



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION

ACEC NO. 25 OF 2016

ETHICS & ANTI-CORRUPTION COMMISSION PLAINTIFF

V E R S U S

DR. IBRAHIM HAJI ISAAK DEFENDANT

RULING

1. On 29th April 2020, Judgment against the defendant/applicant was entered directing the defendant to refund a sum of Kshs. 11,500,000/- to the State being money fraudulently obtained from Kenya Meat Commission by the defendant while working for the said organization as a Public Officer in his capacity as the Managing Commissioner. Judgment was delivered vide e-mail to the respective parties due to the prevailing pandemic of Corona Virus.

2. Subsequently, the defendant/applicant under Certificate of Urgency, lodged a Notice of Motion dated 30th April 2020 and filed on 5th May 2020 pursuant to Orders 51 rule 1 and 42 rule 6(1) of the Civil Procedure Rules and Sections 1A, 1B and 3A and 63 of the Civil Procedure Act seeking orders that;

- (i) This application be certified urgent, service be dispensed with thereof and the same be heard ex parte in the first instance.**
- (ii) That this Honourable Court be pleased to order a stay of execution of the Judgment issued by Justice Honourable Onyiego on 29th April 2020 pending the hearing and determination of this application interpartes.**
- (iii) That this Honourable Court be pleased to order a stay of execution of the Judgment issued by Justice Honourable Onyiego on 29th April 2020 pending the hearing and determination of this application.**
- (iv) That this Honourable Court be pleased to order a stay of execution of the Judgment issued by Justice Honourable Onyiego on 29th April 2020 pending the hearing and determination of the intended appeal.**
- (v) That this Honourable Court makes such further or other orders and/or directions as it deems fit in the interest of justice.**
- (vi) That the costs of this application be in the cause.**

3. The application is premised upon grounds stated on the face of it and affidavit sworn by the applicant sworn on 30th April 2020. Basically, the applicant's case is hinged on the allegation that Judgment herein having been delivered electronically via e-mail pursuant to his counsel's consent, he had no opportunity to orally apply for temporary stay of execution to allow him source the decretal amount or proffer an appeal thereto. That being dissatisfied with the Judgment he intends to file appeal hence the prayer for stay of execution pending appeal.

4. He averred that he was apprehensive that the Plaintiff/Respondent was likely to commence execution. That the application has been filed without undue delay and that if execution is to take place, his appeal will be rendered nugatory hence suffer irreparable damage. He contended that the intended appeal is meritorious with high chances of success.

5. He expressed the view that the respondent will not suffer any harm if the orders are granted and that justice will be done if the applicant is allowed to exercise his right of appeal to its conclusion.

6. In submission, M/s Githogori counsel appearing for the applicant filed her submissions on 27th May 2020 arguing that the applicant is likely to suffer substantial loss should the court decline to grant the orders of stay. Counsel urged the court to exercise its discretion and find that the applicant is likely to suffer substantial loss if the orders are not granted. In support of this argument counsel made reference to the

decision in the case of Halai and another v Thorton and Turpin (1963) Ltd (1990) KLR 365 in which the court held that:-

“The High Court’s discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly, the appellant must establish sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay.”

7. Learned counsel opined that the subject of the decree is money and that there is no prove that the applicant is a person of straw who will not be able to pay the money if the appeal fails to succeed. Further, that the hardship likely to be suffered by the applicant if forced to pay money will be greater than waiting for the outcome of the appeal. In agitating for this position, counsel made reference to the holding in the case of Kenya Hotel Properties Limited v. Willesden Investments Limited Civil Appl. 322 of 2005 (UR) where the court stated that undue hardship would be caused to the applicants if stay is refused simply on grounds that the decree is a monetary decree.

8. According to counsel, payment of Kshs. 11.5 million will cripple the applicant and his family financially thus occasioning them financial loss. Counsel further submitted that, if the decretal amount is paid and the appeal succeeds it will be difficult to recover the money from the defendant which is a public entity operating on allocation of public funds.

9. As to the filing of the application within reasonable time, counsel submitted that the same was filed within a week from the date of delivery of judgment. Regarding security of costs, counsel submitted that the applicant is ready to furnish security for due performance of the decree as the court may determine. To advance this position, learned counsel placed reliance on the decision in the case of Kinyunjuri Muguta v. Wotuku Muguta (2018)eKLR where the court stated that:-

“It is the duty of the court to determine the security if the applicant is successful.”

10. In response to the application, the respondent lodged its replying affidavit sworn on 18th May 2020 by Viola Ocharo counsel appearing for the plaintiff/respondent. M/s Ocharo averred that the decree is a monetary one hence the applicant can be restored back to his original position if the appeal is decided in his favour.

11. That the applicant should not be deprived its fruits of Judgment as a successful litigant. She contended that the applicant has not furnished any security for the due performance of the decree. That it is the respondent who will suffer substantial loss by being denied the opportunity to enjoy the fruits of its Judgment.

12. It was further deposed that the applicant has not met the threshold for grant of stay of execution orders. That the mere filing of an appeal does not connote that a stay of execution order shall issue. That it is in the interest of the public that the orders be denied.

13. In submission, counsel representing the respondent filed her submissions on 22nd May 2020. Counsel literally reiterated the averments contained in the replying affidavit. she submitted that there was no proof that a Notice of Appeal had been filed as none was annexed to the application. Counsel contended that in the absence of a Notice of Appeal on record, the court cannot issue stay orders.

14. Counsel asserted that the grounds raised do not meet the threshold for grant of stay orders as required under Order 42 rule 6(1) of the Civil Procedure Rules. That the applicant has not demonstrated any substantial loss likely to be suffered should the court decline to grant the orders. That if substantial loss is not proved, it is unlikely that the appeal will be rendered nugatory. To fortify this submission counsel placed reliance on the decision in the case of Shell Ltd v. Kabiru and Another (1986) (HC. 420).

15. Regarding depositing security, counsel submitted that the willingness by the applicant to deposit security should have been demonstrated by the applicant depositing actual security or suggested the security intended to be deposited. Counsel submitted that, should the court consider deposition of security, the entire amount should be deposited or a definite security that the respondent shall be able to access without much difficult should the intended appeal fail. Finally, counsel submitted that there was no proof that if the decretal sum is paid it will not be recoverable refunded.

Analysis and Determination

16. I have considered the application herein, responses thereto and submissions by both counsel. The only issue for determination is whether the applicant has met the threshold for grant of stay of execution orders.

17. The application herein is seeking stay of execution pending hearing and determination of the application for stay and the intended appeal. The grounds upon which an order for stay can issue by a court that is the source of the impugned decision are clearly set out under Order 42 rule 6(2). Further, through case law, superior courts have underscored the grounds set out under Order 42 rule 6(1).

18. Before a trial court whose decision the order or decree is being challenged can issue an order for stay of execution under Order 42 rule 6(1) of the Civil Procedure Rules, the applicant must prove firstly; that he or she will suffer substantial loss if the orders are not granted; secondly, that the application has been filed within reasonable time and thirdly, that security for the due performance has been deposited or furnished by the applicant. Besides the above three grounds, a court can as well consider any other sufficient cause or public interest as additional factors for consideration.

19. However, to grant or not to grant stay orders is a matter of discretion by the court seized of the matter after due consideration of the requisite grounds for grant of stay of execution orders. In the case of Butt v. Rent Restriction Tribunal (1982)KLR 417 the court stated that; the power to grant or refuse an application for a stay of execution is a discretionary power which must be exercised in such a way as not

to prevent an appeal. The court further went to state that an appeal should not be defeated simply because a better remedy will be available to the applicant at the end of the proceedings and that if not granted the appeal will be rendered nugatory.

20. Similar position was held in the case of Halai and Another v Thorton and Turpin (supra).

21. It should however be borne in mind that the purpose of stay of execution pending appeal is to preserve the subject matter and not to prevent a successful litigant from accessing or enjoying the fruits of litigation. See the case of Koki Muia v Samsung Electronics East Africa Limited (2015)eKLR.

22. As stated above, the most critical factor in an application for stay of execution is whether the applicant will suffer substantial loss in the event the appeal succeeds. For a party to convince the court that he is likely to suffer substantial loss, he must prove that he has taken steps to lodge an appeal. This can be by way of filing a Notice of Appeal a copy of which must be in the court file or annexed to the application and file a draft Memorandum of Appeal where appropriate. M/s Ocharo argued that there is no copy of Notice of Appeal on record. However, I can see a copy of Notice of Appeal dated 30th April 2020. Perhaps Mrs. Ocharo did not properly peruse the file.

23. Is the applicant likely to suffer substantial loss? The applicant is arguing that he is likely to suffer substantial loss by the appeal being rendered nugatory if the execution takes place. Proof of likelihood of suffering substantial loss has a nexus to an appeal likely to be rendered nugatory. The other ground the applicant advanced is that, if the decretal sum is paid recovery from the plaintiff will be a challenge if the appeal succeeds. He went further to state that he is willing to furnish security but fell short of specifying the nature of security intended to be deposited.

24. The claim herein is monetary in nature. What substantial loss will he suffer if the decree is executed and if the appeal is successful the plaintiff refunds the same? In the case of James Wangalwa and Another v Agnes Naliaka Cheseto H.C. Misc. 42 of 2011, the court set out the criteria in determining substantial loss as follows;

“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. This is what substantial loss means.”

25. Similar position was held in Mukuma v Abuoga (supra) in which the court stated that:-

“...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.”

26. The applicant is alleging that, if the execution is carried out, it will be difficult to recover the same amount from the plaintiff which is a State entity depending on allocation of public funds. The State cannot be equated to an individual or a person of straw who can find it difficult to refund the money. If that is the applicant's approach, then it cannot stand as the government is not impecunious so as to expect inability to refund.

27. Indeed, the Court of Appeal in Civil Application No. 322 of 2006 (UR 178/06) Kenya Hotel Properties Limited v Willedden Investments (supra) in addressing stay of execution application where money decree was involved observed that;

“... the decree is a money decree so long as the court ascertains that the respondent is not a “man of straw” but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant.”

28. As stated above, government cannot be equated to a person of straw or a pauper. Though the process of refund may take slightly longer due to extensive regulatory processes in managing public funds, there is an assurance that government cannot fail to refund the money. For those reasons, that cannot be a ground of likelihood to suffer substantial loss.

29. The second ground relied on is that, payment of the decretal sum will cripple him and his family. The applicant is approaching the issue from two contradictory perspectives. One, he is not sure of a refund if execution takes place. Two, he is likely to be crippled financially. The applicant has not reconciled the two statements. He has not explained that he is not able to raise the money due to his economic status. He has not disclosed his economic status to ascertain his inability. Whereas a sum of 11.5 million for an ordinary Kenyan is not a small amount to pay, the applicant is worried of not being refunded if the money is recovered. With that in mind, I do not find any substantial loss likely to be suffered if the amount is secured by ordering that the same be deposited in court or in an interest earning account held and opened in the joint names of the respective parties' counsel.

30. Having held that substantial loss will not be suffered by depositing the decretal sum, the issue of rendering the appeal nugatory will not arise. An appeal will ordinarily be rendered nugatory only in a situation where substantial loss has been established. See the case of Shell Ltd v Kabiru and Another (supra) where the court held that;

“It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.”

31. With guidance in the holding of the above quoted case, it is my finding that the appeal will not be rendered nugatory in the circumstances of this case being a monetary claim in which the decretal sum will be kept safely in an account where the same will be ready for release to

the applicant should the appeal succeed.

32. Regarding the appeal having high chances of success, that will be for the appellate court to determine and not the trial court which has already made its position known in the impugned judgment. Having directed that the money can be secured by being deposited in court or in a joint account held by the names of both parties' counsel, the issue of furnishing security is sorted. However, in the event of inability to deposit the whole decretal sum, the applicant can deposit security with a value equivalent to the decretal sum subject to the approval of a jointly appointed valuer by both parties and the ownership documents duly deposited in court.

33. Concerning the filing of the application within reasonable time, the same was filed within a week from the date of delivery. It was therefore filed within time as required in law.

34. Having held as above, the application is allowed to the extent that:-

(a) The application for stay of execution pending appeal is allowed on condition that:-

(i) the applicant deposits the full decretal sum in court or in an interest earning account opened and held in the parties' Advocates' joint names within 30 days from the date of this Ruling.

(ii) In the alternative to Order a (i) above, the applicant is ordered to deposit with the court within 30 days any collateral / title deed as security with a value equivalent to the decretal sum subject to approval and valuation of a jointly appointed and agreed valuer by both parties.

(b) That the stay of execution orders granted herein under the conditions stipulated in order a(i)&(ii) above shall be in force pending filing of the intended appeal which in any event should be filed within 45 days from the date of this ruling.

(c) Regarding costs, the same shall be in the cause.

DATED, SIGNED and DELIVERED by EMAIL at NAIROBI THIS 29TH DAY OF JULY 2020.

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J. N. ONYIEGO

JUDGE