

IN THE COURT OF APPEAL
AT MOMBASA

(CORAM: ASIKE-MAKHANDIA, OMONDI & MUMBI NGUGI, JJ.A)

CIVIL APPEAL NO. E.12 OF 2021.

BETWEEN

KENYA PORTS AUTHORITY APPLICANT

AND

WILLIAM ODHIAMBO RAMAOGI 1ST RESPONDENT

ASHA MASHAKA OMAR 2ND RESPONDENT

GERALD LEWA KIT 3RD RESPONDENT

KENYA TRANSPORTERS ASSOCIATION 4TH RESPONDENT

THE HONORABLE ATTORNEY GENERAL 5TH RESPONDENT

CABINET SECRETARY

MINISTRY OF TRANSPORT & INFRASTRUCTURE 6TH RESPONDENT

KENYA RAILWAYS CORPORATION 7TH RESPONDENT

COMPETITION AUTHORITY OF KENYA 8TH RESPONDENT

MUSLIMS FOR HUMAN RIGHTS 9TH RESPONDENT

MAINA KIAI 10TH RESPONDENT

COUNTY GOVERNMENT OF MOMBASA 11TH RESPONDENT

*((An Appeal against the Judgment and Decree of the High Court of Kenya
at Mombasa (L. Achode, J. Ngugi, P. Nyamweya, E. Ogola & A. C.
Mrima, JJ) dated 6th November, 2020*

in

HC Petition No. 159 of 2018 consolidated with Petition No. 201 of 2019)

RULING OF THE COURT

The Notice of Motion Application dated 12th February, 2021 brought under certificate of urgency pursuant to **Rules 5 (2) (b)** of the court of appeal rules 2010 and supported by the affidavit dated 12th February, 2021, seeks:

(i) That there be a stay of execution of Order No. (c) & (d) of the judgment of the High Court delivered on 6th November, 2020 pending the hearing and determination of Mombasa Court of Appeal Civil Appeal No. E12 of 2021.

(ii) Costs in the cause.

A Replying Affidavit dated 1st March, 2021 is on record. The parties were directed to file written submissions for hearing on 28th July, 2021.

The 1st to 4th respondents filed two separate petitions which were later on consolidated. The petitions challenged various actions by the appellant and the 5th & 6th respondents alleged to have violated several provisions of the constitution.

By a judgment delivered on 6th November, 2020, the High Court dismissed most of the prayers in the consolidated petitions, but granted an order quashing the appellant's directives issued on 15th March, 2019 and 3rd August, 2019. The quashed directives operationalize the Take or Pay agreement and are also meant to ensure efficient and effective operations at the Port of Mombasa.

The order quashing the directives were suspended for 180 days to enable the appellant remedy the faults identified by the learned judges. The applicant, being aggrieved by the decision to quash the directives applied, vide a Notice of Motion dated 30th November, 2020, for stay of execution of the order. However, that application was refused by the High Court on 5th February, 2021, on the basis that the Court of Appeal is better placed to handle the application. The applicant has now

filed the appeal before this Court, and in the meantime sought the orders in this application.

The applicant's case is that the directives were issued in the exercise of its statutory power to manage and operate ports, and quashing them will significantly disrupt its management and operation of the port of Mombasa. It is contended that the directives support the National Government's wider transport policy, and their nullification will affect implementation of the said policy, starting from the port of Mombasa all the way to the ICD in Nairobi and Naivasha.

The applicant explains that the directives are meant to operationalize the take or pay agreement, which is a conduit for the loan for the construction of the SGR to be repaid and with the quashing order it will be impossible to meet repayment obligations leading to default.

Further, that public finances will be spent in complying with the orders given. The applicant is also apprehensive as to whether it would recover any funds paid out should the appeal succeed, saying that the 1st to 4th respondent's financial means is unknown and it is doubtful that they are capable of refunding the financial resources incurred in compliance of order **(d)** of the judgment.

It is argued that the issues to be canvassed on appeal are novel, complex and of significant public importance thus predisposing the same as an arguable appeal with

high chances of success. That in any event, any prejudice and/or loss suffered by the respondent is capable of monetary compensation.

The respondent's position is that the application lacks merit and is aimed at delaying justice for the 1st to 3rd respondents, pointing out that:

- a) The application is brought belatedly.*
- b) The Application does not raise arguable matters.*
- c) The Applicant will suffer no prejudice or loss if application is denied.*
- d) The Applicant ought to have carried out public participation before issuing the quashed directives.*
- e) The respondents will suffer prejudice if the stay is allowed, as their rights will be infringed upon.*

a) Whether the applicant has satisfied the requirements necessary for granting an order for stay of execution. In several past pronouncements, this Court has stated that the principles applicable whether dealing with an application for injunction, stay of execution or stay of proceedings, are the same. Indeed this Court in the case of **Ishmael Kagunyi Thande vs Housing Finance of Kenya Ltd Civil Application No 157 of 2006** on (unreported) stated that to succeed in an application made under **Rule 5 (2) (b)** the applicant must establish that: -

- (i) The Appeal is arguable,*
- (ii) The Appeal is likely to be rendered nugatory if the stay is not granted and Appeal succeeds.*

In the case of **Wasike vs Swala [1984] 591** this Court held that an arguable appeal is not one that would necessarily succeed but one that merits consideration by the court. Also, an arguable appeal is one that is not idle and/or frivolous.

Our perusal of the application, grounds and supporting affidavit herein raises the issue of violation of the Constitution and fair administrative procedures which in our view merits consideration by the court. As to whether or not the same will succeed is for the main appeal.

B. Will the appeal be rendered nugatory should the injunction not be granted? On the appeal being rendered nugatory, this Court has held in the case of **Reliance Bank Limited vs Norlake Investment Limited [2002]1 EA 227** that the factors which render an appeal nugatory are to be considered within the circumstances of each case and in so doing the court is bound to consider the conflicting claims of both sides.

In the case of **African Safari Club Limited vs Safe Rentals Limited, Nai Civ App 53/2010** this Court held:

“...with the above scenario of almost equal hardship by the parties, it is incumbent upon the court to pursue the overriding objective to act fairly and justly...to put the hardships of both parties on scale... we think that the balancing act is in keeping with one of the principles aims of the oxygen principle of treating both parties with equality or placing them on equal footing in so far as is practicable.”

In short, the court is to decide which party's hardship is greater. With that in mind, if the applicant's prayer for stay of execution is denied and the appeal eventually succeeds, there is the likelihood that the applicant cannot be adequately compensated by an award for damages. In addition, the directives that are quashed have a ripple effect on the transport sector that will cause difficulties in implementation of transport policies as well as impeding payments for the SGR loan.

The applicant has also raised the issue that significant public funds will be used in compliance with order No. (d) the impugned judgment and further that the financial means of the 1st to 4th respondents is unknown and should the appeal succeed, the appellant will be at pain to recover the public monies from the respondents.

In the case of **Africa Eco Camps vs Exclusive African Treasures Ltd [2014] e KLR** this court held ‘as was observed in **National Credit Bank vs Aquinas Francis Wasike and Another** – a legal duty is placed on the applicant to prove that it’s intended appeal will be rendered nugatory because the respondent will be unable to pay back the decretal sum should the applicant succeed on appeal. This requirement is however not absolute. It is qualified in that it is unreasonable to expect the applicant to know in detail the resources owned by a respondent or the lack of them. Once the applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden shifts to the respondent to show what resources he has to satisfy the decree should the appeal succeed as this is a matter likely to be peculiarly entirely within the respondent’s knowledge.

The respondent in response to the applicant’s apprehension has just shifted the burden to the applicant to prove that the respondent cannot pay, which goes against holding the above case. The respondent has not shown that he can refund the sources utilized in complying with the court order.

The respondent has also raised the issue that the applicant has delayed in bringing this application. We note that the applicant has addressed this stating that they had first gone to the superior court for stay orders, but the application was refused on the grounds that this court was best suited to determine the application, hence the application now before this court.

We hold and find that, the applicant has shown that indeed it has an arguable appeal and has also shown that its appeal would be rendered nugatory should the application fail. Having satisfied both limbs of the test in a **5 (2) (b)** application, this application be and is hereby allowed.

Dated and Delivered at Nairobi this 25th day of November, 2021.

M. ASIKE - MAKHANDIA

.....
JUDGE OF APPEAL
H. A. OMONDI

.....
JUDGE OF APPEAL
MUMBI NGUGI

.....
JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR