REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 158 OF 2003

BHUPINDER SINGH DOGRA.....PLAINTIFF

VERSUS

COAST DEVELOPMENT AUTHORITY.....DEFENDANT

R U L I N G

1. There is before court an application dated 26/4/2016 seeking two substantive orders:-

i) (spent)

ii) (spent)

iii) THAT there be a stay of execution of the orders issued by Honourable P.J. Otieno(J) issued on the 16th December 2015 and further proceedings pending the hearing and determination of the intended Appeal.

iv) THAT this Honourable Court strikes out the Amended Plaint herein.

v) THAT the cost of this application be provided for.

2. That application is premised on several facts mainly that the plaint had been on 28/1/2004 struck out by consent and the advocate on record did inform the defendant as much and proceeded to close their file.

3. However the defendant expresses dismay that despite that development and in the absence of any communication to it at all, the matter was revived and on the 24/9/2015 and a judgment was entered against the defendant in the sum of Kshs.21,974,035 and the plaintiff has sought to enforce the judgment by execution prior to taxation of the costs. That judgment was entered pursuant to a Notice of Motion dated 19/3/2015 which was argued *exparte* after the defendants advocate complained of lack of instruction from the defendant.

4. It is that order issued on the 16/12/2015 allowing execution before taxation the defendant now seeks to be stayed pending an appeal to the Court of Appeal.

5. There is also the prayer to strike out the amended plaint but no clear grounds have been advanced to support that prayer. Without saying much and delving to scrutinize any facts beyond the application before me, it is expedient that I say at this very early juncture that prayer is neither well thought out nor

merited at all.

6. Incoming to this conclusion I have taken into account the now crystalized principle of law that striking out is a draconian remedy that should only be considered in the clearest of the clear cases. I have no hesitation that on the facts revealed this is not a clear case to strike out a plaint. In any event and additionally the plaint was amended pursuant to a consent order recorded before court. It is trite that a consent order takes the nature and attributes of a contract and cannot be disturbed unless on grounds as would merit vitiating a contract.

7. That application was opposed by the plaintiff who filed a notice of preliminary objection and Replying affidavit. The gist of opposition was that the suit was reinstated on the 10/5/2014 by consent and with the participation of an advocate who appeared for the defendant. Upon setting aside the dismissal order the plaintiff was granted leave to amend the plaint and did so amend.

8. The plaintiff then pointed out to court that the application before court is meaningless and ineffectual because it does not seek to set aside the judgment but is content with stay and setting aside the order granting leave to execute before taxation. To the plaintiff even if the order is granted the judgment on record will remain undisturbed and therefore the court shall have acted in vain as the decree-holder shall still be entitled to enforce the judgment anyway. To the plaintiff the defendant had concealed from court material facts and therefore guilty of materials non-dis closure and not entitled to the orders sought.

9. Pursuant to directions by the court issued on the 28/11/2016 parties did file written submission in which they cited several case law in support of their rivaling positions.

10. The defendant/applicant has dwelt at length on issues ranging from service of the amended plaint, setting aside a default judgment and whether it stands to suffer substantial loss if stay is not granted.

11. On its side the plaintiff/respondent devoted its submissions on the questions whether the application being premised on Order 22 Rule 22 Civil Procedure Act as opposed to Order 42 Rule 6 is properly before court, whether there is jurisdiction on the court to grant stay pending appeal against an order for which no appeal lies as of right; that even if there was jurisdiction to hear the matter then the thresholds under Order 42 Rule 6 are lacking in that no substantial loss or sufficient case have been demonstrated and lastly that the application was brought after undue delay of some four and half months.

12. On prayer 4, the plaintiff/respondent submitted that the amended plaint having been filed pursuant to a consent cannot be struck out prior to the consent being set aside and that even if not grounded on the consent striking out is a draconian remedy that is only available for employment very sparingly.

13. I have had the benefit of considering the papers filed including the affidavits and submissions. I have equally endeavored to read the proceedings in the file for the purposes of understanding all the happenings therein.

14. Having done so, the task before me seeks that I determine only one issue beside the issue of striking out the amended plaint which I have determined hereinabove. The single issue is whether: The applicant is entitled to stay pending appeal.

15. In law, Order 51 Rule 10, a court of law is not limited or restrained from considering an application merely because the provision of the law upon which it be premised is not disclosed. I would therefore consider the prayer for stay pending appeal as having been brought under Order 42 Rule 6 whether that law be cited or not.

16. Having so said, stay pending appeal is premised on the existence of a pending appeal. For purposes of an appeal to the court of Appeal it is enough that a Notice of Appeal has been filed as is the case in this file. However, the plaintiff has raised a point that the law presupposes a competent appeal and that in this case there is no competent appeal as the order sought to be challenged on appeal does not attract an appeal as of right but only with the leave of the court. That may be true, as was held in ***Andrew Nganga***

vs Godfrey Karuri[2006] eKLR, but I take the view that whether there is a competent or an incompetent appeal to the Court of Appeal is for the Court of Appeal and not a matter for this court to decide. That can only be considered and determined by the Court of Appeal. For this court it is enough, as Order 42 Rule 6(4) dictates, that a notice of Appeal has been filed the competence or otherwise of the Notice of Appeal is not for the High Court but the court appealed to determine. See ***REUBEN & 9 OTHERS VS NDERITO & ANOTHER [1998] KLR 459***.

17. However there is then the question of the thresholds set by the statute, being substantial loss and that the application ought to be brought with promptitude and without undue delivery.

18. In ***Silverstein vs Chesoni [2002] 1KLR 867***, the Court of Appeal underscored the important consideration the court has to give to whether or not an applicant for stay pending appeal would be exposed to substantial loss and what constitutes substantial loss. For a loss to be termed and considered substantial it must present a situation that would render the appeal nugatory. The court said

> **"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".**

19. In this matter the decree in existence is not a final one. While the suit claims a total sum of Kshs.117,017,070, the judgment in place is only for Kshs.21,974,035. That judgment was entered on the basis that there had been an inquiry by the Government which found that sum to be due.

20. I take into consideration the fact that the defendant is a public institution funded and sustained by public funds. I have also taken into account that being funded by such public funds, it operates on a budget line and that it can only spend sums allocated to it in the budgetary allocations of the national government. To that extent one must contextualize the circumstances of the parties and strike a balance of possible prejudice either party may suffer by grant or refusal to grant stay. In striking such a balance the court exercises a discretion which must at all times be geared towards the achievement of the justice between the parties.

21. Having said that the decree sought to be executed is only a partial one and the fact that the leave to execute before taxation is also challenged in the appeal to the Court of Appeal, and while noting that however right I may be convinced I was in granting such leave, the court of Appeal may in its own opinion reverse this court, I have come to the opinion that justice would be served best by grant of stay pending the determination of the appeal aforesaid.

22. I grant stay to the defendant but in terms of the requirements of Order 42 Rule 6(2) b direct that the applicant/judgment debtor shall deposit into court the judgment sum or a bank guarantee for that sum within 30 days from today.

23. For purposes of case management and regard being had to the age of the matter in court, it is directed that parties do attend court on the 31/7/2017 for case conference. To enable that case conference to proceed, let parties take any procedural steps necessary in preparing the suit for hearing and therefore if any party intends to file any further or additional witness statements or documents, let that be done within 21 days from the date hereof.

24. I order that each party shall bear own costs of this application.

Dated and delivered at **Mombasa** this **23rd** day of **June 2017**.

HON. P. J. O. OTIENO

JUDGE