



**Christian Broadcasting Network (CBN) Kenya v Almak Aqua Drillers Limited
(Civil Appeal E165,E166,E167,E168,E169 of 2021 & Civil Case 97,649,650,651
& 652 of 2018 (Consolidated)) [2022] KEHC 3156 (KLR) (28 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 3156 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E165,E166,E167,E168,E169 OF 2021 & CIVIL
CASE 97,649,650,651 & 652 OF 2018 (CONSOLIDATED)**

MW MUIGAI, J

JUNE 28, 2022

BETWEEN

CHRISTIAN BROADCASTING NETWORK (CBN) KENYA APPELLANT

AND

ALMAK AQUA DRILLERS LIMITED RESPONDENT

RULING

1. The Applicant filed certificate of urgency of 16/11/2021 with the Application dated 26th October 2021 and filed on 27/10/2021 brought under Section 1A,1B and 3A ,63(e) and 65 of the [Civil Procedure Act](#), and Order 42 Rule 6 of the *Civil Procedure Rules 2010*, the Appellant sought the following orders;
 - a. That pending the hearing and determination of this Application and the Appeal there be a stay of execution of the judgment, decree and any consequential orders issued in Machakos CMCC No. 97 of 2019.
2. The Application is supported by the affidavit of Anne Kasombo sworn in 26th October, 2021, and deposed as follows; that on 23/09/2021 the Trial Court did render its judgment in the suit allowing the Respondents' claim as prayed together with interest at compound rates and costs; that the Appellant/Applicant was dissatisfied with the judgement and has preferred an appeal against the said judgement; that the Appellant/Applicant was granted stay of execution of the judgment and decree by the Trial Court for a period of one (1) month from the date of judgment which period lapsed on the 24/10/2021; that should the said stay of execution be declined the Appellant/Applicant shall be exposed should execution proceed, the appeal herein shall be rendered nugatory; that the orders sought herein are necessary for the preservation of the subject matter of the appeal; that the Respondent stands to suffer no prejudice if the application is allowed as both parties shall be given an opportunity to present their case in the appeal as the subject matter is preserved; that the Appellant/Applicant herein



has the ability to pay the Respondent should the appeal fail; that the Appellant/Applicant is not sure of the Respondent's financial ability to pay back the decretal sum should the appeal succeeds; that this application has been made without unreasonable delay as the stay granted by the lower Court is yet to lapse.

Notice of Motion Dated 15Th November, 2021

3. The Appellant/Applicant filed a similar application seeking the following orders:-
- (a) That pending the hearing and determination of the application dated 26/10/2021 there be a stay of execution of the judgment, decree and any consequential orders issued in Machakos CMCC NO. 97 of 2019.

Respondent's Replying Affidavit

4. The Respondent filed Replying Affidavit dated 12th November, 2021 stating as follows:-
- (a) That the Applicant has filed an application dated 26/10/2021 under certificate of urgency seeking orders that pending the hearing and determination of the application and the appeal, there be a stay of execution of the judgment, decree and any consequential orders issued in Machakos CMCC No. 97 of 2019.
 - (b) That, first and foremost, no judgment was delivered on the 23rd day of September as alleged by the Applicant herein. The said judgment is non-existent. It is imperative to note that the judgment that was delivered by the Trial Court in the same Machakos CMCC NO. 97 of 2019 was delivered on the 22nd September 2021. Consequently, there is no judgment to stay.
 - (c) That the Advocates on record for the Respondent informed the Respondent that even though the applicant has a right of appeal as provided for in the law, that right has since been extinguished as the appeal has been filed without following the mandatory statutory timelines as the appeal has been filed out of time.
 - (d) That the judgment was delivered on the 22nd day of September, 2021 and this application is dated the 26th October, 2021 and the same has been filed on the 27th October, 2021. It is imperative for this Court to note that the Memorandum of Appeal is dated the 27th October, 2021 while the same is purportedly filed on 22nd October, 2021. This is quite surprising how the Memorandum of Appeal could have been filed way earlier before its date, a clear intent to mislead this Court.
 - (e) That the Respondent's Advocates on record informed the Respondent that even if the Memorandum of appeal was filed on the 22nd October, 2021, the same is still out of time as the requisite timelines for filing the appeal lapsed on the 21st day of October, 2021 and therefore the appeal has still been filed out of time.
 - (f) The Applicant herein did not seek any leave to file the Appeal out of time and having filed the appeal herein out of time and without the said leave, both the appeal and the application are incompetent and the only recourse is to have them struck out by this Court.
 - (g) That the Respondent's Advocates on record informed the Respondent that the Applicant was granted a 30 day stay of execution and which stay lapsed on the 21st day of October, 2021. Notably, the Applicant has been indolent enjoying stay of execution orders granted by the Trial Court until the Advocates drew a letter dated 12/10/2021 forwarding the draft decree upon the Applicants advocates on the 15th October, 2021.



Appellants' Submissions

5. The Appellant submitted that they filed their Appeal on the 22nd October, 2021 being dissatisfied by the judgment of the Trial court delivered on the 23/09/2021; that subsequent to filing the Appeal, noting that the stay of execution granted by the Lower Court was lapsing, the Applicant filed another application seeking to stay the execution of the Lower Court judgment dated the 27/10/2021 which application is before the Court. The Court certified the application as urgent but granted no interim orders forcing them to file another application dated 15/11/2021 updating the Court on the change in circumstances, and sought stay of the execution. The Court being satisfied on the same granted the interim orders of stay of execution; the Respondent filed its Replying Affidavit dated 12/11/2021 together with Notice of Preliminary Objection which has since been dealt with.
6. That from the said contracts there emerged contentions on payment between the parties wherein the Appellant/Applicant herein contends that it paid up the contracts fully and that the claims, if at all should be directed to the Respondent's employee who was the sole contact of the Respondent and who had handled all transactions on behalf of the Respondent.
7. That the decision was made against the Appellant/Applicant on the ground that the payments were made to a different entity other than the Respondent whereas there are documents to prove that the Respondent used both names interchangeably.
8. In the case of *Victory Construction v BM* [2019] eKLR the Court summarized that the principles guiding the grant of a stay of execution pending Appeal are provided under Order 42 rule 6(2) of the *Civil Procedure Rules*.
9. Quoting with approval the case of *Visbram Ravji Halai v Thornton & Turpin* – Civil Application No. Nai. 15 of 1990 [1990] KLR 365, ...”

“the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 42 rule 6 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”.
10. In *National Industrial Credit Bank Limited v Aquinas Francis Wasike* the Court of Appeal expressed itself at page 3 paragraph 2 as follows:

“This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.”
11. On the issue of whether the Appellant/Applicant has an arguable appeal the Appellant contends that it has an arguable appeal.
12. The Appellant has contended that they shall suffer substantial loss should the execution proceed.
13. On the issue of Security it was submitted that the Appellant/Applicant contends that it shall abide by the terms of the Court including issue of security.



Respondents Submissions

14. The Respondent submitted that Appellant/Applicant herein contracted the Respondent to drill, construct, develop and test pump a bore hole at the Mutwamwaki for a sum of kshs.1,378,080/. The parties entered into a written contract dated the 25th July, 2017.
15. That the Respondent proceeded to carry out the works to their completion and a bore-hole drilling completion report issued confirming finalization and/or completion of the works. The borehole completion report was annexed as annexure 'AMK4'.
16. Despite the Respondent having completed its contractual obligations as per the contract dated the 25th July, 2017, the Applicant abandoned and/or neglected its contractual obligations and failed to settle the contract sum of the sum of Kshs.1,378,080/- and which sum still remains unpaid to date. The continued and persistent failure by the Applicant to settle the contract amount necessitated the drawing of a demand letter to the Applicant dated the 14th April, 2018 demanding for the immediate payment (the said letter is annexed 'AMK'); that after service of the demand letter upon the Applicant, it is only then that the Applicant herein disclosed that it had made payments to a totally different entity known as 'Allmak Drillers Limited' a totally different entity from the Respondent whose registered name is 'almak Aqua Drillers Limited.' The receipts indicating 'Almak Drillers Limited were annexed as 'AMK6'.
17. It is imperative to note that the contract dated the 25th day of July 2017 which the parties had entered into is between Almak Aqua Drillers Limited while the one that the Applicant paid is known as Allmak Dillers Limited which are two different entities. As a result, the Respondent herein continues to suffer from the breach of contract by the Applicant herein. Copies of the Certificate of Incorporation & C.R.12 Forms were annexed as annexures 'AMK 7A & 7B' respectively.
18. On the issue of whether the Appellant has an arguable appeal reference was made in the case of *Lawrence Musyoka Ndambuki & anor v Daniel Kato Ndambuki* [2018] eKLR considered the case of *Carter and Sons limited v Deposit Protection Fund Board & Two others* – Civil Appeal No. 291 of 1997 the Court stated as follows:-

“ . . . the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay . . .the Applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would result from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay.”
19. Also in the case of *National Bank of Kenya –v- Pipelastik Samkolit (K) Ltd & anor* [2001] as considered by the Court in the case of *Feba Radio v I kiyu Enterprises Limited* [2017] eKLR where the former Court stated as follows:

“where it was held that a Court of law cannot purport to rewrite a contract between the parties, the parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded.”



20. In the case of *Equity Bank Limited v Taiga Adams Company limited* [2006] eKLR as considered by the Court in the case of *Congress Rental South Africa v Kenyatta International Convention Centre; Co-operative Bank of Kenya Limited & another (Garnishee)* 2019 eKLR it was held that:-

“of even greater impact is the fact that an applicant has not offered security at all, and this is one of the mandatory tenets under which the application is brought ...let me conclude by stressing that of all the four, not one or some, must be met before this court can grant an order of stay...” which principle was also emphasized in *Carter & Sons Ltd V Deposit Protection Fund Board & 3 others.*”

21. The fact of an appeal being brought within the requisite timelines was further emphasized by in the case of *Velji Shabmad v Shamji Bros. and Papatlal Karman & Co.* [1957] EA 438 when handling the case of *Diplack Kenya Limited v William Muthama Kitonyi* [2018] eKLR where the Court stated as hereunder:

“In the interests of the public the court ought to take care that appeals are brought before it in proper time and before the proper court or registry and when a judgement has been pronounced and the time for appeal has elapsed without an appeal the successful party has a vested right to the judgement which ought, except under very special circumstances, to be made effectual. And the Legislature intended that appeals from judgements should be brought within the prescribed time and no extension of time should be granted except under very special circumstances.”

Determination

22. The Court considered pleadings and submissions by parties through respective Counsel. The issue for determination is whether pending determination of the instant application for stay of execution application and hearing of intended appeal stay of execution ought to be granted or not.

Preliminary Objection

23. The Respondents raised a Preliminary Objection on 12/11/2021, the Respondent raised the issue that the Memorandum of Appeal was filed on the 22nd October, 2021 and was out of time as the requisite timelines for filing the appeal lapsed on the 21st day of October, 2021 and therefore the appeal has still been filed out of time. The Applicant herein did not seek any leave to file the Appeal out of time and having filed the appeal herein out of time and without the said leave, both the appeal and the application are in competent and the only recourse is to have them struck out by this Court.
24. By this Court's Ruling of 7/2/2022 the Court found that computing 30 days to file an appeal in accordance with Order 50 Rule 1& 2 CPR 2010, the appeal was filed within the requisite legal timelines, although the Court noted that there were duplicate applications of 26/27/10/2021 for stay of execution.
25. On the issue raised that there was no judgment delivered on 23/9/2021, the annexed judgment of the Trial Court was delivered on 22/9/2021, the Court found it to be a typographical error and corrected it by Section 100 CPA.



Stay of Execution

26. In *Victory Construction v BM* [2019] eKLR the Court summarized that the principles guiding the grant of a stay of execution pending Appeal are provided under Order 42 rule 6(2) of the Civil Procedure Rules which provides as follows:

“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. In *Visbram Ravji Halai v Thornton & Turpin* – Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal held that;

“whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 42 rule 6 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.”

Unreasonable Delay

28. The Trial court delivered judgment on 22/9/2021, the instant application and appeal vide Memorandum of Appeal was filed on 22/10/2021. Subsequent similar application(s) were filed on 26/27/10/2021. The Appellant did not delay in filing the appeal.

Substantial Loss

29. Whereas there is no dispute as to completion of works according to the contracts as agreed in all 5 Court files listed above, the Appellant contends that after the Respondent sent Invoice of 30% remaining works, the Appellant paid the amount of Ksh 1,378,080/- in April 2017 through direct Bank transfer. It is not until 2018 the Appellant learnt that the Respondent instituted Machakos Chief Magistrates Court Criminal Case 326 of 2018 against its employee Mr. Joseph Indaisi Mumo whom the Appellant dealt with and made the payment through details availed. If the judgment, decree and orders are not stayed and execution commences, there will be substantial loss as the subject matter will not be preserved. The appeal shall be rendered nugatory.

Arguable Appeal

30. This Court is not seized of the matter its merits or demerits save from gleaning through the Court record. Suffice is to state that the Appellant takes issue with payment of funds that the Appellant claims had already paid the Plaintiff through their employee and the judgment includes compound interest. These are triable issues that merit exercise of right of appeal.

Security

31. Orders 26 & 45 & Section 80 of Civil Procedure Rules & Act respectively speak to security of Costs as a condition precedent to granting stay of execution pending appeal.



32. In *Keary Development v Tarmac Construction* [1995] 3 All Eng Reports relied on in *Oceanview Beach Hotel Ltd v Salim Sultan Molloo & 5 others* [2012] eKLR laid down principles of exercising the Court's discretion in provision of costs among them is that;

The Court has a complete discretion whether to order security, and accordingly it will act in the light of all the relevant circumstances...

33. See also *Equity Bank Limited v Taiga Adams Company limited* [2006] eKLR as considered by the Court in the case of *Congress Rental South Africa v Kenyatta International Convention Centre; Co-operative Bank of Kenya Limited & Another (Garnishee)* 2019 eKLR supra.

34. The circumstances of the cases listed hereinabove that parties agreed to have the lead Court file Civil Case 650 of 2018 for purposes of adopting witness's evidence mutatis mutandis in the series of 4 Court files CMCC 97 of 2019, 649 of 2018, 651 of 2018 & 652 of 2018 as parties and cause of action is the same in terms of the contracts, this Court shall consequently apply provision of security to apply globally to all the Court files together.

35. The decretal sum is Ksh 1,378,080 and compound interest rate of 5% from 4/6/2017 until judgment. The Court shall rely on the following principles also considered *Keary Development vs Tarmac Construction* (1995) 3 All Eng Reports supra as follows;

The Court in considering the amount of security that might be ordered will bear in mind that it can order any amount up to the full amount claimed by way of security, provided that it is more than a simply nominal amount; it is not bound to make an order of a substantial amount.

Before the Court refuses to order security on the ground that it would unfairly stifle a valid claim, the Court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled.

Disposition** ___

1. Therefore, the stay of execution is granted pending appeal on condition the Appellant shall provide security of Ksh.700,000/- to be deposited in an interest earning account held by advocates for Appellant and Respondents jointly within 90 days of the Court's Ruling.
2. Thereafter, the Memorandum of Appeal of 22/10/2021 shall be deemed as filed and served and the Record of Appeal with typed proceedings shall be availed.
3. The Respondent is at liberty to respond.
4. Further Directions on disposal of the Appeal shall be taken thereafter.
5. In default of compliance and evidence of the same presented/filed in Court the right of appeal shall vacate thereafter.

DELIVERED, SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 28/6/2022. (VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

