



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. APPEAL NO. E048 OF 2021**

**KILONZI MUTHAMI t/a**

**QARA BOREHOLE SERVICES.....APPELLANT/APPLICANT**

**VERSUS**

**MUSEMBI MUTISYA.....RESPONDENT**

**RULING**

1. Vide a Notice of Motion dated 22<sup>nd</sup> October, 2022, the Appellant/ Applicant sought the following orders;

**a) Spent.**

**b) Spent.**

**c) That this Honourable Court be pleased to grant stay of execution of Judgment and Decree in Environment and Land Court Case No. 10 of 2019 Musembi Mutisya v Kilonzo Muthami t/a Qara Borehole Services pending the hearing and determination of this Appeal.**

**d) That costs of this Application be provided for**

2. The Application is based on the grounds on its face as well as the Supporting Affidavit of Kilonzi Muthami, the Appellant, where he deposed that Judgment in ELC Case No. 10 of 2019 was delivered on 7<sup>th</sup> October, 2021, where the Appellant was ordered to refund to the Respondent Kshs. 1,300,000/= for breach of contract and that the Appellant has since appealed against the said Judgment and the Appeal has high chances of success; that the trial Magistrate erred by omitting crucial evidence by the Defendant; that the trial Magistrate burdened the Appellant by ordering him to refund the entire contract sum when he had done substantive work as the contract was partially executed; that the Appeal would be rendered nugatory if execution proceeds, and that he stands to suffer substantial financial loss as his business is on the verge of collapse due to the Covid-19 pandemic.

3. The Application is opposed. On 3<sup>rd</sup> November, 2021, the Respondent filed Grounds of Opposition where he averred that the Applicant failed to meet the threshold for grant of stay pending Appeal as stipulated in Order 42 Rule 6 of the Civil Procedure Rules; that the Applicant has failed to demonstrate the substantial loss that they will suffer, if orders sought are not granted; that the Application is meant to defeat finality and justice by denying the Plaintiff the fruits of his judgment; that should this court be persuaded to grant the orders sought, the same should be granted on conditions that half of the decretal sum be released to the Respondent and the remaining half be deposited in a joint interest earning account in the names of advocates for both parties until determination of the Appeal or alternatively the Appellant to deposit in a joint interest earning account, the entire decretal sum, plus costs of the suit or any other security for the due performance of the decree.

4. In a rejoinder, the Applicant filed a Supplementary Affidavit on 9<sup>th</sup> November, 2021 where he deposed that he has satisfied the conditions for grant of the orders sought; that he stands to suffer substantial loss if the orders sought are not granted; that his Appeal has overwhelming chances of success; that the decretal amount is contested, which is the basis of his Appeal; that his financial circumstances are strained and that he is willing to offer his Title Deed as security and that no prejudice shall be suffered by the Respondent if orders sought are granted.

5. The Application was canvassed by written submissions and on record are the Applicant's submissions filed on 3<sup>rd</sup> November, 2021 as well as the Respondent's submissions filed on 5<sup>th</sup> November, 2021.

**SUBMISSIONS**

6. Counsel for the Applicant submitted that the Applicant had an arguable Appeal and relied on the cases of **Obadiah Mugambi v Joyce**

*Ncoro [2021] eKLR and Litayason Neepe & 2 Others vs. Elizabeth Guttman & Another Civil Application No. NAI 324 of 2018*. Counsel argued that the trial Magistrate had overlooked the fact that the Applicant had done substantial work yet ordered for the refund of the entire contract sum. Counsel also contended that the trial Magistrate failed to consider the two hydrological reports which were relied upon by the Applicant which proved the fact that it was not possible to proceed with the drilling works.

7. It was further contended for the Applicant that the Applicant stood to suffer substantial loss unless the orders sought were granted. Counsel relied on the cases of *Silversten v Chesoni [2002] eKLR 867*, *Congress Rental South Africa v Kenyatta International Convention Centre and Cooperative Bank of Kenya Limited and Another (Garnishee) [2019] eKLR*, for the proposition that to prevent substantial loss, *status quo* ought to be maintained, as such loss would render the Appeal nugatory. Further, counsel argued that the Application had been brought without unreasonable delay, having been filed 20 days after entry of Judgment. Counsel also stated that the Applicant was willing to offer security for due performance of the decree.

8. On his part, the Respondent submitted that the orders sought are discretionary and they should be granted in a judicious manner to avoid prejudicing either party. Counsel relied on the case of *R.W.W v E.K.W [2019] eKLR*. Further, counsel argued that for the orders sought to be granted, the Applicant must demonstrate substantial loss. Reliance was placed on the cases of *James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR*, *Caneland Ltd & 2 Others v Delphis Bank Ltd, Civil Application No. NAI 344 of 1999*, *Stephen Wanjohi v Central Glass Industries Ltd Nai HCCC NO. 6726 of 1991*.

9. On the question of security, the Respondent relied on the case of *Absalom Dova v Tarbo Transportes [2013] eKLR*, *Mwaura Karuga T/A Limit Enterprises v Kenya Bus Services Limited & 4 Others [2015] eKLR* and *Gianfranco Manenthi & Another v Africa Merchant Assurance Company Ltd [2019] eKLR*, for the proposition that granting stay pending Appeal should not result in disadvantage to anyone but justice ought to be done to all the parties. Counsel urged that should the orders sought be granted, the same should be on conditions as proposed by the Respondent.

#### **ANALYSIS AND DETERMINATION**

10. I have carefully considered the Application together with the Supporting and Supplementary Affidavits, the Grounds of Opposition and the submissions of parties. The issue that arise for determination is whether the Applicant has met the threshold for grant of stay of execution pending Appeal.

11. Grant of stay of execution pending Appeal is provided for under Order 42 Rule 6 of the Civil Procedure Rules, as follows:

***“ (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 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.***

***3) ...***

***4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.***

***5) ...***

***6) ...”***

12. It is clear from Order 42 Rule 6 (2) of the Civil Procedure Rules that an Applicant seeking for stay of execution of a Decree or Order pending Appeal is obligated to satisfy the following conditions:

***(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.***

13. In *Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365*, the Court of Appeal held that whereas the Court of Appeal’s power to grant a stay pending Appeal is unfettered, the High Court’s jurisdiction to do so under Order 41 Rule

6 of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the Application must be made without unreasonable delay.

14. The Applicant herein has averred that their Appeal has high chances of success and contended that the trial Magistrate ordered for the refund of the entire contract sum notwithstanding the fact that the Applicant had done substantial work and that the trial Magistrate failed to consider the two hydrological reports produced by the Applicant which proved the fact that it was not possible to proceed with the drilling works. The issues raised by the Applicant raise arguable grounds which the Applicant should ventilate and I find that the Appeal raises arguable grounds.

15. On the question of substantial loss, the Applicant averred that he stands to suffer substantial financial loss as his business is on the verge of collapse, the same having been severely affected by the Covid-19 pandemic and that he cannot afford to settle the Judgment amount. I have considered the record of the lower court. It is not in dispute that the parties herein entered into a contract for the Defendant to drill a borehole for the Plaintiff at a sum of Kshs. 1,300,000/= which sum was paid in full. It is also not in dispute that there was drilling but that the same did not result in finding water for the Respondent. While the Respondent in the lower court pleaded breach of contract, the Appellant pleaded frustration. As the Applicant received from the Respondent the sum of Kshs. 1,300,000/=, the ends of justice demand that stay orders granted ought to be conditional.

16. In the premises, I grant order of stay of execution of Judgment in Mavoko ELC No. 10 of 2019, pending Appeal on condition that the Applicant deposits the decretal sum of Kshs. 1,300,000/= in an interest earning joint account in the names of the parties' advocates on record within 30 days of this Ruling. Costs shall abide the Appeal.

17. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 23<sup>RD</sup> DAY OF MARCH 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

**In the presence of:**

Mr. Muhoro for the Appellant

Ms. Mwanzia for the Respondent

Ms. Josephine Misigo- Court Assistant