



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO 265 OF 2014

BROADWAY ENTERPRISES LIMITED.....PETITIONER

VERSUS

MINISTRY OF HOUSING & URBAN DEVELOPMENT.....1ST RESPONDENT

NATIONAL LAND COMMISSION.....2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

THE KENYA NATIONAL HIGHWAYS AUTHORITY.....4TH RESPONDENT

RULING

1. **Kenya National Highway Authority**, the 4th respondent herein, look out a motion dated 21st April 2017 and filed in Court on the same day under sections 1A, 1B and 3A of the Civil Procedure Act and Order 42 rule 6(2) of the Civil Procedure Rules, 2010, seeking a stay of execution of orders of this Court of 13th November 2015 and 24th May 2016 and all consequential orders arising therefrom pending the hearing and determination of an intended appeal against the ruling delivered on 24th February 2017. By ruling of 24th February 2017, the Court (**Lenaola J**, as he was) dismissed an application for review dated 24th June 2016. The applicant and the petitioner/respondent had entered into consent for payment interest amounting to Kshs. 13,768,934. The applicant sought a review of that order but that application was dismissed.

2. The motion is supported by an affidavit sworn on 21st April 2017 by **Jessica Mbae**, the Legal Officer of the applicant and grounds on the face of the motion. **Miss. Mbae** deposed that by orders of 13th November and 24th May 2016, the Court ordered the Applicant to pay the respondent **Kshs. 13,768,934** as accrued interest on the principal amount of compensation payable to the petitioner. It was also deposed that being dissatisfied with that order, the applicant filed the application for review which was however dismissed.

3. According to the deponent, the intended appeal is meritorious, is arguable and has high chances of success. It was further deposed that the petitioner/ respondent has threatened to execute and has already commenced execution by seeking .to cite the 4th respondent's Director General for contempt over the outstanding amount.

4. The applicant contended therefore, that if the application is not granted, the intended appeal will be rendered nugatory and the applicant will suffer irreparable loss and a miscarriage of justice since the money is from the public coffers. It further was deposed that the respondents' assets, means and or financial capability is unknown hence the applicant will suffer substantial loss should the appeal succeed.

5. The applicant contended that respondent will not suffer prejudice if the application is granted since the applicant is a public body which is funded by the public and should the appeal fail, it will be able to pay the money.

6. The respondent filed a replying affidavit by **Niraj Shah**, a director of the respondent, sworn on 28th April 2017 and filed in Court on 3rd May 2017. **Niraj Shah** deposed that the petitioner/respondent is a going concern with assets worth hundreds of millions of shillings and is therefore capable of refunding the money should the appeal succeed. He stated that the portion of the land that remained after compulsory acquisition of its land is valued more than **Kshs. 14 million** which is in excess of the money to be paid by the applicant. He also stated that the respondent's audited accounts for the year 2016 (**Annexure 1**) show that its asset base is over **Kshs. 476 million**. It was therefore deposed that the application had no basis and should be dismissed.

7. During the hearing of the application, **Miss Mwangi**, learned counsel for the applicant moved the application urging the Court to grant stay of execution pending the hearing and determination of the intended appeal. Learned Counsel contended that although the principal amount was not in dispute, they are contesting the order for interest of **Kshs. 13,786,934**. **Miss Mwangi** submitted that the applicant is aggrieved by the order to pay interest and although they applied for review that application was declined hence the intended appeal. It was their contention that the intended appeal has high chances of success. She relied on the case of **Housing finance Kenya v Sharok Kher Mohamed Ali Hirji & Another** [2015] eKLR for the submission that it is enough for an applicant to show that an appeal is likely to succeed. It was contended that interest was paid while the respondent was in possession.

8. Counsel further relied on the case of **Housing finance Kenya v Sharok Kher Mohamed Ali Hirji & Another** (supra) on the need to balance interests of the parties and **Edward Kamau & Another v Hannah Mukui Gichuku & Another** [2015] eKLR on the right of appeal. Learned Counsel submitted that the application was filed without delay and that the applicant is ready to abide by any conditions the Court may impose. Counsel further contended that there was no risk of the respondent failing to get the money should the appeal fail. She was opposed to depositing money in a joint account arguing that it would take time.

9. **Mr. Githinji**, Learned Counsel for the 1st and 3rd respondent supported the application and associated himself with the submissions by **Miss Mwangi**. He supported grant of the application.

10. **Mr. Wawire** Learned Counsel for the respondent opposed the application. He relied on their affidavit in response to the application adding that the applicant will not suffer substantial loss. He contended that the petitioner has substantial means and is able to refund the amount should the appeal succeed. Learned Counsel further submitted that the authorities relied on by the applicant are not applicable in this case. According to Counsel, one is not required to prove that the intended appeal is arguable but that he will suffer substantial loss. Counsel contended that parties in the matter had entered into a consent for payment of interest of **Ksh 13,768,934** on 24th May 2016 to be paid by 30th June 2016 and therefore, the money having been agreed upon, is payable. He urged that the application be dismissed.

Determination

11. The applicant seeks stay of execution of the consent order for payment of interest to the petitioner/respondent in the sum of **Kshs.13,768,934** pending the hearing and determination of an intended appeal against that order. The applicant and petitioner recorded a consent in Court on 24th May 2016 where by the applicant was to pay the amount of interest by 30th June 2016.

12. The applicant seems to have changed its mind over the issue and sought a review and setting aside of that order. That application was however dismissed. It has now applied for stay of execution pending the hearing and determination of the intended appeal. The application is brought under Order 42 rule 6(2) of the Civil Procedure Rules.

13. In support of its application the applicant has contended that the respondent's means and financial status are unknown and therefore it may not be in a position to refund the money if it is paid the intended appeal eventually succeeded. The applicant further contended that the money is from public coffers hence the public may lose should the respondent fail to refund the money if the appeal were to succeed.

14. Countering that argument, the respondent dispelled the fear that it may not be able to refund the amount stating that it is a going concern and that it is able and has means of refunding the money should the appeal succeed. The respondent deposed through one of its directors that it is worth more than 400 million shillings in assets and attached its audited accounts for the year 2016 as proof of this fact. It also deposed that part of the land that remained after compulsory acquisition of her land, is valued more than the amount to be paid as interest. It also attached a valuation report to that effect.

15. Order 42 rule 6 provides:-

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(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”

16. An application for stay under Order 42 rule 6 seeks exercise of the Court's discretion. An applicant must show that first, he will suffer substantial loss, that the application has been made without delay and that it has provided security as may be ordered by the Court. The considerations whether or not to grant stay of execution under Order 42 6(2) of the Civil Procedure rules are clear. Of importance, the Court in considering such an application exercises discretion which must be exercised judiciously. The Court is under a duty to balance the applicant's interests with those of the respondent, especially in view of the fact that an appeal does not operate as a stay of execution of a lawfully obtained judgment (See **M/s Port Reitz Maternity v James Karanga Kobia** Civil Appeal No 63 of 1997.)

17. In exercising its discretion on whether or not to grant stay, the Court must consider these conditions, that is; whether there will be

substantial loss if the stay is not granted, that the application has been made without delays and that the applicant has provided security should the Court so direct.

18. On whether the application has been made without delay, the applicant cannot be faulted. The application seeking review was declined on the 24th February 2017 while the present application was filed on the 21st April 2017, within a period of about 2 months. That, in my view, was prompt and within a limited period hence the applicant satisfied the requirement of promptness.

19. The most important requirement if the Court is to grant stay of execution pending appeal is proof that the applicant will suffer “**substantial loss**” if stay is not granted. Substantial must mean such a significant loss that it will be difficult for the applicant to return to its normal operations such as bringing the applicant’s operations to a standstill. Substantial loss must result into some extraordinary hardship that would be difficult for the applicant to recover from such as near collapse. It must be something difficult to rationalize with. It is not enough for the applicant to merely state without evidence or showing how, that it will suffer substantial loss. The applicant must go further and show with sufficient evidence why this will be so to enable the Court exercise its discretion in its favour.

20. In this regard I agree with **Gikonyo J’s** observation in the case of **James Wangalwa & another v Agnes Naliaka Cheseto** (High Court Misc. Application No 42 of 2011[2012]eKLR) where he stated:-

“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... 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.”

21. In the case of **Kenya Shell Ltd vs. Kibiru** [1986] K.L.R 410 the Court of Appeal emphasized on the centrality of substantial loss as the cornerstone of the Court’s jurisdiction to grant stay pending appeal. **Platt Ag. J. A** (as he then was) addressed that issue in the following terms at page 416;

“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 cornerstone of both jurisdictions for granting stay. That is what has to be prevented”
(See Mukuma vs. Abuoga [1988] KLR 645 and Silverstein vs. Chesoni [2002] 1K LR 867.)

22. Applying the above principles to the present application, the applicant has not established that it will suffer substantial loss if stay is not granted. Its contention has been that the respondent’s financial means are unknown and for that reason it will not be able to refund the amount should the appeal succeed. The respondent has responded to that concern by deposing that it has financial means to refund the amount should the appeal succeed. The fact that the applicant is a public body which uses public funds to finance its operations is not in itself enough in establishing that it will suffer substantial loss if stay is not granted.

23. The applicant has a duty to meet its obligation under a decree and cannot plead the fact of being a public body as proof of substantial loss. It has not shown that should the amount be paid, it will be gravely affected to the extent of not being able to function, thus jeopardizing public interest. It is also clear that the amount is due as a result of a consent order hence the applicant was aware at the time of recording the consent that though a public body, it willingly entered into the consent to pay that amount. The applicant has not therefore satisfied the Court that it will suffer substantial loss to warrant grant of stay.

24. Regarding security, counsel for the applicant stated that the applicant was willing to abide by any conditions the Court may impose. She at the same time submitted that the applicant did not favour depositing the money into a joint interest account arguing that it would take time. It is a good practice for the applicant, as a matter of good faith, to indicate willingness to abide by an order of security as the Court may require or better still offer or propose such security on its own. In the applicant’s case, it says it is willing to abide by any directive of the Court on security but excludes depositing the money into a joint account. That in my view, is not a sign of readiness to meet any conditions that the Court may impose.

25. Having given due consideration to the application and considered submissions by counsel for the parties as well as the applicable principles of law, I am not satisfied that the applicant has met the criteria for grant of stay of execution pending the hearing and determination of the intended appeal. For that reason, the application dated 21st April 2017 is declined and dismissed with costs.

Dated Signed and Delivered at Nairobi this 21st Day of March 2018.

E C MWITA

JUDGE