



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CIVIL APPEAL NO 20 OF 2020

COUNTY GOVERNMENT OF NAROK.....APPELLANT

Versus

BRITISH PHARMACEUTICALS LIMITED.....RESPONDENT

RULING

[1] The significant order sought in the Notice of Motion dated 7th October, 2020 is: -

i) Stay of execution of the decree in the sum of Kshs. 7,049,628 arising from the judgment dated 8th September 2020 in NRK CMCCC NO 99 OF 2017.

[2] In support of the Motion, the applicant argued that;

(1) *That the appellant will suffer substantial loss if stay of execution is not granted, for;*

(i) it will be forced to divert public funds spared for provision of emergency health care services to combat COVID-19 PANDEMIC;

(ii) It may not recover the decretal sum should appeal succeed as the respondent has not demonstrated that it is financially sound to make a refund of the decretal sum should the appeal succeed;

(2) *That the appeal is arguable and will be rendered nugatory unless stay is granted; and*

(3) *That, under order 42 rule 8 of the Civil Procedure Rules, a County Government is exempt from provision of security required under order 42 rule 6 of the Civil Procedure Rules.*

[3] See the grounds set out in the Motion, the supporting affidavit, further supporting affidavit and expounded in the submissions filed. They also cited **Ex Parte** Stephen Wanyee Roki; Republic vs. AG & Ano [2016] eKLR and Magnate Ventures vs. Simon Mutua & Ano [2028] eKLR.

[3] The respondents opposed the application through a replying affidavit sworn by George Oluoch, an advocate of the High Court of Kenya. They also filed submissions expounding their arguments. The respondent argued that the appellant must satisfy all four requirements under order 42 rule 6 of the CPR but not one or some of them if stay is to be granted. They emphasized that the right of appeal is not greater than the right to enjoyment of fruits of judgment. Right of appeal must be viewed within the respondent's right to judgment.

[4] The respondent took a swipe at the appellant's challenge to the competence of the judgment as well as non-consideration of fraud by the trial court. They were of the opinion that these challenges do not hold any water as they are not supported by evidence, thus, their appeal is devoid of any chance of success.

[5] The respondent further urged that the appellant has not demonstrated in their affidavits or otherwise, that substantial loss would occur unless stay of execution is granted. They accused the appellant of making mere statements on re-allocation of funds to provision of emergency health services to combat COVID-19. The respondent also took issue with the submission that the respondent has not demonstrated its financial ability to refund the decretal sum should the appeal succeed. They submitted that the respondent is still in business and able to make a refund should it become necessary. In any event, they argued that it was the burden of the appellant to prove that the respondent cannot make a refund of the decretal sum; something the appellant has not done.

[6] The respondent also substantially submitted on the objection to the Replying Affidavit on the basis that it was sworn by the advocate for the respondent. Of essence, they argued that there is no prohibition that an advocate cannot depose an affidavit for a client as long as it

deposes of matters within the advocate's knowledge.

[7] They cited the following cases in support of their arguments: -

- i) Macharia T/A Macharia & Co. Advocates vs. East African Standard No. 2 (2002) eKLR
- ii) Equity Bank Ltd vs. Taiga Adams Co. Ltd (2012) eKLR
- iii) Margaret Anyango v. National Bank of Kenya Ltd & 3 others Civil Case No. 2533 of 1992.
- iv) Congress Rental South Africa v. Kenyatta International Convention Centre; Co-operative Bank of Kenya Ltd & Another (Garnishee) [2019]
- v) Mohamed Salim T/A Choice Butchery vs Nasserpuria Memon Jamat (2013) eKLR
- vi) Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 others (2015) eKLR
- vii) Kenya Shell Ltd v. Kibiru & Another, Civil Application No. 97/1986
- viii) Civil Application No. 27 of 2020, Kenya Hotel Properties v. AG & 5 others
- ix) County Government of Nyeri v. Benson Warui & Another (2020) eKLR
- x) Regina Waithira Mwangi Gitau vs Boniface Nthenge (2015) eKLR
- xi) First Community Bank Ltd v. Talib Omar Said (2020) eKLR
- xii) Retirement Benefits Appeals Tribunal Ex-Parte Heritage A. I.I. Insurance Co. Ltd Retirement Benefits Scheme (2017) eKLR.

[8] In sum, the respondent argued that the appellant has not shown substantial loss would occur or that their appeal will be rendered nugatory. Therefore, they should not be granted stay of execution.

ANALYSIS AND DETERMINATION

[9] Before I delve into the merit of the application, let me determine *in limine* the challenge to the replying affidavit filed by the advocate for the respondent. There is no prohibition to an advocate depositing an affidavit for his client on matters within his knowledge. Therefore, an affidavit will not be defeated merely because it was sworn by an advocate on behalf of his client. However, it is quite problematic where an advocate deposes to matters which; are not within his knowledge, or he cannot substantiate or are contentious and may demand the deponent to be called as a witness in the suit. The replying herein relates to matters within the knowledge of the advocate and are already discernible from the pleadings.

Stay of execution

[10] Stay of execution pending appeal provided under Order 42 rule 6 of the Civil Procedure Rule is a discretionary remedy granted only where sufficient reason has been shown. The predominant objective of the said remedy is to prevent substantial loss from befalling a successful appellant; to be reduced to a holder of a barren result of appeal. Such is loss of real value as blows away the essential core of the right of appeal. In money decrees, the loss ordinarily consist in the inability of the Respondent to refund the decretal sum should the appeal succeed or subjecting the successful appellant to hardships in the recovery of the decretal sum from the respondent. There is however, another eminent reality; the respondent's right to immediate enjoyment of the fruits of judgment. I agree with the respondents that none of the rights is the lesser. Such are, therefore, competing rights-settlement of which requires a subtle judicial balancing act in order to serve justice in the case; an act that never elevates or subjects one right over or to the other, respectively. The court had occasion to deal with this subject in **ABSALOM DOVA vs. TARBO TRANSPORTERS [2013] eKLR and stated:**

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant has right of appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder has right to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination”

[11] From the facts stated, has sufficient cause been established to warrant stay of execution of the decree herein?

[12] The appellant argued that it has had to re-allocate funds to provide emergency health services to combat COVID-19 PANDEMIC. The court takes judicial notice that COVID-19 PANDEMIC has affected the whole world including Kenya. And, County governments have had to take such measures as are necessary to combat the pandemic. Even if a formal directive has not been provided, it is in public domain that County governments were required to focus on combating the pandemic which invariably includes allocation of funds towards that end. This reality is not lost from the court.

[13] The foregoing notwithstanding, the appellants have claimed that the respondent may not be able to refund the decretal sum should their appeal succeed. The respondent claimed that they are in business and are able to refund the decretal sum. However, obscurity reigns here. An affidavit of means would have been necessary in resolving this aspect of the case. There is also need to give the right of appeal practical significance. In the circumstances of this case, I am satisfied that a stay of execution is warranted.

Of security

[14] Provision of security under order 42 rule 6 of the CPR helps in balancing these competing rights. However, the appellant claims protection of order 42 rule 8 of the CPR which provides: -

8. 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.

[15] The respondent did not put forward arguments on this provision. Nonetheless, proponents of such protections to governments base its rationale *inter alia* on the fact that government expenditure is governed by public finance and management provisions. Notably also, under Chapter 2 – *The Republic*, of the Constitution, governments in Kenya are at National and County levels.

[16] Be that as it may, as the respondent has right to immediate realization of the fruits of its judgment, I will not order a blanket stay of execution. It will be on terms. Accordingly, I order stay of execution of the decree herein pending appeal subject to the following: -

- i) The appellant shall pay a sum of Kshs. 1,000,000 to the respondent within 90 days of today;
- ii) The appellant shall file and serve record of appeal within 21 days.
- (iii) This appeal shall be listed before court on a date to be appoint by court for directions on the hearing of the appeal.
- (iv) Costs of the application shall be in the cause.

Dated, signed and delivered through Microsoft Teams Application at Narok this 25th day of January 2021.

F. GIKONYO

JUDGE