



**National Social Security Fund Board of Trustees v Kirundi & 3 others (Environment and Land Case Civil Suit 104 of 2007) [2023] KEELC 20678 (KLR) (5 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20678 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 104 OF 2007**

**J OMANGE, J**

**OCTOBER 5, 2023**

**BETWEEN**

**NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES ..... PLAINTIFF**

**AND**

**GEOFFFREY CHEGE KIRUNDI ..... 1<sup>ST</sup> DEFENDANT**

**MIKE MAINA KAMAU ..... 2<sup>ND</sup> DEFENDANT**

**COMMISSIONER OF LANDS ..... 3<sup>RD</sup> DEFENDANT**

**THE ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. Vide amended Notice of Motion application dated 23<sup>rd</sup> March 2023 the Applicant seeks the following orders:
  - a. That pending inter partes hearing and determination of this application, the honourable court be pleased to stay the execution of the order for costs issued on 29<sup>th</sup> November 2021.
  - b. That this honourable court be pleased to set aside and/discharge the purported Notice to show cause dated 22<sup>nd</sup> September 2022.
  - c. Pending hearing and determination of Nairobi Civil Appeal No E025 0F 2023 NSSF Board of Trustees Vs Geoffrey Chege and 3 others the honourable court be pleased to stay the execution of the order for costs issued on the 29<sup>th</sup> November 2021.
  - d. Costs of the application
2. The Application was supported by an affidavit sworn by Caroline Rakama who deponed that she is the principal legal officer of the applicant herein.



3. The Applicant avers that Judgement was entered against them and they were condemned to pay the 1<sup>st</sup> Defendant and 2<sup>nd</sup> Defendant costs at Ksh 6,735,875 and Ksh 5,303,372 respectively. They have appealed against this decision in Nairobi Civil Appeal No E025 OF 2023 NSSF Board of Trustees vs Geoffrey Chege and 3 others.
4. The Plaintiff/Applicant contend that the 1<sup>st</sup> Defendant illegally obtained a notice to show cause in respect of the costs contrary to Order 22 Rule 18 of the Civil Procedure Rules, and unless the same is set aside, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants will prosecute based on an irregular and unlawful notice to show cause which will occasion substantial loss to the Applicant.
5. The Applicant states that if stay is not granted, and the appeal is successful then it will be rendered nugatory as the 1<sup>st</sup> and 2<sup>nd</sup> Defendants will not be in a position to reimburse the Applicant the total sum of Ksh 12, 039,247. They argue that the Defendants have no known means of income.
6. The Applicant further state they are willing to abide to any conditions the Court issues for grant of the stay.
7. The Applicant's counsel submitted substantial loss would be occasioned to the applicant if stay is not granted. Counsel argued that the 1<sup>st</sup> and 2<sup>nd</sup> defendants would not be able to reimburse the decretal amount if the appeal were to succeed. The Applicant further submitted that the notice to show cause was unlawful as it was not issued by the court executing the decree contrary to order 22 Rule 18.
8. It was further submitted that the Applicant is a statutory entity created by an act of parliament (Section 3 of the NSSF Act) and any attempt to obtain warrants of attachment of their movable property would contravene the principles of the rule of law as it is contrary to Section 58 of the NSSF Act, which explicitly states that: "(3) Notwithstanding any other written law, the assets of the Fund shall not be liable to attachment under any process of law. They placed reliance on *Kenya National Highways Authority v Zenith Steel Fabricators Limited & another* [2017] eKLR. In which the court issued a directive that the decree holders were barred from attaching the appellant's property by the mere fact that it was a state body established by an act of parliament which Act had a provision for non-attachment of movable property.
9. The 1<sup>st</sup> Defendant/Respondent filed grounds of opposition dated 24<sup>th</sup> July 2023 in response to the application. The 1<sup>st</sup> Defendant contended that the applicant had not explained the delay in filing the application hence was guilty of inordinate delay. Further the 1<sup>st</sup> Defendant refuted the allegation that he had no means of reimbursing the Plaintiffs should the appeal be successful. Lastly, he stated that the appeal had no chances of success hence should not be allowed.
10. The 1<sup>st</sup> Defendant submitted that the application should be dismissed as the inordinate delay is inexcusable. He further submitted that in the event the court is inclined to grant orders for stay, the Plaintiff should deposit the sum of Ksh. 6,735,875 in a joint account in the name of the Advocate for the Applicant and the Advocate for the 1<sup>st</sup> Defendant.
11. The purpose stay of execution is to preserve the substratum of the subject matter- pending an appeal. In the case of *RWW vs. EKW* (2019) eKLR cited by Musyoka J. in *HE v SM* (2020) eKLR the Court held that the purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the Appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. The issue before the court for determination is therefore;

Whether the applicant has satisfied the requirements as set forth in order 42 rule 6 for the grant of stay pending appeal?



The principles on grant of stay of execution pending appeal are well settled. Order 42 rule 6(2) of the [Civil Procedure Rules](#) provides;

- (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.

12. Substantial loss has been defined in several judicial pronouncements. In *Silverstein –vs- Chesoni* [2002]1 KLR 867 the Court held that:

“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 a loss would render the appeal nugatory.”

13. The above position was further reinstated in the case of *Shell Ltd –vs- Kibiru & Another*, Civil Appeal No. 97 of 1986, Nairobi where it was stated that: -

“The application for stay made before the High Court failed because the 1<sup>st</sup> of the conditions was not met. There was no evidence of substantial loss to the applicant, either in the matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made since the Respondents would be unable to pay the money.”

14. The onus on the applicant to prove substantial loss was similarly addressed in *Antoine Ndiaye –vs- African Virtual University* [2015] eKLR; in which the court indicated as follows; -

“The onus of proving substantial loss and in effect that the Respondent cannot repay the decretal sum if the appeal is successful lies with the applicant; it follows after the long age legal adage that he who alleges must proof. Real and cogent evidence must be placed before the court to show that the Respondent is not able to refund the decretal sum should the appeal succeed.”

15. In the present case, the Applicant avers that if they pay the decretal amount and the appeal is successful the 1<sup>st</sup> Defendant would be unable to reimburse the amount. The 1<sup>st</sup> Defendant disputes this and insists that he is capable of reimbursing the Plaintiff. He does not however adduce any evidence as to his earnings and so fails to discharge the burden laid out in the Court of Appeal decision in the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR in which the court held that: “Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge...”

16. In the circumstances and in absence of any evidence on the earnings of the 1<sup>st</sup> Defendant I am of the view that the concern of the Applicant is justified and it has proved that it will suffer substantial loss.

17. The 2<sup>nd</sup> Defendant in the ground of opposition contended that the applicant is guilty of inordinate delay in prosecuting the appeal since Judgement was entered on 22<sup>nd</sup> November 2022 and the notice of motion filed on the 23<sup>rd</sup> March 2023.



18. The court had occasion to define inordinate delay in the case of *Mwangi S. Kimenyi Vs. Attorney General & Another* (2014) eKLR where it was held

“There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case, the explanation given for the delay; and so on and so forth” nevertheless, inordinate delay should not be difficult to ascertain once it occurs, the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable.”

19. The applicant has filed the application five months after the proceedings were typed. I do agree with the 2<sup>nd</sup> Defendant that this amounts to considerable delay. However, having found that substantial loss would likely be suffered by the Plaintiff if stay is not granted and considering that such loss would be borne by tax payers I find that this is a fit case to exercise discretion in favour of the Plaintiff/Applicant.

20. The court has a duty to ensure that the 1<sup>st</sup> and 2<sup>nd</sup> defendants are not unreasonably delayed from enjoying the fruits of their Judgement but at the same time ensuring that the Applicant does not pursue an Appeal which if decided in its favour will have no impact as the orders sought to be appealed against will have already been effected.

21. Having considered the foregoing, the application is allowed in the following terms;

- a. Notice to show cause dated 22<sup>nd</sup> September 2022 is hereby set aside.
- b. Stay of execution of the order for costs issued on 29<sup>th</sup> November 2021 is hereby granted pending hearing and determination of Nairobi Civil appeal No E025 0F 2023 NSSF Board of Trustees vs Geoffrey Chege and 3 others.
- c. The applicant to deposit Kshs 2,000,000 in an interest earning account in the names of all counsels within 30 days.
- d. In default of (c) above the stay orders to lapse and the notice to show cause is to be enforced.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 5<sup>TH</sup> DAY OF OCTOBER 2023.**

**JUDY OMANGE**

**JUDGE**

In the presence of: -

Mr. Kiplatin for Mr. Mumma for Applicant

Mr. Wachira for Respondent

Steve - Court Assistant

