufficient time to do so, placed the matter before the Hon. the Chief Justice for constitution of this Bench.

D. Analysis And Determination

7. In other circumstances, depending on its nature, where an application is unopposed, and the Court sees merit in it, then it should be granted without much ado. Not the present Motion as the same is fraught with all manner of difficulties.
8. Firstly, a party approaching any Court ought to indicate, with a measure of precision, what procedure it is invoking in doing so. In that regard, it is basic that the Civil Procedure Act, Cap.21 does not apply to proceedings before this Court and therefore setting aside of orders under that Act is an alien procedure to this Court.
9. Secondly, the Applicant seeks orders to recall, set aside, rescind, nullify and void the orders we issued on 8th May 2019. No specific rule contained in the Supreme Court Rules, 2011 has been cited in that regard. That anomaly notwithstanding, Rule 23 of the said Rules provides that “an interlocutory application to the Court shall be by Notice of Motion ... and shall be supported by an Affidavit.” and to that extent, we must address the Applicant’s Motion on its merits.
10. [10] Thirdly, the nature of an interlocutory application for example whether it be for an injunction, stay orders, or setting aside is not stated in the Rules but Rule 24 provides specifically for applications for grant of certification while Rule 25 for leave to join proceedings as an Interested Party. No specific Rule provides for the prayers the Applicant seeks.
11. We must at this stage note, in passing only that, the Supreme Court Rules 2020 have amended the 2011 Rules which were applicable when the present Application was filed and provide for example in Rule 31 that “an interlocutory application shall not be originated before a Petition of appeal or reference is filed before the Court.” We further note that in fact there is presently no Petition of Appeal before us to authenticate the substantive issues we may later deal with. We digress however.
12. With the above background in mind, do we have the jurisdiction to grant the orders sought by the Applicant? In answer to the question, it must be recalled that, what the Court previously did was to strike out the Appellant’s Notice of Appeal. The reasons for doing so are captured at paragraph 29 of our Ruling where we stated thus:

“In the present Application, we note [that] the Notice of Appeal was filed 8th August 2016 and the time for filing an appeal as of right lapsed on 7th September 2016. Up to date there is no appeal filed. The time for filing an appeal under Article 163(4)(b) lapses 30 days after the grant of certification. There is nothing on record to confirm that the 16th Respondent sought certification, and if the same was allowed, and when it was allowed. In a nutshell, it is our finding that the 16th Respondent has failed to provide sufficient grounds for his failure to file his appeal within the prescribed time. We are inclined to allow the application with costs to the Applicants.”



13. In his Motion, Supporting Affidavit and Submissions, the Applicant has completely failed to address the above issue. Instead, he has gone on a tangent to attack Tullow Oil PLC and its Counsel as having obtained the orders by fraud and concealment of, and misrepresentation of fact. Not one piece of credible evidence, save conjecture and speculation, has been produced to prove these very serious allegations.
14. Fourthly, while therefore there is no express provision in our Rules granting us the jurisdiction to set aside, rescind or annul our orders, even on the merits, the Application is so scandalous and devoid of any merit that to grant it would only placate a dissatisfied litigant who has misunderstood the real reason his Notice of Appeal was struck out.
15. Lastly, the Applicant must be told, without reservation, that he has hit the end of the road. Litigation, however painful, must come to an end. He is flogging a dead horse and he ought to busy himself with other ventures of use to him. In other words, his Application is one for dismissal but because it was not defended, we shall make no orders as to costs.

E. Disposition

17. For the above reasons, these are our final orders:
 - i) The Notice of Motion dated 13th January 2020 is hereby dismissed.
 - ii) There shall be no order as to costs.
18. It is so Ordered.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF APRIL, 2020.

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P. M. MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

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M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

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S. C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR



SUPREME COURT OF KENYA

