Kenya Airports Authority v Mitu-Bell Welfare Society & another (Civil Application 114 of 2013) [2014] KECA 444 (KLR) (18 July 2014) (Ruling)

Kenya Airports Authority v Mitu-Bell Welfare Society & Another [2014] eKLR

Neutral citation: [2014] KECA 444 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION 114 OF 2013

RN NAMBUYE, PO KIAGE & AK MURGOR, JJA

JULY 18, 2014

BETWEEN

KENYA AIRPORTS AUTHORITY ..... APPLICANT

AND

MITU-BELL WELFARE SOCIETY ..... 1ST RESPONDENT

THE HON. ATTORNEY GENERAL ..... 2ND RESPONDENT

(Application for stay of execution pending the hearing of the appeal against the judgment of the High Court of Kenya at Nairobi (Ngugi, J.) dated 11th April, 2013 **in** **HC. PETITION NO. 164 OF 2011)

RULING

1. By its motion dated 28th May 2014, Kenya Airports Authority (the applicant) seeks from this Court an order of stay of execution of the judgment and decree of the High Court (Ngugi J) made on 11 th April 2013 and any subsequent orders issued in its furtherance pending the final determination of an intended appeal.

2. The grounds on which the application is premised appear on its face and they include assertions that the applicant does have an arguable appeal with high chances of success, and that if the stay sought is not granted, the intended appeal would be rendered irrelevant, nugatory and academic.

3. The application is supported by the Affidavit of Eng. Stephen Gichuki, the applicant's Managing Director expressed as sworn on 28th May 2013. In it he details the chronology of events leading to the application before us. He also points out what the applicant perceives to be errors on the part of the learned Judge the effect of which is to render the applicant's intended appeal arguable. The deponent

then swears to the applicant's apprehension that absent a stay order, the applicant may be exposed to contempt of court proceedings at the High Court.

4. By way of opposition to the Motion, the 1st Respondent Mitu Bell-welfare Societyfiled an affidavit sworn by its Vice- Chairperson Ruth Isiavuka Onzereon 27th June 2013. The deponent avers that the application lacks merit and should be dismissed because it does not raise an arguable appeal. She also swears that the applicant, having failed or refused to comply with the impugned orders of the High Court, is not entitled to the relief sought, for it has not acted equitably.

5. At the hearing of the application, Mr. Gatonye, learned counsel appearing with Mr. Mutua sought to show the applicant as having an arguable appeal by first submitting that the learned Judge abdicated her decisional duties by delegating them to third parties who were never party to the proceedings. Counsel took serious issue with the learned Judge's order that placed upon the applicant the responsibility to settle landless Kenyans which is not part of its statutory mandate. He criticized the learned Judge for seeming to impose an obligation, not based on the law on land owners to settle persons who encroach upon private property. Counsel further asserted that the learned Judge's finding that it was the applicant who evicted the respondents was not based on any evidence. He also argued that the eviction had been preceded by earlier notices to vacate. He finally stated, in a bid to demonstrate that the applicant has an arguable appeal, that the learned Judge was patently wrong in requiring the applicant to account to persons who were not parties to the suit and with whom it had no relationship whatsoever.

6. Mr. Gatonye next turned to the second consideration about which the applicant must convince us before we can grant stay, namely that unless stay is granted the appeal may be rendered nugatory. He posited that the only land the applicant owns is airport land and so it would be absurd for persons to be settled on such land which is necessarily sensitive implicating the safety of the aviation industry. Such settlement, argued counsel, would hamstring the operations of the applicant which would be highly prejudicial to the public interest.

7. It was further contended that the applicant's chief officers faced a real and imminent danger of being cited and punished for contempt of the High Court's orders notwithstanding that the said orders were beyond the power of the applicant to execute. Mr. Gatonye concluded that the matter at hand is unprecedented and requires serious interrogation when the appeal is argued and it is therefore meet that execution be held in abeyance until the appeal is heard.

8. On his part, Mr. Kaimba, learned counsel for the Hon. Attorney General, the 1st respondent, indicated that the Attorney-General was not averse to the grant of stay of execution as prayed by the applicant. Counsel took issue with the learned Judge's handling of the case, in particular with the judgment which he stated did not bring finality or closure to the dispute but instead referred the applicants and the other parties before her to a different process. He otherwise fully associated himself with the sentiments expressed by Mr. Gatonye.

9. In opposing the application, Mr. Mongeri, learned counsel for the 1st respondent, argued that the motion before us was premature since the judgment challenged was declaratory in character and there was no danger of execution. On the question whether the appeal itself is arguable, Mr. Mongeri did not deny the fact, stating as follows:-

> "The appeal may or may not be arguable – it is not very important. What I am concerned with is the nugatory aspect."

10. Counsel maintained that the applicants had not demonstrated the nugatory aspect. He rested by stating that the application for stay is premature and unnecessary. He urged us to dismiss it.

11. In his rejoinder, Mr. Gatonye reiterated that the applicant did not wish to engage with and subject itself to Pamoja Trust who was a stranger to the litigation. Such a process of engagement as ordered by the learned Judge would be open-ended and defective. It would at any rate be ultra vires for being outside the applicant's narrow statutory mandate.

12. In further response, Mr. Mutua stated that the applicant could not file an affidavit questioning the High Court's direction as that would have invited contempt of court proceedings to the detriment of the applicant and its chief officers. He urged us to find that there was a sufficient basis for the granting of the prayers sought.

In order to succeed on an application brought under Rule (5) (2) (b) of the Rules of Court the applicant must satisfy two requirements, namely:-

(i) Demonstrate that it does have an appeal that is urguable, and

(ii) Show that such appeal would be rendered nugatory if an order of stay is not granted.

13. This Court has on occasions too many to mention reiterated these twin principles and expanded on their meanings. An arguable appeal is no more than one that raises a legitimate point or points deserving judicial determination. An appeal need not raise a multiplicity or any number of such points; a single arguable point is sufficient to earn an appeal such appellation. (See *Damji Pragji Mandavia v Sara Lee Houshold & Body Care (k) Ltd* Civil Application No. NAI345 OF 2005; *Silverstein v Chesoni*[2002] 1KLR 867. Moreover, an arguable point need not be one that will necessarily succeed when the appeal proper is heard, for it is not the function of the Court at the hearing of such an application to make final determinations on the points to be argued on appeal. (See *Joseph Gitahigachau& Anor v Pioneer Holdings (a) Ltd & 2 Others*civilapplicationno.124 of2008.

14. Having perused the motion and the supporting affidavit and heard learned counsel on the point, it seems to us quite clear that the applicant does have an arguable appeal including on the central point whether there does exist a legal duty on the applicant, State Corporation though it be, to resettle landless Kenyans when its statutory mandate lies in aviation and whether also, a land owner bears a burden to first obtain alternative land to resettle trespassers on its land before it can remove them from its land; and also whether it is appropriate for the learned Judge to have ordered the applicant to obtain policies and programmes for the provision of shelter and housing for marginalized groups and to engage in discussions towards resolution of the housing problem with entities who were not only not parties to the litigation such as Pamoja Trust, but also an amorphous groups and indeterminate civil society organizations.

15. It is also not lost to us that the first respondent did not deny the arguability of the applicant's appeal or assert that it was not arguable. Indeed, it essentially admitted its arguability.

16. An arguable appeal does not of itself unlock the Court's discretion to grant a stay. An applicant must establish the second limb, the nugatory aspect, for the two are properly conceived of as being twin principles and are, we dare add, inseparable. See *Githunguri v Jimba Credit Corp.ltd Nor* [1988] KLR 838; *Magnate Venturesltd v E.n.g, Kenya Limited*[2009] KLR 538. The nugatory limb is meant to obviate the spectre of a meritorious appeal, when successful, being rendered academic the apprehended harm, loss or prejudice having come to pass in the intervening period. Our stay of execution jurisdiction is meant to avoid such defeatist eventualities in deserving cases.

17. Notwithstanding what the first respondent urges to the contrary, it seems to us that the applicant stands to suffer loss, prejudice and harm unless stay orders are granted. It has been ordered by the High Court to undertake a programmatic exercise of research and stake- holder engagement in an area

way beyond and outside its statutory mandate and with persons and entities it has neither interest in nor connection with as it contends. What is more, it faces a real and imminent danger of having its chief officers cited and possibly punished for contempt of court for failing to do that which it says is outside its statutory remit. A doing of things outside its legitimate statutory sphere, and for which a corporation is ill-equipped, at pain of quasi-criminal proceedings and penal consequences, appears to us to fall squarely within what would go to render the applicant's appeal nugatory.

18. For these reasons we conclude that the application before us is merited and accordingly grant it in terms of prayer 1. The costs shall be in the intended appeal which, if not already filed, must be filed within the next thirty (30) days in default of which, the stay order shall automatically lapse.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF JULY 2014.

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGEOF APPEAL

I certify that this is a true copy of the original

DEPUTYREGISTRAR