



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
CIVIL CASE NO. 81 OF 2014

MIDROCWATER DRILLING CO. LTD.....PLAINTIFF/RESPONDENT

VERSUS

NATIONAL WATER CONSERVATION & PIPELINE CORPORATION...DEFENDANT/APPLICANT

RULING

The Application

1. The application for determination was filed by the Defendant, being a Notice of Motion dated 30th October, 2020. It is brought under Sections 1A, 1B 3A and 95 of the Civil Procedure Act, Order 42 Rule 6 and 51 Rule1 of the Civil Procedure Rules, Section 7 of the Appellate Jurisdiction Act and all other enabling provisions of the law.
2. The main prayers sought are that the court issues a stay of execution of this Court's judgment delivered on 18th September, 2020 pending the hearing and determination of the intended appeal filed by the Applicant, that the court grants the Applicant leave to file a Notice of Appeal out of time and that the court issues any other orders or directions as it deems fit to grant.
3. The application is supported by the grounds on the face of it and the affidavit of Sharon Obonyo, the Chief Executive Officer/Secretary to the Board of the Applicant sworn on 30th October, 2020. It suffices to state that under the grounds supporting the application it is indicated that the same is supported by the affidavit of Baraka Xavier Francis which is not factual.
4. The crux of the supporting affidavit is that after the judgment of the Court was delivered, counsel for the Applicant was not immediately issued with a copy of the judgment until the 5th October, 2020. Instructions to appeal the judgment were subsequently issued on 26th October, 2020 by which time the 14-day stay granted by the court had lapsed on 18th October, 2020.
5. It is averred that if the stay is not granted the Defendant stands to lose substantially as it may never get the money in the sum of Ksh. 29,274,493.80 that was subject of the judgment and that taxation may proceed any time. It is further argued that the Applicant has an arguable appeal and if that stay is not granted, the same may be rendered nugatory.
6. It is reasoned that even if the appeal succeeds the Defendant may never get back the money due to the Plaintiff's inability to pay premised on its business. That thus, execution would ruin the Applicant or threaten its existence.
7. It is further deposed that the application has been filed without delay and the grant of the orders sought will not prejudice that Respondent in any way.
8. The application was opposed vide a Replying Affidavit sworn by Mohamed Chute, the Chief Executive Officer/Managing Director of the Plaintiff/ Respondent on 23rd December, 2020.
9. It is deposed that although a copy of the judgment of the court was not issued on 18th September, 2020, the date of the judgment, parties were asked to collect it on 22nd September, 2020. In respect of the Respondent, they were able to get a copy on 23rd September, 2020. As such, the Applicant cannot argue that it could not file an appeal based on a late release of the judgment.

10. That furthermore, even if the Applicant had received a copy of the judgment on 5th October, 2020 as alluded it had sufficient time to file Notice of Appeal or make any other necessary application. As such, it cannot also be an excuse that instructions to appeal were given late as the parties knew of the outcome of the judgment on time.

11. Further, that the matter has been in court for over 10 years with several fruitless attempts to settle it. Hence, the issue of consultations on whether to appeal is not tenable, Furthermore, a temporary stay of execution was granted immediately after the judgement and the Applicant took no action during this window. As such, there is clear indolence on the part of the Applicant to file the Notice of Appeal, which delay is inexcusable.

12. It deposed that the Applicant, being a Corporation, has not demonstrated the loss it stands to suffer if stay is not granted, and that in the contrary it is the Respondent who would suffer if the decretal sum is not paid. This is in view of the fact that the Respondent is entitled to the fruits of its judgment.

13. As regards the argument that the appeal is likely to be rendered nugatory if the stay is not granted, is deposed that this is an issue that ought to be argued at the appeal level as this court cannot sit on its own appeal.

14. Further, that although the Applicant offers to deposit security under Order 42 Rule 8 of the Civil Procedure Rules, the court should not be inclined to grant the stay as in the first place, it did not file a defence to the suit. In any case that, the Applicant is a well- established Corporation with assets worth millions of shillings, some of which were those the Respondent was hired under the suit contract.

15. It is also deposed that the stay is unwarranted as the Respondent has not commenced the execution process and in any event, there is no appeal in place.

16. It is also averred that although the amount that was claimed was Ksh. 62,391,433, only a sum of Ksh. 29,274,493/ was awarded.

17. It urged that the court dismisses the application as the same is filed as an afterthought and it lacks merit.

SUBMISSIONS

Applicant's submissions

18. The application was canvassed before me on 6th January, 2021 by way of oral submissions. Parties additionally filed lists of authorities. The Applicant was represented by learned counsel, Mr. Baraka whilst the Respondent by learned counsel, M/s Mugo. Both counsel basically emphasized the contents of the affidavits in support of, and opposition to, the application. I will only therefore, highlight what is necessary.

19. On the part of the Applicant, Mr. Baraka submitted that the Applicant had met the threshold for grant of stay of execution. As regards the aspect of suffering substantial loss, he submitted that the Applicant was likely to suffer immensely because it was not likely to recover the judgment sum from the Respondent who demonstrated its ability to compensate the Applicant by motor vehicles. This was in view that the Respondent only attached log books as security for loss, yet the log books were not accompanied by valuation reports to show that they were worth the value of the judgment sum. The case of **Kenya National Abdullahi Highways Authority v Ahmednasir Maalim [2020]e KLR** was cited to demonstrate the parameters for grant of stay where substantial loss is likely to be occasioned.

20. Under this head, it is further argued that no security can be ordered from the Applicant which is a Corporation as its functions and liabilities were transferred to Counties. Counsel relied on Section 153 of the Water Act, Act No. 43 of 2016. On this, reliance was placed in the case of **Zedka Technical Services Limited v County Government of Uasin Gishu & 3 Others [2020]e KLR**.

21. As regards the issue of delay, counsel submitted that the judgment was delivered on 18th September, 2020 after which a stay of execution of 30 days was granted. The application having been filed on 30th October, 2020 means that there was a delay of only one and a half weeks which is not inordinate. The case of **Alice Wamaitha v Jane Wanjiru [2018]e KLR** was cited to buttress this submission.

22. As regards the prayer for filing the appeal out time, counsel urged the court to have regard to the well-known criteria set by the law namely, that the application is brought without delay and if there is delay the reasons for the delay are explained; that the appeal is arguable and the degree of prejudice if the stay is not granted.

23. As regards the delay, the Applicant reiterated that there was only a delay of one and a half weeks; and that the delay is explained by the receipt of the of the Court's judgment late.

24. On the likely success of the appeal, it is urged that the same tilts in favour of the Applicant as the Respondent was not entitled to the judgment sum as no deliveries were made to the government.

25. On the prejudice aspect, it is argued that the Applicant stands to lose over Ksh. 29 Million if the stay is not granted. To this end, counsel urged that court to invoke its inherent powers pursuant to Section 1A,1B and 3A of the Civil Procedure Act in the interest of doing justice, and consequently stay the taxation proceedings.

26. Finally, Mr. Baraka urged that court to order that each party bears its own costs of the application.

Respondent's submissions

27. On the issue of delay of filing the appeal, Miss Mugo submitted that the Notice of Appeal ought to have been filed within 14 days of delivery of the judgment. The same having been filed on 30th October, 2020 means that there was a delay of over two months which was not explained. To this end, she relied on the Applicant's authority in the case of **Gerald Kithu Muchange v Catherine Muthoni Ngare & Another [2020] e KLR** where the court dismissed a similar application as no justifiable cause was granted for the delay. Similar case obtained, as submitted, in a decision by the Supreme Court in the case of **Kenya Revenue Authority v Habima Sued Hemed & AG-Supreme Court Application No. 23 of 2015 [2017]e KLR** as well as **Maree Ahmed & Another v Lelichaka Ngoro- HC Misc No. 27 of 2017[2017]e KLR, Bilha Gahuya Akatsav AG & Another ELC 273 of 2017 [2020]e KLR** and **Simon Towett Maritim N Jotham Muiruri Kibaru HC Misc No. 1720 2004[2004]e KLR**.

28. It is also submitted that the issue of the merit of the appeal should be dealt with in the Court of Appeal.

29. As regards the prayer for stay, counsel submitted that the same was a non-starter as no appeal had been filed and relied on the case of **Peter Chege Kiarie v George Matu & Others- Thika ELC No. 300 4 of 2017**.

30. Counsel added that the Applicant had not met the conditions for grant of stay under Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules. As regards the issue of security, counsel stated that the Respondent has demonstrated that it was able to compensate the Applicant should the appeal succeed. Counsel also submitted that the Applicant can be ordered to deposit security because it is a Corporation on its own established under a common seal and it is neither represented by the Attorney General. In this regard, the case of **NTSA V Elisha Ongoya & Another HC Civil Appeal No. 153 of 2018** was cited.

31. On the issue of taxation, counsel submitted that the same should be dealt with separately as a reference. That furthermore, there was no threat of execution as no warrants had issued and that therefore, the request to stay taxation is not warranted.

32. Counsel added that a stay of taxation proceedings could not issue as no prayer in that regard has been sought.

33. On the whole, Miss Mugo submitted that the Applicant had not demonstrated that the application was merited and accordingly urged the court to dismiss it.

Rejoinder

34. In response, Mr. Baraka submitted that court can issue the stay of taxation so to safeguard the appeal being rendered nugatory.

35. On the delay, counsel reiterated that the judgment could not be released to the parties before it was corrected and as such, counsel could not seek instructions from the Applicant in time on whether to appeal.

Analysis and determination

36. I have accordingly considered the application, the Reply to the Application and the respective rival submissions upon which I have concluded that the issues arising for determination are whether the court should grant leave to the Applicant to file a Notice of Appeal out of time, whether a stay of execution of the judgment should issue and whether the taxation proceedings should be stayed.

Whether leave to file a Notice of Appeal out of time should be granted

37. Under this prayer, the Applicant invoked the provisions of Section 7 of the Appellate Jurisdiction Act which provides as follows:

"The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired."

38. It is clear that the above provision does not set the conditions for extension of time to file a Notice of Appeal. That is why it is now settled that the grant of the relief is purely in the discretion of the court. In my view therefore, an Applicant seeking the relief must show good cause why the relief should issue. In so finding, I am minded by the provisions of Order 50 Rule 6 of the Civil Procedure Rules which states:

"Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise."

39. The Supreme Court further set out the guiding principles for the exercise of such discretion in the case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR** as follows:

"This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the underlying principles that a Court should consider in exercise of such discretion:

1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
3. Whether the court should exercise the discretion to extend time is a consideration to be made on a case to case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."

40. In the instant case, there is no dispute that the judgment was read to the parties on 18th September, 2020. What is disputed is the date the judgment was availed to the parties. According to the Respondent, its counsel was able to get a copy on 22nd September, 2020 whilst the Applicant allude that its counsel was availed the judgment on 5th October, 2020. That means that the Applicant was still within time (30 days) to file the Notice of Appeal as only about 12 days had lapsed. The Applicant's counsel did not however file the Notice immediately citing that, it was not until the 26th October, 2020 that the client issued instructions to appeal. Indeed, there is a letter dated 26th October, 2020 from National Water and Harvesting Storage Authority annexed to the Supporting Affidavit marked SO2 in this regard. Notably from this letter is the fact that counsel for the Applicant had as at 12th October, 2020 advised his client on the need to appeal but no response was received until 26th October, 2020. By this date, 33 days had elapsed since the delivery of the judgment and as such, the Applicant was time barred to file a Notice of Appeal within 14 days pursuant to Rule 75(1) and (2) of the Court of Appeal Rules.

41. From the respective submissions made by the parties, I am unable to ascertain that indeed the judgment of the Court was availed to the parties as at 22nd September, 2020 as alluded by the Respondent's counsel. Counsel for the Respondent has exhibited nothing to counter the Applicant's counsel assertion that he was furnished with the judgment on 5th October, 2020.

42. Against this backdrop, I take it in good faith that the Applicant's counsel received a copy of the Judgment on 5th October, 2020. It was well explained what steps he took soon thereafter to commence the process of appeal. He gave instructions to his client who did not respond on time. On this, I agree with the submission that since the Applicant is a Corporation, instructions to appeal could not be given single-handedly. Board meetings had to be conducted and unanimously agreed on it.

43. Yes, I agree that there was delay cumulatively of about 42 days, but this delay is well explained. There was no deliberate or undue delay in filing the Notice of Appeal. I would then have no reason of not exercising the discretion conferred on me to grant leave to file the Notice of Appeal out of time. Furthermore, I do not see what prejudice the Respondent stands to suffer if the extension of time is granted. I now grapple with the next issue for determination.

Whether a stay of execution should be granted.

44. The power to grant orders for stay of execution pending appeal is discretionary which must be exercised judiciously. **Order 42 Rule 6(2)** of the **Civil Procedure Rules, 2010** sets out the conditions necessary for the grant of stay of execution in the following terms:

"(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 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."

45. I have already addressed the question of delay; that even if the application was not made quite timeously, sufficient explanation to the satisfaction of the court was given. I need thus not belabor on this point.

46. As regards substantial loss, it is generally considered as the corner stone for granting stay of execution. In circumstances where a money decree is involved such as the case herein, substantial loss lies in the Respondent's inability to reimburse the decretal sum incase the appeal succeeds. It places an obligation upon the court to strike a balance between two competing interests. On the one hand, the Plaintiff as the successful party is entitled to the fruits of his judgment while on the other, the Defendant being aggrieved by the judgment is entitled to exercise his right of appeal and to have that right protected by avoiding a situation where his appeal may be rendered nugatory. It is therefore imperative for an applicant to satisfactorily demonstrate the substantial loss that he stands to suffer in the event that stay is not granted.

47. In **Machira t/a Machira & Co. Advocates v East African Standard [2002] eKLR**, cited by the Applicant herein the court expressed itself as follows:

"The ordinary principle is that a successful party is entitled to the fruits of his judgment or any decision of the court giving

him success at any stage....In attempting to convince a court that substantial loss is likely to be suffered so that whatever he intends to achieve by his intended recourse to some other authority will be nugatory if ultimately he prevails, the applicant is under a duty to do more than merely repeating to the court words of the relevant statutory rule or general words used in some judgment or ruling of a court in a decided case cited as a judicial precedent to guide. It is not enough merely to state that substantial loss will result, or that the appeal if successful will be rendered nugatory. That will not do.

If the applicant cites, as a ground, substantial loss, the kind of loss likely to be sustained must be specified, details or particulars thereof must be given, and the conscience of the court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue and that if it comes to pass, the applicant is likely to suffer substantial injury by letting the other party proceed further with what may still be remaining to be done or in execution of an awarded decree or order, before disposal of the applicant's business (e.g. appeal or intended appeal)."

48. I am satisfied that the Respondent has been unable to demonstrate that it would be able to pay the decretal sum should the appeal succeed. I say so because, although it attached several log books of motor vehicles owned by it, the log books were not accompanied by valuation reports. It is therefore difficult for the court to ascertain their worth. That aside, my view is that motor vehicles are such fluid assets in the sense that they quickly deteriorate in value. They also are susceptible to total destruction through accidents. They can also easily move from one hand to another.

49. I am simply stating that, motor vehicles are not assets whose ownership in terms of security such as in this case can be ascertained in long term. More notably because it is not the duty of the court to keep their log books so as to prevent future sale or ensure sustainability of their value from the date of the order to the date the appeal is heard and determined. Hence, unless in very special circumstances, this court would be hesitant to rule that they are a good security by which the Defendant can be compensated should the appeal succeed.

50. The overriding principle is to ensure that a party exercising its indisputable right of appeal is not exposed to unwarranted harm by failure to grant stay of execution. In the case of **Butt v Rent Restriction Tribunal [1979]e KLR**, the Court of Appeal cited **Brett, LJ in Wilson v Church (No.2)12 Ch D (1879 454** where at page 458, **Cotton LJ** held thus:

"I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory."

51. In the case of **National Industrial Credit Bank Limited v Aquinas Francis Wasike & Another [2006]e KLR**, the Court of Appeal sitting in Nairobi found that the means or resources of the 1st Respondent remain unknown, and that in those circumstances, the court agreed that if the decretal sum was paid over to either the 1st or 2nd Respondent, the two might not be able to repay it back were the appeal to succeed. The Court in the circumstances found that the appeal would be rendered nugatory. In short, the Respondent herein has been unable to demonstrate that it would be able to pay back the decretal sum if the appeal succeeds. This would definitely render the intended appeal nugatory.

52. On the issue of deposit of security in due performance of the decree, the Applicant submitted that it cannot be ordered to deposit the security by virtue of Order 42 Rule 8 of the Civil Procedure Rules. The same reads;

"No such security as is mentioned in rules 6 and 7 shall be required from the Government or where the Government has undertaken the decree of the suit or from any public officer sued in respect of an act alleged to be done by him in his official capacity."

53. The Respondent on its part submitted that the court had been misled that the Applicant is a Government yet it is established under a Common Seal and is a Corporation on its own and is not represented by the Hon. Attorney General. **HC Civil Appeal No. 153 of 2018-NTSA V Elisha Ongoya & Another** was cited in support of this submission.

54. In the case of **Anniversary Press (K) Limited v National Water Conservation & Pipeline Corporation [2020] e KLR**, a Judgment was entered against the Defendant/ Respondent, in this case National Water Conservation & Pipeline Corporation. A Notice To Show Cause was subsequently issued in execution of the judgment standing in the sum of Ksh. 9,450,407/ and costs, fees and interests of Ksh.32,139,235/. The NTSC was served upon the Respondent which gave rise to a Preliminary Objection as the NTSC was received by National Water Harvesting and Storage Authority (NWHSA). It was argued that the identity of the Respondent had since changed to NWHSA and as such, its directors could not be summoned in execution of the decree therein.

55. In the instant case, the issue of change of identity was not argued. That notwithstanding, there is no doubt that the Applicant is a Corporation and even if it has metamorphosed into NWHSA, it still remains a Corporation established under the Water Act, Cap 372, Laws of Kenya.

56. On the other hand, Government proceedings are governed by the Government Proceedings Act, Cap40, Laws of Kenya. Section 21(1) refers to institution of civil proceedings against a government or a government officer while sub section (4) bars the execution of or attachment or process in the nature for enforcement by the government, or government department or government officer.

57. The entire Section 21 of the Act does not at all refer to a Corporation and specifically sub section (4) does not exempt execution against a Corporation. It follows that the Applicant is not subject to Government Proceedings Act and being established under a Common Seal can sue and be sued on its own. It must shoulder its responsibilities and liabilities individually. It cannot hide under the guise of being a Government Corporation to cushion it against execution.

58. I also find solace in the case of **Anniversary Press (K) Limited v National Water Conservation & Pipeline Corporation (supra)**

where the court cited the case of Greenstar Systems Limited v Kenyatta International Convention Centre (KICC) & 2 Others [2018] eKLR where the Court held thus:

“Finally on this point I will refer to the decision of Hon. Justice J. Onguto (now deceased) in the case of IKON PRINTS MEDIA COMPANY LIMITED – VS – KENYA NATIONAL HIGHWAYS AUTHORITY & 2 OTHERS [2015] eKLR in which he held: - ‘Foremost though, it is important to point out that it may not be tenable to invoke the Government Proceedings Act (Cap 40) as a bar to any execution herein. The 1st Respondent is a body corporate with perpetual succession and a common seal. It is a corporate entity capable of subsisting independently. It is dependent on government funding but it is not government or servant of agent of Government. Any judgments decreed against the 1st Respondent are not judgments against the government but against an independent juridical body.” The above authority which is of persuasive value upholds the view that a state corporation or parastatal is not automatically subject to the Government Proceedings Act.... It is too late in the day for the Applicant to seek to don a different coat. Its invocation of the Government Proceedings Act is but a last ditch attempt to scuttle the execution proceedings against it..”

59. This is case that involves a monetary decree and a security in equal measure is the most appropriate to order. The court will accordingly order the deposit of a security it deems fit and just to grant.

Whether the Taxation proceedings should be stayed.

60. This was not a substantive prayer that was sought but the court was urged to exercise its discretion whilst invoking Sections 1A,1B and 3A of the Civil Procedure Act. My view on this is that the taxation proceedings are entirely separate from the main suit. Looking at the main suit file which this court has possession of, shows that no Bill of Costs has been drawn in it. As such, ordering a stay of proceedings that are not within the proceedings of the suit the court is handling is overbearing and crossing the boundaries. That request is without merit.

Conclusion

61. The upshot of the above is that the Notice of Motion dated 30th October, 2020 partially succeeds as follows:

a. There shall be a stay of execution of the judgment delivered on 18th September, 2020 and all consequential orders pending the hearing and determination of the intended appeal on condition that the Defendant deposits the sum of Ksh. 29, 274,493.80 in a reputable bank to be agreed upon by both the Plaintiff and the Defendant in an interest earning account in the joint names of the advocates for the Applicant and advocates for the Respondent within 14 days of this ruling.

b. In the alternative, the Defendant shall provide an irrevocable bank guarantee in the sum of Kshs. 29, 274,493.80 from a reputable bank, to be valid during the pendency of the appeal, within 21 days from the date hereof, failure to which the stay order shall lapse.

c. The Defendant is also granted leave to file a Notice of Appeal against the Judgment of 18th September, 2020 within fourteen (14) days from the date hereof.

d. The costs of the application shall be borne by the Defendant/Applicant.

DATED AND DELIVERED AT NAIROBI THIS 23RD MARCH, 2021

G.W.NGENYE-MAHARIA

JUDGE

In the presence of:

1. Mr. Baraka for the Defendant /Applicant.

2. Ms. Mugo Plaintiff/Respondent (Absent).