



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

(CORAM: CHERERE-J)

CIVIL CASE NO. E146 OF 2021

BETWEEN

KENYA WILDLIFE SERVICE.....APPELLANT/APPLICANT

AND

STEPHANO MURURU MUKIIRA.....RESPONDENT

RULING

Background

1) On 29th September, 2021, the court in **MERU CMCC 12 OF 2017** entered judgment in favour of the Respondent as against the Appellant/Applicant for Kshs. 12,800,000/-.

2) By a notice of motion dated 26th October, 2021 filed on 27th October, 2021, Appellant/Applicant seeks orders for:

1) Stay of execution of judgment in MERU CMCC 12 OF 2017 pending the hearing and determination of the appeal

2) Costs be provided for

3) The notice of motion is premised on grounds among others that the Appellant/Applicant is aggrieved by the judgment of the trial court and that the appeal has high chances of success.

4) The application is also supported by an affidavit and a further affidavit sworn on 26th October, 2021 and 24th November, 2021 respectively by Hellen Olwanda, the Appellant/Applicant's Legal Officer who reiterates the grounds on the face of the application. Additionally, she avers that the judgment sum is colossal and that the Appellant/ Applicant is willing and ready to provide a bank guarantee from Cooperative Bank of Kenya Ltd as security for the judgment sum.

5) Respondent opposed the application by way of an affidavit sworn on 16.11.2021 01st November, 2021 in which he avers that the Appellant has not demonstrated substantial loss and further that he is a man of means and is able to refund the decretal sum in the event that the appeal succeeds. Annexed to his affidavit are a valuation report dated 29th October, 2021 for three parcels of land valued at a total of Kshs. 14,500,000/-.

Analysis and Determination

6) I have considered the application in light of affidavit on record the issue for determination is whether there ought to be Stay of execution of judgment in **MERU CMCC 12 OF 2017** pending the hearing and determination of the appeal

7) Concerning stay of execution, Order 42 (6) of the Civil Procedure Rules provides:

(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
- b. That the application has been made without unreasonable delay; and
- c. 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.

8) There is a myriad of cases on what constitutes substantial loss. In Civil Appeal No. 186 Of 2007 Standard Assurance Co. Ltd –Vs- Alfred Mumea Komu the Court stated-

“Substantial loss, in its various forms is the corner stone of best jurisdictions for granting a stay. That is what has to be presented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.”

9) Similarly, in Civil Case No. 41 Of 1995 United Builders & Contractors (Africa) Limited –Vs- Standard Chartered Bank Ltd the Court stated-

“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 suits.”

10) Additionally, the court in ABN Amro Bank N.V. v Le Monde Foods Ltd Civil Application No. Nairobi 15 of 2002 held that:

“Each party bears a specific burden regarding proof of substantial loss in a case such as before us.So all an Applicant in the position of the bank (Appellant) can reasonably be expected to do is to swear, upon reasonable grounds, that the Respondent will not be in a position to refund the decretal sum if it were paid over to him and the pending appeal was to succeed. In those circumstances, the legal burden still remains on the Applicant but the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal were to succeed. This evidential burden would be very easy for a Respondent to discharge. He can simply show what assets he has – such as land, cash in the bank and so on.”

11) The Respondent was awarded general damages in the sum of Kshs. 12,800,000/-. Whereas there is evidence that the Respondent is a man of means, the fact that the Appellant/Applicant disputes the awarded sum is evidence enough that it is likely to suffer substantial loss if the order of stay of execution is not granted.

12) Security is a legal requirement under 42 (6) (2) (c) of the Civil Procedure Rules. The Appellant has offered to furnish a bank guarantee for due performance of the decree herein pending the hearing and determination of the appeal.

13) Whereas it is not my duty at this stage to determine if the Applicant has an arguable appeal, I am minded, in the interest of justice to exercise this court’s discretion under section 3A of *the Act* to afford the Appellants an opportunity to prosecute their appeal.

14) In the end, the notice of motion dated notice of motion dated 10.11. 2021 and filed on 11.11.2021 is allowed in the following terms:

- 1) There shall be a Stay of execution of judgment in MERU CMCC 12 OF 2017 pending the hearing and determination of the intended appeal on condition that the Appellant/Applicant shall furnish a bank guarantee from COOPERATIVE BANK OF KENYA LTD as security for the decretal sum within 14 days of today’s date
- 2) The Appellant/Applicant is directed to file and serve the record of Appeal not later than 30 days’ from today’s date
- 3) Mention on 06th April, 2022 to confirm compliance with orders 1 and 2 above
- 4) Costs shall abide the outcome of the intended appeal

DATED IN MERU THIS 17th DAY OF February 2022

T.W. CHERERE

JUDGE

Court - Morris Kinoti

For Appellant/Applicant - Mr. Ochieng for Hamilton Harrison & Mathews Advocates

For Respondent - Mr. Mwirigi for Mwirigi Kaburu & Co Advocates