



**Mubei v Kenya Electricity Transmission Co Limited & 2 others (Environment & Land Case 141 of 2019) [2023] KEELC 19267 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19267 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 141 OF 2019**

**A OMBWAYO, J  
JULY 28, 2023**

**BETWEEN**

**KENNETH KIPKIRUI MUBEI ..... PLAINTIFF**

**AND**

**KENYA ELECTRICITY TRANSMISSION CO LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> DEFENDANT**

**THE ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. Kenya Electricity Transmission Co. Limited (hereinafter referred to as the applicant) has come to court with application dated June 17, 2023 seeking orders that the Honorable Court be pleased to issue an order of stay of execution of the orders of the Environment and Land Court at NAKURU (Hon. Justice Ombwayo) in E.L.C Cause no. 141 of 2019 issued on July 11, 2023 pending the hearing and determination of the Appeal lodged by the Applicant to the court of appeal; That the costs of this Application abide the outcome of the intended appeal that any other or further orders as this Honorable Court may deem fit and just in the circumstances of the case.
2. The application is based on grounds this court in its judgment delivered on 11<sup>th</sup> July, 2023 held that the Plaintiff should be paid Kshs. 15,000,000 as compensation for acquisition of a public right of way by the Applicant over his property known as L.R. No. 13287/42. That Applicant is not satisfied by the said order of the court and has appeal against the same to the court of appeal. That amongst the Applicant's issues with the Judgment is the fact that while it had demonstrated through its documents and oral testimony the formula with which it arrived at a proposed compensation of Kshs.6,970,073.25. for the 1<sup>st</sup> Respondent's affected area of land, the superior court did not give any explanation as to how it arrived at the award of Kshs.15,000,000/= awarded to the 1<sup>st</sup> respondent.



3. The applicant is apprehensive that the Honorable trial judge found that it had not demonstrated how it arrived at the valuation of Ksh.5,000,000/- per acre for the compensation to the 1<sup>st</sup> Respondent while in fact the 1<sup>st</sup> Defendant had produced two valuation reports in support of its case.
4. That further, while the learned trial judge agreed that the 1<sup>st</sup> Respondent had already been paid the sum of Kshs. 6,970,073.25 being compensation for acquisition of the limited right of way, he did not offset the same from his final award of Kshs.15,000,000/- leaving the Applicant facing an uncertain yet grave possibility of being attached for the settlement of the entire judgment yet a significant portion thereof had already been paid to the Plaintiff/1<sup>st</sup> Respondent,
5. The Applicant being a state corporation, there is no risk whatsoever that it will fail to pay the judgment debt and that considering that the Judgment Debt will be paid from taxpayers' money, it is in the public interest that this court grants stay of execution to preserve the public interest of the subject matter until the appeal is heard and determined.
6. The applicant contends that it is equally in the public interest to preserve the subject matter of the appeal considering that this matter may serve as an authority with respect to matters of compensation for acquisition of wayleaves.
7. The Applicant has at all times during the course of this suit acted in good faith, including applying at the onset of this suit, on its own motion, to be permitted to deposit in court the assessment it had made for compensation payable to the 1<sup>st</sup> Respondent of Kshs. 6,970,073.25, which was then deposited in court. That the Applicant has equally demonstrated good faith in this suit by consenting to transfer the said amount of Kshs. 6,970,073.25 to the 1<sup>st</sup> Respondent even as the suit progressed.
8. The applicant contends that it is on the basis of such good faith that the Applicant seeks to invoke the favour of this honorable court to grant the equitable reliefs of stay of execution pending the hearing and determination of the appeal.
9. According to the applicant, unless stay of execution is ordered by this Honorable court, the substratum of the appeal will be extinguished since the Applicant will be compelled to pay monies to the 1<sup>st</sup> Respondent) which monies may not be recoverable. That further, the Applicant pleads that if the 1<sup>st</sup> Respondent is permitted to execute the order, it will suffer prejudice as tax payers money will be applied to settle a Judgment that is still subject of appeal and which is highly likely to be vacated on appeal. That on the flip side, the 1st Respondent will not suffer prejudice since he has already been paid a significant portion of the compensation due on account of the acquisition of the wayleave, which was paid during the pendency of this suit.

### **Respondents Reply**

10. In reply, Kipkoech B Ngetich states that the application is bad in law, lacking in merit, brought in bad faith and is only meant to stop my client from realizing the fruits of the judgment delivered in my client's favour. That the trial court in awarding Kshs.15, 000,000/= to the plaintiff/ I<sup>st</sup> respondent took into consideration both valuations as proposed by the I<sup>st</sup> Respondent and the Applicant and also the fact that the I<sup>st</sup> Respondent was allowed limited use of the parcel of land. This is contrary to the allegations by the Applicant in its Application that the trial court failed to give an account as to how it arrived at the said award.
11. That the judgment delivered by the honorable A. Ombwayo J on the July 11, 2023, was to the effect that the compensation in the tune of Ksh.6,970,073.25 by the applicant to the 1<sup>st</sup> respondent was not sufficient.



12. That the conditions for the grant of an order of stay of execution are well laid out in order 42 rule 6 of the *Civil Procedure Rules*, which inter alia provides as follows: No order for stay of execution shall be made under subrule (1) unless-
13. 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
14. 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.
15. That the Applicant has not sufficiently demonstrated that it will suffer substantial loss in the event that an order for stay is not granted. The fact that the applicant is apprehensive that my client might start the process for execution of the judgment does not automatically amount to substantial loss without proof of such loss. An applicant must go a mile further to establish such loss capable of tilting the discretion in its favour.
16. That further, the Applicant has not demonstrated sufficient willingness to furnish security for the performance of its obligations as the judgment debtor.
17. That in any case an order for stay is granted, the applicant ought to deposit as security the decretal amount Kshs. 15,000,000 as in the draft Decree herein annexed and marked as KBN 1.
18. That courts do not stay costs and our costs of Kshs, 6,233,640 as enumerated in the Bill of Costs annexed herein and marked as KBN 2 should be paid forthwith or deposited in a joint interest earning account.
19. That both the doctrine of good faith and the manner in which it is invoked by the Applicant in its Application does not suffice to move the court to grant the order of stay of execution as sought. That the said application is therefore incompetent, calculated to waste the court's time, and he prays that the same be dismissed with costs to the plaintiff.

### **Analysis and Determination**

20. Order 42 rule 6 of the *Civil Procedure Rules* inscribes the conditions for grant of stay of execution pending appeal. The principles are well settled. These principles are provided for under the aforesaid order of the *Civil Procedure Rules* which provides:
  - “No order for stay of execution shall be made under subrule (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.
21. An applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in order 42 rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. See *Antoine Ndiaye v African Virtual University* [2015]



eKLR.. As to what substantial loss is, it was observed in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under order 42 rule 6 of the *CPR*. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

22. This court directed the parties to submit only on the issue of security because having read the application and the response the court was of the view that the application was filed timeously and without inordinate delay. Moreover, that the decretal amount is substantial that the same will be paid from public funds. However, the court is aware that the plaintiff is also entitled to the fruits of the judgment and that the plaintiff and the defendants are equal in the eyes of the law and justice. Balancing the private interest of the plaintiff and the public interest of the defendant, I do hereby grant a stay of execution pending appeal on condition the 1<sup>st</sup> defendant deposits half the decretal sum in an interest earning account in a reputable bank to be agreed upon by the parties. In the alternative, the 1<sup>st</sup> defendant to execute a bank guarantee of ksh 15,000,000. Each party to bear own costs of this application.

**RULING DATED, SIGNED AND DELIVERED AT NAKURU THIS 28<sup>TH</sup> DAY OF JULY 2023.**

**A.O.OMBWAYO**

**JUDGE**

