



**Mistry Premji Ganji (Investment) Limited v Kenya National Highway Authority
(Civil Case 106 of 2015) [2023] KEELC 16165 (KLR) (6 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16165 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CIVIL CASE 106 OF 2015
LL NAIKUNI, J
MARCH 6, 2023**

BETWEEN
MISTRY PREMJI GANJI (INVESTMENT) LIMITED PLAINTIFF
AND
KENYA NATIONAL HIGHWAY AUTHORITY DEFENDANT

RULING

Introduction

1. The Notice of Motion application dated 11th May 2021 before Honorable Court was instituted by the Defendant/Applicant – “The Kenya National Highway Authority” (Hereinafter referred to as “KENHA”) for its determination. The application was brought under the provisions of Sections 1A, 1B, 3, and 3A of the [Civil Procedure Act](#), Cap. 21 and Order 42 Rule 6 of the Civil Procedure Rules, 2010.

The Defendant/Applicant’s case

2. The Defendant/Applicant sought for the following prayers:-
 - a. Spent.
 - b. Spent.
 - c. That there be a stay of execution and enforcement of the Judgement and orders made by Justice Omollo on 8th April 2021 in Mombasa ELC Case No. 106 of 2015 pending the hearing and determination of the intended appeal.
 - d. That the costs of this application abide the intended appeal.



3. The application is premised on the testimonial facts, grounds and the averments made out under the 19 Paragraphed Supporting Affidavit of Norah Beatrice Odingo the Corporation Secretary/Deputy Director and Head of Legal Services for the Defendant/Applicant who has the competence and authority to swear the affidavit on its behalf together with one annexures marked as “NBO – 1” annexed thereto.
4. She averred that on the 16th February, 2015, the Defendant/Applicant gave a notice to the KTDA for intended demolition/removal of encroachment on a road reserve within thirty (30) days, failure to which the Defendant/Applicant would remove the encroachment as authorized under the provision of Section 49 (5) of the Roads Act, 2007 and Section 91 (2) of the Traffic Act (Cap. 405). KTDA forwarded the said notice to the Plaintiff/Respondent who had leased the space to KTDA.
5. She deposed that by a letter date 19th February, 2015, the Plaintiff/Respondent wrote to the Defendant/Applicant objecting to the notice and stated that it was the legal owner of the suit property and its land was not encroaching on a road reserve as alleged. On 13th April, 2015 the Defendant/Applicant wrote to the Plaintiff/Respondent stating that the suit property was created from several sub - divisions of the original Plot No. MN/V/393/R from which the Government had acquired 0.333 hectares (0.8222 acres) for the road expansion vide Gazette Notice No. 3581 of 21st November, 1969. A map was attached to the letter demonstrating how the suit property was encroaching on the road reserve by 6.35 m at beacon JP11 and 10.72m at JP10. The Plaintiff/Respondent was asked to demolish the wall as per the notice of 16th February, 2015.
6. The Deponent held that on 18th May, 2015, over 3 months after the notice, the Defendant/Applicant demolished the perimeter wall and other structures encroached on the said road reserve, By this time, the Defendant/Applicant had issued the Plaintiff/Respondent with a notice of intended demolition and documents showing encroachment on the road reserve. She deposed that the Plaintiff/Respondent moved to Court vide a Complaint dated 21st May, 2015 seeking “inter alia” a declaration that it was the lawful and indefeasible owner of CR 18624 and general aggravated and/or exemplary damages for the unlawful demolition by the Defendant/Applicant. Having heard it, the Court granted the Plaintiff/Respondent’s prayers of injunction and preservation orders on an interim basis on 27th May, 2015 and the orders were confirmed by consent of the parties on 14th July, 2015 pending the determination of the suit and hence there had been no threat of any demolition after the 27th May, 2015.
7. On 8th April, 2021, Justice A. Omollo held that the demolition of the wall by the Defendant/Applicant was uncalled for, illegal and against the rights of the Plaintiff/Respondent as the proprietor of the suit property. To this effect, the Court issued permanent injunctions against the Defendant/Applicant, awarded the Plaintiff/Respondent damages of Kenya Eighty One Million Five Seventy Four Thousand Six Thirty One (Kshs. 81, 574, 631/=
8. Pursuant to this Judgement, the Defendant/Applicant intended to prefer an appeal against the said. On 15th April 2021 they filed and served a Notice of Appeal and wrote to the Deputy Registrar requesting for typed proceedings and Judgement to enable in preparation of the record of appeal.
9. By and large, the Defendant/Applicant believes that the appeal based on the grounds founded on the memorandum of the Appeal is arguable and urged Court to allow the stay of execution least the Plaintiff/Respondent would commence execution against the Defendant/Applicant herein. The Defendant/Applicant argued that now that the 30 days stay of execution granted by this Court had expired, the Plaintiff/Respondent would commence the process of execution and the Defendant/Applicant was apprehensive that if the Decree was executed before the hearing and determination of



the intended appeal it would suffer substantial loss and render the appeal nugatory. the taxpayer would suffer substantial loss if the respondent proceeds with the intended appeal.

10. She held that the Defendant/Applicant was ready and willing to abide by the Court order for Security for Costs for performance of the Decree. They urged for the prayers sought from the application to be allowed. t will abide with any court order for security for costs.

The Plaintiff/Respondents case

11. On 2nd July, 2021, the Plaintiff/Respondent in response to the application for stay of execution pending appeal, by filing a 14 Paragraphed Replying Affidavit dated even date and sworn by SURESH KANJI PATEL the Plaintiff/Respondent's director authorized to swear it and well conversant with the issues of this case and together a bundle of annexures Marked as "SKP – 1" annexed hereto. He deponed that the Honorable Court found in favour of the Plaintiff/Respondent on 8th April 2021 ordering the Defendant/Applicant to pay the Plaintiff/Respondent a sum of Kenya Shillings Eighty One Million Five Seventy Four Thousand Six Thirty One hundred (Kshs. 81,574,631/=) as damages for loss of income, unlawful demolition of the Plaintiff/Respondent's wall and electrical alarm wiring. He argued that the Defendant/ Applicant had not demonstrated by way of evidence what substantial loss it stood to suffer should the orders of stay be declined.
12. He held that the application sought to prevent the Plaintiff from enjoying the fruits of the Judgement. He averred that if the Court was to grant the orders sought it would be prolonging the recovery of the reparations and damages arising out of the Defendant/Applicant's wrongful acts which occurred over five years earlier in the year 2015. The Defendant/Applicant had failed to demonstrate by way of evidence what substantial loss it would suffer should the orders sought in the Application was denied.
13. He deponed that contrary to the averments of the Defendant/Applicant's supporting affidavit, the Plaintiff/Respondent maintained that it had the financial capability to repay the entire decretal sum in the event the Defendant/Applicant's appeal succeeded at the Court of Appeal.
14. The deponent attached the Plaintiff/Respondent's audited accounts and financial statements for the year ending 31st December 2020 to demonstrate to court that the Plaintiff/Respondent was a profitable and solvent company with a healthy balance sheet with lots of valuable assets well enumerated under the contents of Paragraph 9 a) to f) of the Replying Affidavit within its ownership and which would be disposed off in the event there was need to do so.
15. Therefore, the denial of the orders of stay would not render the intended appeal nugatory. The deponent urged court where it may be inclined to allow the application to, in the interest of preserving the rights of all parties, that the Defendant/Applicant be directed to deposit the entire decretal sum in a joint interest earning account in the names of the respective advocates within 30 days in default the Plaintiff/Respondent be allowed to proceed with the execution.

The Submissions

16. It will be noted that, the parties had been attempting an out of Court negotiation over these issues. However, on realizing that the negotiations were taking too long, on 6th October, 2022, the Court directed that the Notice of Motion application dated 11th May, 2021 be canvassed by way of written submissions. Pursuant to that all the parties fully complied and a ruling date was reserved by the Court accordingly.



The Written Submissions by the Defendant/Applicants

17. On 29th October 2021, the Learned Counsel for the Defendant/Applicant, the Law Firm of Messrs. Sagana Biriq & Company Advocates filed their written submissions dated 27th October, 2021 in support the application. Mr. Muganda Counsel commenced by stating that the cause of action in the matter arose from the demolition of the Plaintiff's perimeter wall and gate in the suit property by the Defendant as an encroachment into the road reserve. He stated that the application was pursuant to being aggrieved by the Judgement delivered by the Court on 8th April. 2021. He submitted that the Defendant/Applicant had filed a Memorandum of Appeal before the Court of Appeal and which had demonstrated it had an arguable appeal. He argued that if stay was not granted the same would be rendered nugatory. The Defendant/Applicant submitted and by citing the cases of "RWW – Versus – EKW" (2019, eKLR, "Antoine Ndiaye – Versus – African Virtual University, 2015 eKLR", and "Butt – Rent Restriction Tribunal (1979) eKLR," that it had met the conditions set out under the provision of Order 42 Rule 6 of the Civil Procedure Rules, 2010 for granting an order of stay which the Court held were discretionary and should be granted where an applicant demonstrated sufficient cause. First the Defendant/Applicant maintained that the application was filed timely without undue delay on 11th May 2021 while Judgement was entered on 8th April 2021.
18. On the second condition of substantial loss. The Counsel submitted that execution of the Judgement would cause a state of affairs that would adversely affect the operations of the Defendant/Applicant, which were entirely funded by the taxpayer. The Counsel submitted that through the Plaintiff/ Respondent had demonstrated in its Replying Affidavit that it had assets capable of repaying the decretal sum incase the appeal succeeds; the said assets do not translate to liquidated cash. That the Defendant/Applicant, would be forced to institute recovery litigation in order to liquidate the assets, which would take more time and resources from both the parties. He relied on the cases of "James Wangalwa – Versus – Agnes Naliaka Ceseto (2012) eKLR and "Air Services Limited – Versus Theuri Munyi, 2014 eKLR"
19. On whether the Defendant/Applicant as State Corporation was required to deposit Security as a condition for stay. The Counsel argued that the Defendant/Applicant was a public institution funded by taxpayers and uses public funds prudently. Being required to deposit decretal sum mean to divert public funds meant for construction and maintenance of public roads, which will lead to halting of several projects of national importance and interest. The Counsel argued that the provision of Order 42 Rule 8 of the Civil Procedure Rules, 2010 exempted the government from the provisions of security in Rules 6 and 7, together with Section 68 of the [Kenya Roads Act](#) exempted the Defendant/Applicant being a State Corporation/a Parastatal from providing security as a condition for stay. He averred that in the case of:- "TSC – Versus - Benson Kuria Mwangi (2020) eKLR it was held that

"Being a public institution, there is public interest in granting the orders of stay as the decretal sum is payable from public funds. ...Being a public institution, the applicant is not required to deposit security by virtue of Order 42 Rule 8 of the Civil Procedure Rules, 2010."
20. The Counsel urged the Honorable Court to find that the Defendant/Applicant was not obligated to offer any security, yet it had sufficient funds to meet any liability that may result if the appeal failed. This was the position taken in the case of: "Paul Kipsang Kosgei – Versus - NITA & another (2021) eKLR, where it was held that:-

"I have however taken judicial notice of the fact that the 1st Respondent is a public institution with sufficient funds to meet any liability from the decision herein and any



liability that may arise from the decision of the appellant court should it appeal fail. I will therefore on this ground alone not require it to deposit security for the appeal.”

21. In conclusion the Counsel submitted that the balance of convenience tilted in its favour as it had not only demonstrated that it would suffer substantial loss unless the orders were granted but also that it had filed the application timeously. The Defendant/Applicant urged the Honorable Court to allow the application and grant the orders as prayed.

Analysis and Determination

22. I have carefully considered the pleadings and the written submissions made herein by the parties with regard to the Notice of Motion application 11th May, 2021, the cited authorities and the relevant provisions of the Statutes. In my view, in order to arrive at an informed, reasonable and fair decision in the matter, the Court has framed three (3) issues for its determination. These are:-
- a. Whether the Notice of Motion application by the Defendant/Appellant has met the threshold for the issuance of orders of stay of execution of the decision of the trial court pending the hearing and determination of the appeal.
 - b. Whether the parties are entitled to the relief sought from the application.
 - c. Who will meet the Costs of the application.

Whether the Notice of Motion application by the Defendant/Appellant has met the threshold for the issuance of orders of stay of execution of the decision of the trial court pending the hearing and determination of the appeal.

23. In a nutshell, the facts of the case are that on 8th April 2021, Justice Omollo delivered a judgement herein, she found that the Plaintiff (the Respondent herein) is entitled to compensation for lost rent for the period running from 2017 till Judgement date. The court made the following orders:
- a. A declaration that the certificate of title CR. 18624 that the plaintiff holds in respect of the suit land constitutes conclusive evidence of ownership of the said land and that the plaintiff is the lawful and indefeasible owner and entitled to immediate possession of all the said land.
 - b. A permanent injunction be and is hereby issued restraining the defendant whether by themselves and/or their servants or agents or otherwise howsoever from demolishing or further demolishing or destroying any part of the said land or any structure or structures thereon.
 - c. A permanent injunction restraining the defendant whether by themselves and/or their servants or agents or otherwise howsoever from either entering, occupying or any party having a lawful interest in the said land from either entering occupying or using any part of the said land.
 - d. Restoration of the walls unlawfully demolished by the defendant on the said land together with damages of Kshs 81,574,631 as enumerated in paragraph 67 hereinabove.
 - e. A stay of execution for a period of 30 days is hereby given.
 - f. Interest thereon at court rates



g. Costs

24. Being dissatisfied with the said Judgment, The Defendant (appellant/applicant herein) filed a Notice of Appeal on 14th April 2021 and consequently filed this application on 11th May 2021 seeking to stay of execution of the judgement delivered on 8th April 2021 pending the hearing and determination of the appeal. The applicant was made without in due time and was within a reasonable time period.
25. The granting of stay of execution pending appeal by court is governed by Order 42 Rule 6 of the Civil Procedure Rules, 2010. While fully concurring with the cited cases of “RWW – Versus – EKW” (2019, eKLR, “Antoine Ndiaye – Versus – African Virtual University, 2015 eKLR”, and “Butt – Rent Restriction Tribunal (1979) eKLR,” by the Learned Counsel for the Defendant/Applicant Stay of execution is granted at the discretion of Court when sufficient cause has been established by the applicant. Sufficient cause is demonstrated when the applicant proves the following conditions on a balance of probabilities that:-
- a. substantial loss may result to the applicant unless the order is made,
 - b. the application has been made without unreasonable delay,
 - c. and such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

These three conditions must all be present as founded in the case of “Tabro Transporters Limited – Versus - Absalom Dova Lumbasi (2012) eKLR it was held that:- “These conditions are the essence of Order 42 Rule 6 of the CPR. They however share an inextricable bond such that, if one is absent, it will affect the exercise of the discretion of the court in granting stay of execution.”

26. The centrality of substantial loss was reinforced by the case of:- ”Court of Appeal in Rhoda Mukuma – Versus - John Abuoga[1988] eKLR, where it was held that:

“Granting a stay in the High Court is governed by Order XLI rule 4(2), the questions to be decided being – (a) whether substantial loss may result unless the stay is granted and the application is made without delay; and (b) the applicant has given security. The discretion under rule 5(2)(b) is at large, but as was pointed out in the Kenya Shell case substantial loss is the cornerstone of both jurisdictions. That is what has to be prevented, because such loss would render the appeal nugatory. Therefore, it is necessary to preserve the status quo.”

27. It’s a fact that the Defendant/Applicant, the Kenya National Highways Authority (KeNHA) is a statutory body established under the State Corporation Act, Cap. 466 and *Kenya Roads Act* of 2007. With the responsibility to develop, rehabilitate, manage and maintain all national trunk roads comprising of the Class S, A, and B roads. Being a public institution, the Defendant/Applicant was funded by tax payers and was constitutional obligated to manage its funds through the rules and principles of public finance management. Under the provision Article 201 of *the Constitution* of Kenya, 2010 provides for Principles and framework of Public Finance, it provides for in (d) public money shall be used in a prudent and responsible way. The Defendant/Applicant has argued that it has a constitutional burden to safeguard public fund, and execution will cause diversion of public funds which are earmarked for the development, maintenance and management of all truck roads in the country.



28. In the case of: “Samvir Trustee Limited – Versus - Guardian Bank Limited [2007] eKLR, it was held that:-

“It is my humble view that for the applicant to obtain a stay of execution, it must satisfy this court that substantial loss would result if no stay is granted. It is not enough to merely put forward allegations or assertion of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider mere assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and appropriate evidence of substantial loss.”

29. In a money decree like this case, substantial loss may lie in the inability of the respondent to refund the decretal sum should the appeal succeed. The Plaintiff/Respondent has attached its books of accounts to demonstrate to Court that it has the financial capability to refund the decretal sum in the event that the appeal succeeds. Other than stating that it’s a public institution financed by public funds, the applicant has not established the substantial loss it will occur unless an order for stay is made. The Defendant/Applicant would have demonstrated through evidence, which specific project will be halted if stay is not granted, however the same was not done.

30. The Defendant/Applicant cannot merely rely on the protection advanced by Order 42 Rule 8 of the Civil Procedure Rules, 2010 which states that:-

“No such security as is mentioned in rules 6 and 7 shall be required from the Government or where the Government has undertaken the defence of the suit or from any public officer sued in respect of an act alleged to be done by him in his official capacity.”

31. The Defendant/Applicant is an Authority established as a body corporate by Section 3 of the Roads Act, with the ability to sue or be sued. It is therefore redundant for the applicant to hide behind Rule 8 and simply state it cannot provide security for costs. In case of “National Transport and Safety Authority – Versus - Elisha Z. Ongoya & 2 others [2019] eKLR, the honorable Court held that:-

“The applicant cannot ride on the Order 42 Rule 8 that being a government institution it cannot provide security. Section 3 of the National Transport and Safety Authority gives it a mandate as an entity which can sue and be sued. The consequence of being sued is that it can be ordered to pay damages. It cannot therefore run away from its liabilities and hide under the veil of Order 42 Rule 8 of the Civil Procedure Rules.”

32. The court is called to balance the rights of the applicant and respondent when granting stay of execution. In the case of:- “Samvir Trustee Limited (Supra) it was held that:-

“But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his Judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement, hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The Respondent is asserting that matured right against the Applicant/Defendant.”

33. A stay of execution pending appeal is never meant to put one party against the other, but rather to administer justice while recognizing both parties have rights as discussed herein.



Who will bear the Costs of the application?

34. It is now trite law that costs is an issue of the discretion of the court. Costs mean the award which is granted to a party at the conclusion of a legal action, process and/or proceedings in any litigation. The proviso of section 27(1) of the *Civil Procedure Act*, Cap 21 provides that costs follow the events (See the cases of Supreme Court Jasbir Singh Rai & 3 Others –Versus- Tarlochan Singh (2014) eKLR and Rosemary Wairimu Munene –versus- Ihururu Dairy Farmers Co-operative Society (2014) eKLR) by events it means the result of the legal action, process and proceedings.
35. Although the Defendants/Applicant has succeeded in its application I feel it will be reasonable, fair and just for each party to bear their own costs in the given circumstances.

Conclusion and Disposition

36. Consequently, upon conducting the analysis to the framed issues herein, the Honorable Court is persuaded that the Defendant/Applicant herein has proved its case on preponderance of probability and therefore I direct as follows:-
- a. That the Notice of Motion application dated 11th May, 2021 be and hereby allowed.
 - b. That an order be and is hereby granted that there shall be stay of execution of the Judgement dated 8th April 2021 and the decree issued therein pending the hearing and determination of this appeal.
 - c. That an order be and is hereby made that the Defendant/Applicant deposits a sum of Kenya Shillings Eighty One Million Five Seventy Four Thousand Six Hundred and Thirty One (Kshs. 81,574,631/=) in an interest earning Escrow Joint bank account to be held in the joint names of both Law firms of Messrs. Daly Inamdar Advocates and Messrs. Sagana Biriq & Company Advocates within the next 90 days from the date of the delivery of this Ruling hereof. The money shall be deposited with either Kenya Commercial Bank or National Bank of Kenya on the preference of the parties and whichever that provides the best interest.
 - d. That failure to adhere with the above order will led to the vacation of the stay orders.
 - e. That each party shall bear its costs.

37. It is so ordered accordingly.

RULING DELIVERED SIGNED AND DATED AT MOMBASA THIS 6TH DAY OF MARCH, 2023

HON. JUSTICE L.L NAIKUNI

JUDGE

