



**National Government - CDF - Bumula v Merchandise Technology Logistics Limited & 2 others; Equity Bank Ltd (Interested Party) (Civil Appeal E105 of 2022) [2023] KEHC 431 (KLR) (24 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 431 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL APPEAL E105 OF 2022  
DK KEMEL, J  
JANUARY 24, 2023**

**BETWEEN**

**NATIONAL GOVERNMENT - CDF - BUMULA ..... APPELLANT**

**AND**

**MERCHANDISE TECHNOLOGY LOGISTICS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**SECRETARY BOARD OF MANAGEMENT ST JUDE MUANDA SECONDARY SCHOOL ..... 2<sup>ND</sup> RESPONDENT**

**BOM ST JUDE ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**EQUITY BANK LTD ..... INTERESTED PARTY**

**RULING**

1. Vide a notice of motion application dated October 28, 2022 brought under certificate of urgency, the appellant/applicant seeks the following prayers;
  - a. Spent.
  - b. Spent
  - c. That the honourable court be pleased to stay the execution of order nisi dated June 8, 2022, Order absolute dated June 16, 2022 and order issued on October 25, 2022 pending the hearing and determination of the appeal.
  - d. Other orders or directions as may appear to this court and convenient to grant.
  - e. The respondents do pay costs of the application.



2. The application is premised on the grounds on the face of the motion and the sworn affidavit of Philip Simiyu and a further affidavit sworn on November 17, 2022 wherein he deponed inter alia; that he is the applicants fund account manager; that they were shocked to learn of the orders issued on October 25, 2022 directing the applicant to pay the sum of Kshs 7, 397,626/- to the 1<sup>st</sup> respondent; that the orders were made without the applicant's notice and or participation; that on October 14, 2022, the court dismissed the applicant's application and stayed the execution of the orders of June 16, 2022; that the applicant is a government entity and there was no need for security for costs since if the appeal was dismissed ultimately, the 1<sup>st</sup> respondent would still recover the decretal sum. In advancing the ground that the appeal has chances of success, he depones that the subordinate court was bereft of jurisdiction by dint of section 56 of the NG-CDF Act and section 40 of the *Government Proceedings Act*.
3. He further depones that the applicant allocates funds as per the projects and that the amount attached is meant for other projects which are now in jeopardy. He depones that the applicant is in the process of constituting a committee and therefore it is not possible to deposit the decretal sum in a joint interest earning account.
4. The application is opposed. The 1<sup>st</sup> respondent filed grounds of opposition and a replying affidavit sworn by Captain (retired) Charles Masinde and who depones that the law on stay of execution pending appeal do not apply selectively to the applicant because it is a government entity. He disputes the fact that the applicant was not served with court processes in the subordinate court and depones that the applicant was served but chose to ignore.
5. He depones that the failure by the applicant to pay him for the works done continues to injure him. That the applicant and the interested party secretly and fraudulently continued to operate the frozen account and that the safest way is to order the payment of the undisputed amount to him while the disputed amount can be deposited in a joint account.
6. By directions of the court, the application was disposed of by way of written submissions. Both parties duly filed and exchanged their submissions.
7. I have given due consideration to the application and the rival affidavits as well as the submissions and authorities. On whether the applicant is entitled to orders of stay, the legal foundations are found in Order 42 Rule 6 and 8 and the authority in *Antoine Ndiaye v African Virtual University [2015] eKLR* that the court has the discretion to grant the orders sought if sufficient cause is shown and that the appeal must have a high chance of success.
8. The applicant goes ahead to fault the manner in which the proceedings before the subordinate court were irregularly conducted, for instance, failure to accord the applicant a fair hearing, lack of jurisdiction and irregular execution. In support thereof, the authorities in *Samuel Ngari Gitinji v Constituency Development Fund Board & another; Equity Bank Limited (Garnishee) [2021] eKLR* and *Monics Agencies Limited v Kenya Airports Authority KAA [2019] eKLR* were cited.
9. As regards the delay in filing the application, it is submitted that the application was filed promptly following the orders issued on 14<sup>th</sup> and October 25, 2022 which fact is not disputed by the respondents.
10. On the issue of substantial loss, the applicant submits that if the execution is allowed to proceed, other projects will stall as well as bursaries to needy students which had already been budgeted for. In support of the argument, counsel cites the authorities in *James Wangalwa & another v Agnes Naliaka Cheseto [2012] eKLR* and *Rose A Ochanda & Agricultural Finance Corporation v Richard Wafula Makokha t/a R M Wafula & Co Advocates [2022] eKLR*.



11. On the issue of security for costs, it is submitted that the applicant is a government entity and is exempt from furnishing security pursuant to Order 42 Rules 7 & 8 of the *Civil Procedure Rules*. The cases of Samuel Ngari Githinji (*supra*) and *Zedka Technical Services Limited v County Government of Uasin Gishu & 3 others [2020] eKLR* have been cited.
12. The respondent submits on the issue of whether the appeal is incompetent, non-starter and mala fides that the appellant initially had the capacity to sue and be sued before the declaration of unconstitutionality by the Supreme Court in the case of *Institute for Social Accountability & another v National Assembly & 3 others and 5 others [2022] eKLR*. That since the pronouncement, no proceedings can emanate from such an illegal body.
13. The second issue is whether the entire CDF is moribund and non-existent. On this issue, it is submitted that the body ceased to exist on August 8, 2022 upon declaration by the Supreme Court and hence the entire appeal and the application are therefore a nullity.
14. On whether the applicant has met the conditions for the grant of stay orders, it is submitted that there is no risk of the appeal being rendered nugatory as the decree sought to be appealed against is a monetary one. In support of this contention, the cases of *Spectre International Limited v M/s Jondu Enterprises Limited [2021] eKLR* and *Kenya Hotel Properties Limited v Willesden Properties Limited* Civil application 322 of 2006-Nai (unreported) have been cited.
15. The other issue raised relates to whether the record of the subordinate court is before the court. It is submitted that the subordinate court record has not been availed and that the factual representation by the applicant will be addressed once the record is availed.

### **Analysis and determination**

16. After carefully perusing the application, the responses thereto, the rival submissions and the law, I am of the view that the only issue arising from the application is whether the applicant is entitled to orders of stay pending appeal. I am equally aware that at this stage, the merits of the intended appeal is not called for as that is a province of the appellate court and which is yet to be delved into.
17. The first port of call is Order 42 Rule 6 which enacts;
  - 1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside.
  - 2) No order for stay of execution shall be made under subrule (1) unless
    - i. the Court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and;



- ii. such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

18. The above provisions have been applied in several authorities from within our jurisdiction. In [\*Michael Ntouthi Mitheu v Abraham Kivondo Musau \[2021\] eKLR\*](#) that;  
  
..... the High Court's jurisdiction to do so under Order 41 Rule 6 of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the [\*Civil Procedure Act\*](#), the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the [\*Civil Procedure Act\*](#) or in the interpretation of any of its provisions. According to section 1A(2) of the [\*Civil Procedure Act\*](#).
19. On the first condition on substantial loss, both parties have argued their respective positions on the issue. It is not in doubt that the decree is monetary. The applicant contends that it is a government entity which is funded by the public and money sought to be attached is public money meant for public projects. It contends that if the money is attached then several projects will stall to the detriment of the public.
20. From the application and the various annexures thereto, I gather that the decretal sum is in the region of over Kshs 7,000,000/= currently held by the interested party. It is not lost to me that the 1<sup>st</sup> respondent is equally entitled to enjoy the fruits of judgement and thus the reason that this court has to balance between the equally important and conflicting rights of either party.
21. In considering what would amount to substantial loss, Platt, Ag JA in [\*Kenya Shell Limited v Kibiru \[1986\] KLR 410\*](#), held at Pg 416 that;  
  
.....If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money.
22. I have considered the rival positions taken by the parties on the subject, guided by the legal provisions and case law, my finding is that the applicant has shown that it will stand to suffer substantial loss if the orders of stay are not granted.
23. The second limb to be satisfied is whether the application has been made expeditiously. From the material on record and the applicant's submissions, the order sought to be appealed against was made on October 25, 2022 and the instant application filed on October 31, 2022. The respondents have not challenged this assertion. I equally find that the application was made promptly.
24. The third limb is security for the due performance of the decree. On the issue, the applicant contends that it is a government agency and this requirement does not therefore apply to it. The 1<sup>st</sup> respondent on its part contends and proposes that the undisputed amount be paid to him while the disputed balance be deposited in a joint interest earning account.



25. Order 42 Rule 6 provides thus;

No such security as is mentioned in rules 6 and 7 shall be required from the Government or where the Government has undertaken the defence of the suit or from any public officer sued in respect of an act alleged to be done by him in his official capacity.

26. From the Rule, it is clear that the government is not required to deposit security during the pendency of an appeal. This position was discussed in [Bob Thompson Dickens Ngobi v Kenya Ports Authority \[2017\] eKLR](#) where it was held;

.....and hold that a statutory corporation, unless the creating statute says otherwise, is not an appendage or department of the Government as contemplated under the [Government Proceedings Act](#). One need not invite the application of the [Government Proceedings Act](#) when parliament in its own wisdom has splendid time and public resources to enact a statute to regulate the body so desired to be created.

27. The applicant is created by the [CDF Act, 2013](#) and clothed it with capacity to sue and be sued. The Act was subsequently declared unconstitutional by the Supreme Court in Institute for social accountability & another (supra) with a consequence that the applicant's board is currently improperly constituted and cannot therefore transact any business.

28. In light of the above, it is my finding that when parliament clothed the applicant with the requisite legal capacity, it had all the good intentions and that the applicant cannot hide under the guise of government and the provisions of the [Government Proceedings Act](#).

29. There is the contention by the applicant that the works done by the 1<sup>st</sup> respondent is valued at Kshs 2, 486,960/- after the amount already paid to him has been deducted. The 1<sup>st</sup> respondent proposes that the undisputed amount be paid to him and the balance deposited in a joint account. This valuation was done by officials of the ministry of works on invitation by the applicant. It is noted that the applicant is worried about the release of monies by the interested party to the prejudice of other projects funded by the applicant. Since the applicant has already carried out a valuation of the works undertaken by the 1<sup>st</sup> respondent, then it should be ready to release the amount that is not disputed while the disputed sums can be deposited into a joint interest earning account in the names of the parties' advocates pending the appeal. Such arrangement will suit the circumstances of the parties.

30. In the result and in view of the foregoing observations and having in mind that this court has to balance the rights of both parties, I am mindful to balance the rights and interest of both parties. Consequently, the appellant's application dated October 28, 2022 is allowed in the following terms:

- a) An order of stay of execution of the judgement and decree and all consequential orders in Bungoma CMCC No 216 'A' of 2019 is hereby granted pending the hearing and determination of the appeal.
- b) The sum of Kshs 2, 486,960/= (undisputed) be paid directly to the 1<sup>st</sup> respondent within fourty five (45) days from the date hereof while the disputed sum of Kshs 3, 420, 000/ be deposited in a joint interest earning account in the names of the parties' advocates within fourty five (45) days from the date of this ruling.
- c) The costs of the application shall abide the outcome of the appeal.

Orders accordingly.

**DATED AND DELIVERED AT BUNGOMA THIS 24<sup>TH</sup> DAY OF JANUARY, 2023**



**D KEMEI**

**JUDGE**

**In the presence of :**

No appearance for Abidha for Appellant/Applicant

Sichangi for 1<sup>st</sup> Respondent

Wangila for Garnishee

**Kizito Court Assistant**

