



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CIVIL SUIT NO. 11 OF 2017**

**ENDEBESS DEVELOPMENT COMPANY LIMITED .....PLAINTIFF**

**VERSUS**

**COAST DEVELOPMENT AUTHORITY.....DEFENDANT/APPLICANT**

**RULING**

1. Vide an application by way of Notice of Motion dated the 6/8/2020 the Defendant/Applicant seeks an order that the court be pleased to issue a stay of execution of its judgment issued on 9/6/2020 and the decree thereof pending the hearing and determination of an intended appeal.
2. The grounds adduced in support of the application are, *inter alia*, that by the Judgment delivered on 9/6/2020 the defendant was ordered to pay a sum of Kshs.100,750,000/= inclusive of interest and the Plaintiff/Respondent has drawn the requisite decree thereof, that there is a threat of the Plaintiff proceeding with the execution of the said decree and in that effort the Plaintiff has filed taxation proceedings which have been temporarily stayed. It is averred that if execution proceeds, then the Defendant being a public body established under Section 3 of the Coast Development Authority Act, 1990 will be affected in its public functions. Nonetheless, the Defendant/Applicant has preferred an appeal against the whole judgment and the same may be rendered nugatory if the amount claimed is paid to the Plaintiff who has no Known resources. Lastly, the Applicant avers that by dint of Order 42 Rule 8 of the Civil Procedure Rules, 2010, it is exempted from furnishing security by virtue of it being a public body. These grounds are explicated in an affidavit sworn in support of the application by Dr. Mohamed Keinan Hassan, the Defendant's Director on 6/8/2020.
3. The Application was opposed by the Plaintiff, who filed a replying affidavit sworn by its general manager, Michael Magero on 16/9/2020. In the said affidavit, the deponent briefly illustrated the transactions that led to the dispute culminating into the suit herein and which issues were considered in the judgment delivered by this court on 9/6/2020. I see no need to duplicate the issues again in this ruling.
4. As that may be, the Plaintiff is of the view that the Defendant is not a government body as alleged but a body corporate established by virtue of Section 3 of the Coast Development Authority Act and therefore cannot be exempted from furnishing a security as a precedent of stay under Order 42 Rule 6 of the Civil Procedure rules. According to the Plaintiff the intended appeal raises no arguable issues and has been made in bad faith just so as to deprive the Plaintiff from the fruits of a successful litigation. In addition, it is argued that the Defendant has failed to furnish any security and does not satisfy the principles stipulated in **Geilla –vs-Cassman Brown [1973] E.A.**
5. The Defendant/Applicant filed a further affidavit on 19/10/2020 in response to the issues raised in the replying affidavit. The Deponent reiterates that the appeal is arguable given that the agreement was flaunted with irregularities at the execution stage. The Defendant maintains the position that it is a public body and this can be confirmed by, among other factors, that the Defendant's matters of litigation are handled by or with directions from the Office of the Attorney General. Thus the issue of whether the Defendant is

excused from giving a deposit cannot be deliberated upon.

6. Be that as it may, it is deposited that the Defendant being a government body is facing financial constraints owing to the hard economy due to the Covid-19 pandemic and cannot afford to deposit a security for such a high amount without any budgetary approval from the treasury. Therefore, it would not be in interest of justice to direct the Defendant to deposit any security.

7. Parties equally filed written submissions. Submissions by the Defendant/Applicant are dated 15/10/2020 and filed on the 19/10/2020 while those of the Plaintiff/Respondent are dated 30/10/2020 and filed on 5/11/2020. I have had the benefit of reading the written as well as the oral submissions offered and the decided cases. They replicate much on the grounds in support and opposition of the application and I need not to duplicate the same herein.

#### **Analysis and Determination**

8. Having pointed out each party's respective position as above, it is noteworthy that **Order 42 Rule 6(1) of the Civil Procedure Rules, 2010** empowers this court to stay execution, either of its Judgement or that of a court whose decision is being appealed from pending and determination of the appeal. However, there are conditions to be met before stay is granted and the same are provided by Rule 6(2) as follows:

*“a.No order for stay of execution shall be made under subrule (1) unless–*

*b. 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*

*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.”*

9. Before I venture unto whether the Defendant/Applicant has satisfied the conditions preceded to granting orders for stay under Order 42 Rule 6(1), it is prudent that the question as to whether the Defendant/Applicant is a government entity or not be determined first. In resolving this issue, I will consider the path trodden by others before me, and in this connection I find useful guidance in the case of **Association of Retirement Benefits Schemes v Attorney General & 3 others [2017] eKLR**, wherein the court cited with approval the Indian Supreme Court case of *International Airport Authority(R.D Shetty) vs The International Airport Authority of Indian & Ors.* In the two cases, the guidelines for determining whether an entity is a Government body or not have been set out as follows:

**(a) consider whether any share capital of the corporation is held by the Government and if so that would indicate that the corporation is an instrumentality or agency of Government;**

**(b) where the financial assistance of the State is so much as to meet almost the entire expenditure of the Corporation, that fact would afford some indication of the corporation being impregnated with Governmental character;**

**(c) it may also be relevant to consider whether the corporation enjoys monopoly status conferred by the State;**

**(d) whether the body has deep and pervasive State control;**

**(e) whether the functions of the corporation are of public importance and closely related to Governmental functions then that would be a relevant factor in classifying the corporation as an instrumentality or agency of Government, and**

**(f) if a Department of a Government is transferred to a corporation then it becomes an instrumentality or agency of the Government.**

10. In the two cases, the courts further stated that if after

consideration of these relevant factor it is found that the corporation is an instrumentality or agency of government, it would be an 'authority' and therefore, part of the definition of 'State' within the meaning of the expression used in the **Constitution**.

11. Guided by those two cases and based on guidelines (b) and (e) at paragraph (9) above, the Applicant fits to be defined as an agency of the state or public body as it performs functions of public nature and obtains its funds

from allocations by the parliament or borrowings authorized by the Minister. Its members are also public officers with the chairman being appointed by the president. In a narrow sense, the Defendant/Applicant is a public Corporation established under Section 3 of the **Coast Development Authority Act, Cap 449**, and mandated with among others, the responsibility of planning and coordinating the implementation of development projects in the Coast Province and the Exclusive Economic Zone.

12. Secondly, the Defendant/Applicant fits the definition of a Public

Body under **Section 3(1)** of the *Interpretation and General Provisions Act* as an authority performing functions of a public nature and more specifically, to plan and co-ordinate the implementation of development projects in whole of the Coast Province and the exclusive economic zone.

13. The Plaintiff argues that the Defendant is vested with the capacity to sue and be sued in its own name and is therefore a different and distinct entity from the government following the principles reiterated in the Landmark case of *Salmon-vs-Salmon*. I am however of a contrary view, that the fact that an agency of the government has the capacity to sue or be sued in its own name does not mean that the entity loses its character as an instrumentality or agency of government. In my view the answer to the foregoing question is in the affirmative.

14. Turning back to Order 42 Rule 6(2) of the Civil Procedure Rule, an Applicant in an application for stay must satisfy the court that he/she stands to suffer substantial loss if stay is not granted and that the application has been filed without unreasonable delay. The applicant must also show that he is willing to offer such security as may be ordered by the court.

15. On the issue of substantial loss, the Applicant argued that the Respondent is of unknown means and if the decretal sum is paid, then the Applicant may be unable to recover the same in case the appeal is successful. There is no doubt that the amount of the decree is quite substantial. To that fear, the difficulty to recover the decretal sum should the appeal succeed, the Plaintiff/Respondent has not given an answer or rebuttal thereof. I have not been given the capital base of the Plaintiff/Respondent and I cannot say for certain that it is a company of substance and one to which if the decretal sum is paid over, it will not be beyond the reach and control of the Defendant/Applicant. The law as I understand it is that the Defendant/Applicant having expressed the fear it is upon for the Plaintiff/Respondent to allay such fears by stating its ability to refund. Having not done so, I hold the view that the Defendant's fears are not idle and that it needs to be taken into account in considering the prayer for stay. In the decision in the case of ***Kenya Shell Ltd vs Kibiru [1956] KLR 410*** the Court of Appeal pointed out that if an applicant alleges difficulties in recovery of decretal sum, it rests upon the respondent to show that he would be able to effect a refund.

16. Lastly, as to whether the Defendant/Applicant should be ordered to deposit security, the argument by the parties is heated. Whereas the Plaintiff insists that it is a precondition to furnish security as provided for under Order 42 Rule 6 of the Civil Procedure Rule, the Defendant/Applicant submits that it is a public entity and therefore excused from furnishing security.

17. To this end, the court having reached a conclusion that the Defendant is an agency of the Government, the question which now begs an answer is whether the Defendant is exempted from furnishing security under Order 42 Rule 8 of the Civil Procedure Rules.

**Order 42 Rule 8** provides as follows:

*“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.”*

18. An appropriate answer can be reached by revisiting the Statute under which the Defendant/Respondent is established. **Section 3** of the **Coast Development Authority Act, 1990**, reads as follows:

3. *Establishment of the Authority*

*There is hereby established an Authority which shall be a body corporate by the name of Coast Development Authority, with perpetual succession and a common seal, and which shall be capable in its corporate name of:-*

a) *Suing and being sued*

b) *Taking, purchasing or otherwise acquiring, holding, charging and disposing of movable and immovable property;*

c) *Borrowing and lending money*

d) *Entering into contracts.*

e) *Doing or performing all such other things or acts necessary for the proper performance of its functions under this Act which may lawfully be done or performed by a body corporate.*

19. The said gives the Defendant/Applicant a mandate as an entity which can sue and be sued. The consequence of being sued is that it can be ordered to pay damages. It cannot therefore run away from its liabilities and hide under the veil of **Order 42 rule 8 of the Civil Procedure Rules**.

20. If the argument by the Defendant/Applicant is that it has a duty to protect public funds by pursuing an appeal and therefore its reluctance at releasing the funds now, then so that the interests of both parties are safeguarded, the decretal sum of Kshs.62,000,000/= must be deposited or an equivalent security provided. I have taken into account the circumstances of this case and I think the best form of security the applicant should give is to file a bank guarantee to secure the decretal sum within the next 60 days.

21. The end result is that an order of stay pending appeal is granted on condition that the Applicant provides a bank guarantee for Kshs.62,000,000/= within 60 days from the date hereof. In default thereof, the motion stands dismissed and the Plaintiff/Respondent shall be at liberty to execute.

22. The costs of the application to abide by the outcome of the appeal.

It is so ordered.

**DATED, SIGNED and DELIVERED at MOMBASA on this 27<sup>th</sup> day of January, 2021.**

**D. O. CHEPKWONY**

**JUDGE**

**Order**

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15<sup>th</sup> March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open Court.

**JUSTICE D.O CHEPKWONY**