



IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. 269 OF 2016

BETWEEN

UTILITY CAPITAL MANAGEMENT LTDPLAINTIFF

AND

EKAA AFRIKA LIMITED1ST DEFENDANT

CHRISTINE OCHIENG OUKO..... 2ND DEFENDANT

DENNIS MUGO3RD DEFENDANT

MORRIS WETINDI4TH DEFENDANT

RULING

1. The Defendants have moved the court by the Notice of Motion dated 19th August 2021 under **Order 42 rule 6** of the **Civil Procedure Rules 2010** seeking stay of execution of the decree issued following the judgment delivered on 11th August 2021 by Odero J.

2. The application is grounded on the supporting affidavits of Dennis Mugo Mwenda and Morris Wetindi, the 3rd and 4th Defendants, sworn on 19th August 2021. The application is opposed by the Plaintiff through Grounds of Opposition dated 25th August 2021 and the replying affidavit of James Stuart Smith, a Director of the Plaintiff, sworn on 25th August 2021.

3. Before I deal with the issue at hand, let me recap the facts in order to provide the necessary context of the application. The 1st Defendant approached the Plaintiff for short term financing to enable it fulfil a tender for the supply of Smart Boards to the Ministry of Education at a total cost of KES. 67,496,000.00 which the Plaintiff funded to the tune of USD 380,638.18. The parties entered into a Master Receivables Purchase Agreement (“the MRPA”) by which the Plaintiff undertook to finance the supply and delivery of the goods in consideration of assignment of the dues from the Ministry under the Supply Contract. In due course, the Ministry made some payments to the 1st Defendant to its account at Equity Bank and not Standard Chartered Bank as agreed in the MRPA forcing the Plaintiff to apply for an order freezing the account at Equity Bank. The Plaintiff claimed breach of contract and sought the outstanding sum due to it under the MPRA.

4. In its judgment, the court found that the 1st Defendant has breached the MRPA and that the Plaintiff was entitled to the USD 380,368.18. The court also found the 2nd, 3rd and 4th Defendants liable as guarantors to the 1st Defendant. The court awarded the Plaintiff USD 4,979.00 as special damages on account of taxes paid to enable the subject goods be cleared at the Mombasa Port. The court directed that the amount held in the frozen account at Equity be wired to the Plaintiff.

5. The principles that guide the court in an application for stay of execution pending an appeal are grounded in **Order 42 Rule 6(2)** of the **Civil Procedure Rules**. In order to succeed, the applicant must demonstrate substantial loss may result unless the order of stay is made. It must also demonstrate that the application has been brought without undue delay and lastly, the applicant must give such security as the court may order for the due performance of the decree or order as the case may be. The principles have been reiterated in several cases among them **Kenya Women Microfinance Ltd v Martha Wangari Kamau KJD HC Civil Appeal No. 14 of 2020 [2020] eKLR** which cited the position of Warsame J., (as he then was) in **Samvir Trustee Limited vs. Guardian Bank Limited NRB ML HCCC 795 of 1997 (UR)** where he

expressed himself as follows:

Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss....Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation ... At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions.

6. With the aforementioned principles in mind, I now turn to determine whether the Plaintiffs have made out a case for stay of execution pending their intended appeal. The Plaintiff does not dispute that the Defendants have evinced their intention to lodge an appeal to the Court of Appeal by filing a Notice of Appeal and applying to the court for a record of the proceedings. In addition, the application has been brought without delay. The only question for resolution then is whether and upon what terms should the court order stay of execution pending appeal.

7. Mr Khayega, counsel for the Defendants, submitted that the sum of KES. 13 million now in Equity Bank which has been frozen by the court is sufficient security for the decree. Mr Ndalila, counsel for the Plaintiff, took the position that KES. 13 million was not the amount due to the Plaintiff under the MPRA hence it could not be used as security. Counsel urged the court to order the Defendant to furnish adequate security in light of the judgment in its favour.

8. Since the Plaintiff has already succeeded and is entitled to the fruits of its judgment, I do not see how the Defendants can demand that the Plaintiff put up its own money as security. It is the Defendants who must now secure the Plaintiff pending appeal otherwise, it would proceed with execution. The Defendants must provide security pending the hearing and determination of the appeal. Although the 3rd and 4th Defendants have stated in their depositions that they are willing to comply with any condition that this court may impose, they have not indicated what security is sufficient in the circumstances. Bearing in mind that the total decretal sum is at least USD 380,368.18, I would consider a security of KES. 15,000,000.00 in the form of a Bank guarantee as sufficient in the circumstances.

9. I allow the Defendants' application dated 19th August 2021 on the following terms:

(a) A Stay of execution of the Judgment and consequent decree of this court be is and hereby issued pending the hearing and determination of the appeal to the Court of Appeal on the terms hereunder.

(b) That the Defendants shall provide a Guarantee of KES. 15,000,000.00 from a reputable bank with 30 days from the date hereof and in default the stay shall lapse.

(c) In the event of compliance, the order of stay shall lapse after one year from the date hereof unless extended by this court or the Court of Appeal.

(d) The costs of the application shall be in the appeal.

DATED and DELIVERED at NAIROBI this 30th day of AUGUST 2021.

D. S. MAJANJA

JUDGE

Mr Ndalila instructed by Ndalila and Company Advocates for the Plaintiffs.

Mr Khayega instructed by Khayega Chivai and Company Advocates for the Defendants.