



**BM Logistics Limited v Kenya National Bureau of Statistics; Bulk Movers  
and Logistics (EA) Co Ltd (Interested Party) (Civil Suit 79 of 2010)  
[2023] KEHC 24544 (KLR) (Commercial and Tax) (26 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 24544 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT 79 OF 2010  
MN MWANGI, J  
MAY 26, 2023**

**BETWEEN**

**BM LOGISTICS LIMITED ..... PLAINTIFF**

**AND**

**KENYA NATIONAL BUREAU OF STATISTICS ..... DEFENDANT**

**AND**

**BULK MOVERS AND LOGISTICS (EA) CO LTD ..... INTERESTED PARTY**

**RULING**

1. The defendant filed a Notice of Motion application dated 28<sup>th</sup> March, 2022 brought under the provisions of Section 21(4) of the *Government Proceedings Act* Cap 40, Laws of Kenya, Sections 1A, 1B, 3A & 63(e) of the *Civil Procedure Act*, Cap 21 Laws of Kenya, Order 22 Rules 25, 51, 52 and Order 51 Rules 1 and 3 of the *Civil Procedure Rules*, and all other enabling provisions of the law. The defendant/applicant seeks the following orders –
  - i. Spent;
  - ii. Spent;
  - iii. That this Honourable Court be pleased to grant a stay of execution of the judgment delivered on 28<sup>th</sup> April, 2020 by Hon. Justice G.L Nzioka in the High Court Civil Case No. 79 of 2010 pending the hearing and determination of the intended appeal; and
  - iv. That costs of this application be in the cause.



2. The application is brought on the grounds on the face of it and is supported by an affidavit sworn by Mary Murugi Ngige, learned Counsel for the defendant on 28<sup>th</sup> March, 2022. In opposition thereto, the plaintiff filed a replying affidavit sworn on 28<sup>th</sup> April, 2022 by Dr. Michael Maling'a Mbito, the plaintiff's director.
3. The plaintiff filed a further affidavit sworn by Dr. Michael Maling'a Mbito the plaintiff's director on 8<sup>th</sup> July, 2022. The said affidavit was filed after parties had filed their written submissions and without leave of the Court. To remedy this situation, the plaintiff filed a Chamber Summons application dated 14<sup>th</sup> July, 2022 seeking leave of the Court to file a further affidavit. On perusal of the Court record, I note that the said application has never been set down for hearing and/or determined on its merits. For this reason, it is my finding that the plaintiff's further affidavit sworn on 8<sup>th</sup> July, 2022 is not properly on record hence the contents therein shall not be considered by this Court.
4. The present application was canvassed by way of written submissions. The defendant's submissions were filed on 6<sup>th</sup> July, 2022 by the Hon. Attorney General, whereas the plaintiff's submissions were filed on 10<sup>th</sup> July, 2022 by the law firm of Gitonga Mureithi & Company Advocates.
5. Ms. Murugi, learned Counsel for the defendant stated that the defendant is apprehensive that the plaintiff will commence execution of the judgment herein upon taxation of the bill of costs. She cited the provisions of Section 21(4) of the *Government Proceedings Act* and submitted that the defendant is a statutory body created under the *Statistics Act*, 2006 and that liability lies with the government and not on the defendant personally. She relied on the holding in the case of *Josphat Gathee Kibuchi v Kirinyaga County Council* [2015] eKLR and submitted that the proper way for the plaintiff to enforce the judgment herein is through mandamus against the Permanent Secretary in the National Treasury and Planning.
6. Ms. Murugi referred to the case of *RWW v EKW* [2019] eKLR and stated that the judgment in issue is for a liquidated amount and should the instant application be disallowed, the plaintiff may execute the decree emanating therefrom causing the defendant to suffer irreparable damage as the financial status of the plaintiff is unknown to the defendant. She further stated that the defendant has never received any notification that the proceedings were ready for collection despite several follow ups.
7. She submitted that the request for proceedings was made on 7<sup>th</sup> May, 2020 and during this period, most Courts were closed due to the Covid-19 pandemic which would explain the delay in furnishing the defendant with the said proceedings. She stated that the defendant only became aware of the fact that the proceedings were ready on perusing the annexures to the plaintiff's replying affidavit and that it is relying on the same to file the intended appeal as they wait for their copies of proceedings and a certificate of delay to enable them file the memorandum and record of appeal. Ms. Murugi also stated that the Office of the Attorney General was not on record in the proceedings before the High Court.
8. Mr. Gitonga, learned Counsel for the plaintiff submitted that the defendant is already out of time in filing the intended appeal in view of the fact that the proceedings were available. He further submitted that the instant application is only meant to scuttle the enjoyment of the judgment and the taxation of the bill of costs since it was filed on the eve of the taxation.
9. He contended that the reason advanced that the Attorney General came on record later is not excusable since they came on record in September 2020 but never took any steps in the matter until the eve of taxation of the plaintiff's bill of costs. He submitted that an application for stay of execution pending appeal must be brought without unreasonable delay however in this case, the defendant has not even attempted to explain why the instant application has been brought after the lapse of thirteen (13) months, which delay is inordinate. Mr. Gitonga stated that the intended appeal cannot be filed without



an extension of time, and as such, in the absence of an appeal there is no substratum upon which an order for stay of execution can issue.

10. He cited the provisions of Section 2 of the *State Corporations Act*, Cap 446 Laws of Kenya and stated that, the defendant is a body corporate established under the *Statistics Act*, 2006 with perpetual succession, capable of suing and being sued in its corporate name. He relied in the case of *Greenstar Systems Limited v Kenyatta International Convention Centre (KICC) & 2 others* [2018] eKLR, and further stated that the defendant does not enjoy insulation against execution under the *Government Proceedings Act*.
11. On the issue of substantial loss, Mr. Gitonga submitted that execution has not commenced and there is no allegation that the plaintiff is not able to refund the decretal amount in the event the intended appeal succeeds. He indicated that the plaintiff is a highly regarded company that has been in operation for 15 years, and has demonstrated the capacity to give the service that informed the dispute herein. He also indicated that the plaintiff undertakes huge transport and logistic contracts for Government agencies and Non-Governmental Organizations and it is not in financial straits.
12. In submitting that this Court ought to balance the rights of both parties, Counsel referred to the case of *Absalom Dova v Tarbo transporters* [2013] eKLR. He contended that the defendant evaluated the plaintiff and found it financially fit to undertake the 2009 census and awarded it the said contract, therefore the argument on the plaintiff's inability to refund the decretal sum is inconsistent with the evidence and the defendant's dealings with the plaintiff. Mr. Gitonga relied on the case of *Awale Transporters Ltd v Kelvin Perminus Kimanzi* [2020] eKLR and stated that the feeble mention of substantial loss is unsupported by evidence or any serious argument hence it should be disallowed.

#### **Analysis and Determination.**

13. I have considered the instant application, the grounds on the face of it and the affidavit filed in support thereof, the replying affidavit by the plaintiff and the written submissions by Counsel for the parties. The issues that arise for determination are –
  - i. Whether the defendant is protected from execution by dint of Section 21(4) of the *Government Proceedings Act*; and
  - ii. Whether the defendant has satisfied the conditions to warrant the grant of an order for stay of execution.
14. In the affidavit filed by the defendant, its Counsel deposed that judgment was delivered on 28<sup>th</sup> April, 2020 in favour of the plaintiff for a sum of Kshs. 22,943,131.20. That being dissatisfied with the said judgment, the defendant intends to lodge an appeal against the said judgment. She averred that the defendant is apprehensive that the plaintiff will commence execution of the judgment at any time having filed a bill of costs.
15. It was stated by defendant's Counsel that the defendant has already filed a Notice of Appeal and that it wrote to the Deputy Registrar on 7<sup>th</sup> May, 2020 requesting for copies of typed proceedings to enable it file a Memorandum of Appeal but it is yet to receive the said typed proceedings. Ms. Murugi averred that the decretal sum in issue is colossal and is to be paid from tax payer's money. She further averred that the defendant stands to suffer irreparable damage if the orders sought are not granted.
16. The plaintiff in its replying affidavit deposed that the instant application having been made two (2) years after the judgment date amounts to inordinate delay. It averred that the defendant filed a Notice of Appeal dated 7<sup>th</sup> May, 2020 but it has not taken any steps in prosecuting it, in spite of the proceedings



in the matter being ready and available. It further averred that the defendant only moved this Court after the plaintiff filed its party and party bill of costs.

17. It was stated by the plaintiff that the judgment in issue relates to the supply of services for the national census conducted in 2009 hence it is in the interest of justice that the instant application be disallowed, so as to allow the plaintiff to enjoy the fruits of its judgment. It further stated that the application herein has been filed prematurely as its bill of costs is yet to be taxed. As such, execution is not imminent. The plaintiff submitted that the defendant has not offered security for the due performance of the decree.

**Whether the defendant is protected from execution by dint of Section 21(4) of the Government Proceedings Act.**

18. The defendant's case is that it is a statutory body created under the Statistics Act, 2006 and contended that by dint of Section 21(4) of the Government Proceedings Act, liability lies with the government and not on the defendant personally. The defendant contended that the proper way for the plaintiff to enforce the judgment herein is through an order of mandamus against the Permanent Secretary in the National Treasury and Planning.

19. The plaintiff on the other hand submitted that pursuant to the provisions of Section 2 of the State Corporations Act, the defendant is a body corporate established under the Statistics Act, 2006 with perpetual succession, capable of suing and being sued in its corporate name. He relied in the case of Greenstar Systems Limited v Kenyatta International Convention Centre (KICC) & 2 others [2018] eKLR, and submitted that the defendant does not enjoy insulation against execution under the Government Proceedings Act.

20. Based on the foregoing, this Court has to determine whether the defendant is a state corporation to which the provisions of the Government Proceedings Act apply. This Court notes that indeed the defendant is a state corporation pursuant to the provisions of the State Corporations Act, Cap 446 Laws of Kenya since it was established under Section 3 of the Statistics Act No. 4 of 2006. Section 3(2) of the said act provides as follows–

“The Bureau shall be a body corporate with perpetual succession and a common seal and shall, in its corporate name, be capable of-

- a. suing and being sued;
- b. taking, purchasing or otherwise acquiring, holding, charging or disposing of movable and immovable property;
- c. borrowing or lending money; and
- d. doing or performing all other things or acts for the furtherance of the provisions of this Act which may be lawfully done or performed by a body corporate.”

21. On the other hand, Section 21(4) of the Government Proceedings Act, Cap 40 Laws of Kenya provides that –

“Save as aforesaid, no execution or attachment or process in the nature thereof shall be issued out of any such court for enforcing payment by the Government of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by



the Government, or any Government department, or any officer of the Government as such, of any money or costs.”

22. The above provisions of the [Government Proceedings Act](#) only make reference to the Government, any Government department or any officer of the Government, and not to State Corporations. The High Court in the case of [Greenstar Systems Limited v Kenyatta International Convention Centre \(KICC\) & 2 others](#) [2018] eKLR when faced with a similar issue made the following observation-

“the *Black’s Law Dictionary*, 8<sup>th</sup> Edition defines the term “government” as being

1. The structure of principles and rules determining how a state or organization is regulated.
2. The sovereign power in a Nation or State
3. an organization through which a body of people exercises political authority; the machinery by which sovereign power is expressed.”

The Applicant does not fit within the confines of this definition. The Applicant is a tourism agency established under the *Tourism Act*. It is not a Government department...”

23. I agree with the above decision and hold that the defendant does not fall within the confines of the definition of Government. Further, the fact that the defendant is the principal agency of the Government for collecting, analyzing and disseminating statistical data in Kenya as provided for under Section 4(1) of the [Statistics Act](#) No. 4 of 2006, does not lead to the inference that it is a government department properly so called, as envisaged by the [Government Proceedings Act](#). To this end, I am persuaded by the finding in the case of [Ikon Prints Media Company Limited v. Kenya National Highways Authority & 2 others](#) [2015] eKLR where in allowing execution against the 1<sup>st</sup> respondent, the Court held that -

“Foremost though, it is important to point out that it would not be tenable to invoke the *Government Proceedings Act* (Cap 40) as a bar to any execution herein. The 1<sup>st</sup> Respondent is a body corporate with perpetual succession and a common seal. It is a corporate entity capable of subsisting independently. It is dependent on Government funding but it is not government or servant of or agent of Government for the purposes of the *Government Proceedings Act*. The 1st Respondent is an independent judicial person capable of being sued and suing. Its litigation does not involve the Government. Any judgments decreed against the 1st Respondent are not judgments against the government but against an independent juridical body...”

24. Section 3A of the [Statistics Act](#) No. 4 of 2006 states that the Bureau may request for legal advice or representation from the Office of the Attorney-General. As such, it is not a must for the defendant to be represented by the Office of the Attorney General.
25. It is this Court’s finding that the defendant being a body corporate with perpetual succession and a common seal is not automatically subject to the [Government Proceedings Act](#). For this reason, it is not protected from execution by dint of Section 21(4) of the [Government Proceedings Act](#).



**Whether the defendant has satisfied the conditions to warrant the grant of an order for stay of execution.**

26. Stay of execution pending appeal is provided for under Order 42 Rule 6 of the *Civil Procedure Rules* 2010. Sub-rule 2 however provides for the conditions to be considered by the Court when dealing with an application of this nature. The said provisions state as follows –

- “2). No order for stay of execution shall be made under sub-rule (1) unless-
- a. 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
  - b. 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.”

27. The defendant filed a Notice of Appeal dated 7<sup>th</sup> May, 2020 against the judgment dated 28<sup>th</sup> April, 2020. It has now filed the instant application seeking stay of execution of the said judgment pending the hearing and determination of the appeal. It is trite that when dealing with an application for stay of execution, the Court has a duty to balance the interests of the parties taking into account the fact that an appellant has an undoubted right of appeal, whereas the respondent has a decree which he should not be obstructed from executing unless there is a good reason.

28. In the present application, the defendant stated that it is apprehensive that the plaintiff will commence execution of the judgment herein upon taxation of the bill of costs. It also stated that should the instant application be disallowed, the plaintiff may execute the decree emanating therefrom causing the defendant to suffer irreparable damage as the financial status of the plaintiff is unknown to the defendant. Additionally, the decretal sum herein is colossal and is to be paid from tax payer’s money.

29. The plaintiff contended that the instant application is premature since the process of execution has not commenced. In addition, there is no allegation that the plaintiff is not able to refund the decretal amount in the event the intended appeal succeeds.

30. The decree herein is for Kshs. 22,943,131.20 which is a colossal amount of money. It is not disputed that the plaintiff has not yet commenced the execution process. In the case of *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR Platt JA in addressing the issue of substantial loss held that -

“The appeal is to be taken against a judgment in which it was held that the present respondents were entitled to claim damages....It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the high Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the *Civil Procedure Rules* was not met. There was no evidence of substantial loss to the applicant, either in this matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in two courts....”

31. Courts have held that submissions are not pleadings as they are just but an Advocate’s marketing language. On perusal of the defendant’s affidavit in support of the application herein, I note that it is not alleged that the plaintiff’s financial means are unknown to the defendant and that in the event the



intended appeal is successful, it might not be able to recover the decretal sum if paid to the plaintiff. Further, the defendant did not put forth its current financial position and demonstrate how the same will be affected in the event that stay of execution is not granted. All that the defendant said is that the money shall be paid from tax payers' money.

32. The plaintiff did not demonstrate its financial capacity to this Court by providing financial statements to demonstrate its ability to refund the defendant its money in the event that the latter was successful in its appeal. It submitted that it is a highly regarded company that has been in operation for fifteen (15) years, undertaking huge transport and logistic contracts for Government agencies and Non-Governmental Organizations and it is not in financial straits.

33. A mere claim that the plaintiff cannot refund the decretal sum is not sufficient. There must be reasonable grounds provided by the defendant to show that the plaintiff is not in a position to refund the decretal sum, and by so doing, the plaintiff will have the evidential burden of proving otherwise. In *Kenya Shell Limited v Benjamin Karuga Kibiru & another* (*supra*) the Court held 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 cornerstone of both jurisdictions for granting 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.”

34. It is this Court's finding that the defendant has not demonstrated that it is likely to suffer substantial loss in the event that stay of execution is not granted.

35. On the issue of whether the application has been made without unreasonable delay, the judgment in this matter was delivered on 28<sup>th</sup> April, 2020, whereas the instant application was filed on 28<sup>th</sup> March, 2022 approximately twenty-three (23) months after the date of the judgment. The defendant has not even attempted to explain the cause of the delay in filing the instant application. Instead, it has stated that the delay in being furnished with typed proceedings by the Court was occasioned by the fact that the request for typed proceedings was made on 7<sup>th</sup> May, 2020 and during this period, most Courts were closed due to the Covid-19 pandemic. It is my finding that there has been unreasonable and/or inordinate delay in filing the instant application as the law Courts were not closed for close to two (2) years.

36. The defendant has not offered any security to guarantee the due performance of such decree or order as may ultimately be binding on it. In the persuasive decision of *Gianfranco Manenthi & another v Africa merchant Assurance Co. Ltd* [2019] eKLR the Court stated as follows-

“The applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition, a party who seeks the right of appeal from a money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6(1) of the *Civil Procedure Rules*, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal falls.

37. Consequently, I find that the defendant has not satisfied any of the conditions set down to warrant being granted an order for stay of execution.



38. The application dated 28<sup>th</sup> March, 2022 is devoid of merit and the same is dismissed with costs to the plaintiff.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26<sup>TH</sup> DAY OF MAY, 2023. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**

**JUDGE**

In the presence of:

Mr. Gitonga for the Plaintiff/Respondent

No appearance for the Defendant/Applicant

