



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 181 OF 2019**

**KENYA PETROLEUM REFINERIES LIMITED.....APPELLANT**

**-VERSUS-**

**1. NGAYAU MUTIA**

**2. CHAI MUTIA.....RESPONDENTS**

***(Being an Appeal from the Ruling of Hon. Mr. Kyambia SPM delivered on 5<sup>th</sup> April, 2019 in CMCC No. 4768 of 2003)***

**RULING**

1. This ruling relates to a Notice of Motion Application dated 22/5/2020, brought under the provisions of Section 3A of the Civil Procedure Act Cap 21, Order 42 of the Civil Procedure Rules 2010 and all other enabling provisions of the law. The Application seeks for orders that: -

**a) Spent**

**b) Spent**

**c) That pending the hearing and determination of the main appeal this Honourable Court be pleased to order a stay of execution of the Judgment of the Trial Court entered on 5<sup>th</sup> April, 2019.**

**d) That the costs of this Application be provided for.**

2. The application is premised on the seven (7) grounds on its face which are further explicated on the affidavit sworn on even date of 22/5/2020 by **Kadzo Kalama** the Applicant's legal officer. The deponent avers therein that the Respondent has commenced garnishee proceeding in the case of Mombasa CMCC. No 4768 of 2003 and a Garnishee Nisi order was granted, a consequence of which the Appellant/Applicant's bank accounts were restricted from any debits. Since then, it is the Applicant's averment that its business has been crippled, and, given that it is the custodian of public funds, it would be unfair to stall public services. It is further deposed that the Respondent has no known resources and it would be difficult to recover the sum if the same is released to the Respondent. Lastly, the Applicant asserts that it is willing to abide by any conditions by the court including depositing the decretal sum in a joint account to avoid the appeal, which in the Applicant's view is arguable, from being rendered nugatory.

3. The application is opposed on the grounds set out in a replying affidavit sworn on 12<sup>th</sup> June, 2020 by Randolph M. Tindika, the Respondents' advocate. He avers that the Applicant has come before court with dirty hands and is also guilty of material non-disclosure. He goes on to aver that the Applicant has not disclosed that execution in the matter was commenced by way of Judicial Review and the Applicant raised a Preliminary objection thereof which was eventually dismissed.

4. Mr. Tindika appears not to be pleased on how the court has conducted the matter on previous events and his jeremiads are on face of the replying affidavit and I wish not to deposit them here. Nonetheless, he is of the view that the instant application is gimmick to frustrate the Respondents from enjoying fruits of Judgment delivered in favour of the deceased's estate. He requests the court to find that the Applicant has not met the threshold provided for under **Order 42 Rule 6(1) of the Civil Procedure Rules**.

5. Following directions issued by this court on 7/10/2020, the Application was canvassed by way of written submissions. The Applicant's submissions were filed on the 26/10/2020 whilst those by the Respondents were filed on 28/10/20. Those submissions mirror each party's position made in the pleadings as captured above and I need not to repeat the same here.

## **Analysis and Determination**

6. I have considered the application in light of the supporting and replying affidavits, the submission filed on behalf of both parties as well as the authorities relied on. The main issue for determination is whether in the circumstances of this case stay of execution can be granted pending the hearing and determination of the appeal.

7. **Order 42 Rule 6(2)** of the Civil Procedure Rules lays down the conditions which an Applicant must satisfy in order to deserve orders of stay of execution pending appeal. A summary of Order 42 Rule 6 shows that an Applicant must satisfy the court that he/she stands to suffer substantial loss if stay is not granted and that the application should have been filed without unreasonable delay. The Applicant must also show that he/she is willing to offer such security as may be ordered by the court.

8. On whether or not the application was brought without undue delay, there have been no contentions by either party that the application was filed without inordinate delay. According to me and as the record reflects, the application was filed two days after the Garnishee Nisi order was granted. I am therefore satisfied that there was no inordinate delay in the Applicant filing the application.

9. As for whether the Applicant will suffer substantial loss, the Applicant submitted that the Respondent is a man of straw and if allowed to proceed with the execution, then the Applicant may not recover the decretal sum. Therefore, even if the appeal will be successful, it will be rendered nugatory. The Applicant also expressed willingness to deposit the sums in a joint interest earning account in the names of the advocates on record for the parties. However, in the Respondents view, the application in its entirety is meant to defeat the realization of the fruits of a successful Judgment on their part.

10. In my humble view being an application for stay, the main consideration is the need to balance the competing interests of the parties in the litigation. The decree holder has a crystalized right to enjoy the fruits of a successful litigation which ought not to be disregarded unless there exist viable reasons to do so. On the other hand, the judgment debtor/Appellant equally has an important right of appeal of its case to the apex court and hence has unhindered access to justice so that upon conclusion of the process, he/she should not be left with a worthless paper judgment only serving academic purposes. That is the balance the court has to strike and I take the view that the test to be applied is an Adjective one. It is thus a question of coming to a conclusion that secures the two competing interests by preserving the interests of both parties in the most just way possible.

11. In any event, the law as it is, requires that where there is an allegation that the Respondent is not possessed of means, the burden of proof shifts to the Respondent to demonstrate, by way of an affidavit of means evidence that they are possessed of such sufficient means that should the decretal sum be paid to them and the appeal is successful, they shall be in a position to reimburse/refund the decretal sum.

12. Quite unfortunately, the Respondents herein have not file any affidavit of means or at all, thereby leaving this court with nothing to look at in determining its financial standing. That being the case, in making its decision, this court takes into consideration that a litigant that has lost his case has a right to appeal against the findings of the court. It follows therefore that a matter is deemed concluded after going through its due course all the way to the apex court if need be. But, it must also be understood that until and unless the Judgment/Decree has been set aside by the superior court, the same remains in force and incapable of being executed by the Court. There is therefore need for this court to balance the two competing interests of the decree holder and that of the Appellant.

13. I am also of the considered view that the overriding objective of this court is to exercise latitude in its interpretation of the law so as to facilitate determination of cases, once filed, on merit and thus facilitate access to justice by ensuring that the deserving litigants are not shut out.

14. I consider that unless stay is granted, execution shall ensue against the Appellant, thus the money will be put beyond its reach without any assurance that in the event the appeal succeeds, it may be possible to get restituted. It is my consideration that if execution proceeds, it shall be difficult, if not just impossible to make a recovery. This would then render any pursuit of the appeal nugatory and of no meaningful purpose. Such would not be fair nor just. And the court shall of itself have spent its resources in vain and in the most undesirable manner. That should not be the attribute of a court of law.

15. Consequently and for the reasons stated hereinabove, I find that it would be in the interest of justice to exercise my discretion in favour of the Applicant. I therefore grant stay pending appeal but on terms that the Appellant shall avail and have deposited the decretal sum of **Kshs. 1,511,412/=** into an escrow account in the joint names of the counsel for the Appellant and that of the Respondents within 21 days from today. In default the stay hereby granted to the Applicant shall stand lapsed and the Respondents will then be at liberty to take out execution proceedings in accordance with the law.

It is hereby so ordered.

**DATED, SIGNED and DELIVERED at MOMBASA this 19<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**

**JUDGE**