



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 399 of 2002

IRIS PROPERTIES LIMITED & ANR.....PLAINTIFFS

VERSUS

NAIROBI CITY COUNCIL DEFENDANT

RULING

Coram: Mwera J

Mr Omoti for plaintiff/applicant

Mr King'ara for defendant/ respondent

By a notice of motion dated 10.6.09 the applicant, City Council of Nairobi invoked the powers of Order 41 Rule 4 Civil Procedure Rules and Section 3A, Civil Procedure Act with the main prayer:

1) That there be a stay of execution of the order following this court's ruling dated 16.9.2002 pending the hearing and final determination of an intended appeal against that ruling.

The grounds in the body of the motion included: a threatened execution for what the applicant termed a colossal sum of sh. 80,961,825/= which, to it, represented a substantial loss. That the applicant had commenced fresh appellate proceedings after a previous appeal had been withdrawn on 19.5.09. Further, that the applicant would abide by any terms set by this court regarding security for due performance and no prejudice stood to befall the respondents. A supporting affidavit was filed and Mr Omoti relied on it to argue the application.

On the other hand Mr King'ara had a replying affidavit from the respondents to oppose the motion. Mr Omoti opened by intimating that the applicant had a CIVIL APPLICATION NO. 149/09 pending before the Court of Appeal seeking leave to file and serve a notice of appeal together with lodging a record of appeal. The application was still pending. It followed a previous appeal which was withdrawn on 19.5.09.

The court heard that the ruling of 16.9.02 was for a sum of sh. 35m – without interest. It was followed by a stay order which remained in force until 19.5.09 when the said earlier appeal was withdrawn.

Asked how the initial Sh. 35m, in the award about which Waki J, as he was then, ruled on 16.9.02, the court heard that that sum had been inflated by the respondents to Sh. 80.9m on unexplained basis yet it was demanded by letter from M/s Rachier & Amollo's letter of 21.5.09. To Mr. King'ara, this sum came about when the applicant failed to deposit the initial sh. 35m and so the respondent's presumed that interest was justified and warranted with circumstances – hence the demand for sh. 80.9m.

Counsel then told the court that on 1.10.01 the parties had agreed that whoever was aggrieved by the award of sh. 35m could appeal. So that applicant filed HCCA 829/01 which was pending. Mr Omoti's explanation of the long period of pendency of this appeal was that when the earlier C. A. 332/02 withdrawn on 19.5.09 was filed, it diverted the parties' attention from the High court appeal. To Mr. King'ara, all this was meant to delay his clients' enjoyment of the fruits of their litigation.

Focusing on the 3 conditions to govern obtaining a stay under Order 41 Rule 4 Civil Procedure Rules, Mr. Omoti addressed the issue whether there was unreasonable delay in bringing this application. He said that the previous appeal was withdrawn on 19.5.09 and this motion followed on 10.6.09. The slightly less than one month of delay was necessitated by obtaining instructions from the applicant.

As regards the substantial loss his client stood to suffer in the event the sought stay order was not forthcoming, the court heard that the sum sought was large – sh. 80.9m, which in the first place was not the sum awarded (without interest) and secondly if paid, that sum would greatly dent the financial position of the applicant. This point could have been better supported with – evidence eg. the audited accounts of the applicant to demonstrate that its finances could be greatly affected if the execution took place and that could adversely affect its operations. No such evidence was laid before court. However, while citing the case of **Pelican Investment Ltd & Ano Vs National Bank of Kenya Ltd** HC (Mil)CC. 570/98, Mr Omoti sought to persuade this court to find that a sufficient cause to warrant a stay had been demonstrated when the sum sought to be paid was about 3 times the award. That sh. 80.9m, and not sh. 35m, could not be demanded and for that a stay should issue.

Then counsel addressed the 3rd condition under Order 31 Rule 4 Civil Procedure Rules: security for the court to order. Mr Omoti offered sh. 1.5m to guide the court.

Mr Kingara's position was that this application was misconceived, if not premature, in that there was no appeal pending – either by way of a filed and served notice of appeal or filing of the appeal itself. That is what Order 41 Rule 4 Civil Procedure Rules envisages and not an application to the Court of Appeal to seek leave to lodge a notice of appeal and/or the appeal itself. On that point therefore this court was deemed to have no jurisdiction to entertain this application.

It was added that the applicant had not explained the inordinate delay from the time of the ruling to filing the present application and that the consent to appeal the award was not to operate as stay in order to appeal.

Mr Kingara then touched on the demanded sum of sh. 80.9m and not the award sum of sh. 35m. To him, the applicant could only impeach the sum difference in another forum and not by the present application. And finally that the applicant had not demonstrated the substantial loss likely to be suffered in case the stay order is not given (see CIVIL APPLICATION NO. 15/90 **Vishram Ranji Halai & Ano. Vs Thornton & Turpin** (1963) Ltd.). And that the security of Sh. 1.5m to be deposited is so low even if based on the sh. 35m award for a party who, for 9 years, has been kept away from the benefit.

In the circumstances of this case, this court is minded to note that the discretion sought to be exercised under Order 41 Rule 4 Civil Procedure Rules is one geared towards serving interests of justice. It needs to be exercised judicially and judiciously in the matter before court and not on a whim or Caprice. Having so reminded itself, the court holds that with the counsel having gone back and forth – from this court to the Court of Appeal in an appeal which was withdrawn on 19.5.09, and this application following on 10.6.09, the time which lapsed in between may as well not pass for unreasonable delay.

The respondents told the court that since there was no notice of appeal or appeal itself filed, it lacked jurisdiction to entertain this motion because under Order 41 Rule 4 Civil Procedure Rules an application to stay execution is only predicted on there being an appeal in the process. That appears so. But that the applicant has initiated an appeal process in the Court of Appeal that may as well pass for an appeal being in the offing. It may thus be unjust to disregard the process in the Court of Appeal in the circumstances of this case. Accordingly, this court proceeds to entertain prayers for stay of execution.

It is not disputed that the reason given for non-prosecution of the High Court appeal against the award did not sound satisfactory. And that the respondents have been kept away from enjoying their award for nine years. It is equally appreciated that the respondents have not explained satisfactorily here why with the award of sh. 35m. made without interest, they have inflated it to the demanded sh. 80.9m. The court is minded to agree with the applicant that such discrepancy does constitute a sufficient cause to warrant a stay. The larger sum is not explained and up to this point it appears not justified.

So all in all, the court grants the stay sought. But the applicant is directed to pay over to the respondents 10% of the award of sh. 35 m. in the next 45 days to enjoy the stay. In the interest of justice and having been kept out for 9 years, such payment is justified. With the above orders each side to bear its own costs. Orders delivered on 11.2.10.

J. W. MWERA
JUDGE

