



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
THE ENVIRONMENT & LAND COURT
ELC APPEAL NO. 1 `B' OF 2014

TELEKOM KENYA LIMITEDAPPLICANT/PLAINTIFF

VERSUS

BAMBURI CEMENT LIMITED RESPONDENT/DEFENDANT

RULING

1. The application for determination is dated 5th February, 2015 seeking stay of proceedings and stay of execution of the Chief Magistrate's Order issued on 23.9.2014 in Land d Case No. 1105 of 2014. The applicant also prayed for an order that the applicant's defence and counter-claim dated 30.10.2014 and filed on 4/12/2014 out of time be deemed as properly filed. Finally he urged that the costs of this application do abide the outcome of the intended appeal
2. The application is opposed by the respondent who has an affidavit in reply sworn by Betty Kanyagia the Company Secretary. The respondent admitted the ruling of the Senior Resident Magistrate delivered on 30.1.2015 which gave the defendant seven (7) days to vacate the suit premises or institute the necessary application before the superior court. The respondent deposed further that the import of the ruling of 30.1.2015 effectively concluded the objection and allowed the respondent to exercise its right over the suit parcel. Further that the applicant has made numerous indications of filing an appeal from 10.6.2014 which they have done with lack luster effort. It is the respondent's view that this application is only intended to delay the conclusion of this matter and that the applicant has failed to meet the threshold set for grant of orders of stay of execution. It urged the court to dismiss the motion with costs.
3. The counsels for the parties then filed their written submissions which were highlighted. On 20.4.2015 Mr. Wairoto submitted that the applicant has satisfied the conditions set by Order 42 as contained in paragraph 6 of their submissions. He continued that the applicant has been in possession for decades with possession given as a donation. The applicant has erected telephone masts on the property with value amounting to Kshs. 139,000,000. If the appellant's are evicted, they will loose their right to property. Mr. Wairoto submits the application was filed without undue delay and they are ready to deposit such security as shall be ordered by this court. They relied on the case laws contained in their list of authorities.(which I have read and considered and most of which are persuasive)
4. On stay of proceeding, Mr. Wairoto submits that they contest the jurisdiction of the lower court therefore stay is necessary to avoid continuance of a nullity. He cited the renowned case of Lilian S. He concluded that merits of appeal are not to be considered when granting stay as pleaded in the replying affidavit. He urged the court to allow their application. Mr. Ikera for the respondent submitted that

ownership of the land MN/SEC 1/16586 is not in dispute. That the respondent agreed to donate the land 15 years ago on certain conditions, which was to have the land subdivided and the applicant taking enough land for putting its telephone exchange. Counsel submitted that it is erroneous for the applicant to give a valuation for the entire land and that the respondent is only asking for vacant possession. The respondent avers there is no substantial loss to be suffered in the applicant moving the masts as on value of the mast is given incapable of being satisfied.

5. The respondent has admitted this application was filed timeously but submitted the applicant ought to be clear on how much security is offering. He raged the court not to allow the orders sought. On stay of proceedings, Mr. Ikera submits the issue in dispute is about donation and the value attached to it. That there was the issue of costs that would make the donation effective as the value forming the subject matter hence being within the pecuniary jurisdiction of the Chief Magistrate's court. He urged the court to dismiss the motion with costs.

6. The gist of the motion before me is whether the applicant has met the conditions set out under Order 42 to warrant the orders of stay. Order 42 rule 6 (2) gives three grounds to be established for a party to qualify for stay i.e.

a) **Proof of substantial loss**

b) **Application filed without undue delay or**

c) **Provide Security as the court orders for the performance of such decree or order.**

The respondent conceded this application was made timeously thus condition (b) above automatically fulfilled. The contest is whether proof of substantial loss has been made. In the appellant's written submission it referred to a valuation report which was annexed in the supporting affidavit attaching the value of the telephone equipments at Kshs. 102,773,000. It also stated that if the orders are not granted, it stands to suffer colossal loss of profits for the services it renders to the customers and legal repercussions for breach of contractual obligations.

7. The applicant also urged the court to take Judicial notice under section 60 (1) of the Evidence Act that it is a major telecommunication service provider therefore the equipments on the suit property is in active operation. The applicant submitted further that their customers (public) rights on access to information under article 33 and 35 of the Constitution will be violated if the orders are executed. It also contended that it complied with all the conditions for the donation as set out in paragraph 6.3.6 of the submissions.

8. The respondent in response to this subject submitted that execution is a lawful process and if levied and completed cannot be said to result to substantial loss. He cited the case of **Mukura Vrs Abuoga [1988] KLR 645** where the court of appeal emphasized the centrality of substantial loss as ``... **That is what has to be prevented because such loss would render the appeal nugatory.**''The respondent also submitted that judicial notoriety is a matter of presumption to which the court owes a duty that it is well informed and astute with the present times. The respondent went ahead to submit on facts I hold are not relevant to the present application in terms of the details of the applicant undergoing business changes and the existence of competitors to the applicant (paragraph e).

9. In summary, the submissions and pleadings confirm the applicant is in possession of the suit premises. The possession comprises masts that are installed which possession spanning over 15 years. The respondent wants vacant possession before the applicant is heard. If this decree is executed then the applicant's stated equipments will have to be removed. Although the respondent submits that it would employ experts and engineers to professionally remove those equipments, such cannot be guaranteed as this was not part of the order forming the decree to be executed. Further by the respondent admitting the need to engage professionals in my view is conceding that indeed some value is attached to these equipments. Such equipments if tampered with during the execution process will indeed result into loss besides loss of profits alluded to.

10. The applicant and the respondent agree that the dispute before the lower court was on donation in turn resulting to /ownership. In the event I refuse the stay order, the applicant will be evicted making this appeal to be an academic exercise. I say so because once the applicant is removed, it would be costly to reinstate it as it would involve re-installation of the equipments remove. I find the applicant's circumstance to be aptly put in the case of **Mukura Vrs Abuoga** quoted supra. Taking everything into consideration, I am convinced that the convenience will be to maintain the status quo pending the outcome of the appeal by granting stay of execution orders.

11. Lastly on the issue of security for the due performance of the decree, the applicant has undertaken to comply with such as this court shall order to be deposited. The respondent's view is that the applicant should have made an offer. The rules gives this court the discretion to set such sums as security as it deems fit therefore I see no wrong doing on the part of the applicant not making an offer. The decree being appealed from is on vacant possession of the suit property. The security which I find necessary would be for costs in the event the appeal fails as the plot is in place. To this extent and taking into account the value attached by the applicant, I suppose a sum of Kshs Five hundred thousand (500, 0000) would make sufficient security for costs. The applicant in any event does have capacity based on the value of their equipments to settle any costs should it exceed the amount set by this court.

12. In conclusion, since the applicant's appeal questions the jurisdiction of the subordinate court, it is only prudent that the proceedings in the lower court be stayed. This will save judicial time and avoid unnecessary applications that would delay the prosecution of this appeal. I therefore find that the application dated 5.2.2015 is merited and allow it. The security for costs ordered be deposited in court within 45 days of the delivery of this ruling to be held pending the determination of the appeal. Since the record of appeal is ready, parties are directed to facilitate its disposition.

Dated and delivered in open court at Mombasa this 18th day of June, 2015.

A OMOLLO

JUDGE