



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO 179 OF 2013

GREEN POWER GENERATION COMPANY.....PLAINTIFF

VERSUS

KENYA POWER AND LIGHTING COMPANY

HON. ATTORNEY GENERAL.....DEFENDANTS

RULING

1. By a Notice of Motion application dated and filed herein on 30th June 2020, Kenya Power & Lighting Ltd (the 1st Defendant) prays for orders that pending the hearing and determination of the intended appeal to the Court of Appeal, an order of stay be issued staying execution of the Judgment of the Court delivered on 6th May 2020 and the decree arising therefrom.

2. The application which is supported by an affidavit sworn by the 1st Defendant's Acting Manager Legal Services Jude Ochieng is based on the grounds that: -

a) The 1st Defendant is aggrieved by the Judgment of this Court delivered on 6th May 2020 and has on 20th May 2020 filed a Notice of Appeal together with a request for proceedings;

b) The 1st Defendant will suffer substantial loss as the sum of Kshs 10,000,000/- awarded as general damages to the Plaintiff is a significant monetary award;

c) The Plaintiff may not be in a position to readily refund the sum of Kshs 10,000,000/- should the same be paid to it and thereafter the intended Appeal succeeds;

d) The Court's determination that the 1st Defendant's occupation of the suit property is wrongful and amounts to trespass impugns its right to occupy the suit property, as an agent of the Government of Kenya, that it uses to generate electric power supplied to residents of Mpeketoni and the storage of equipment necessary for that purpose. Should the intended Appeal succeed in the absence of an order of stay, substantial and irreparable loss would be occasioned not only to the 1st Defendant but also to the residents of Mpeketoni;

e) The application has been made without unreasonable delay considering that Judgment of the Court was delivered via email on 6th May 2020 and the Covid-19 pandemic has disrupted lives and businesses;

f) The 1st Defendant is ready and willing to abide by an order that this Court may issue as a condition for grant of stay, including depositing the decretal sum or any part thereof as may be directed by the Court, in an interest bearing account in the names of the advocates for the parties herein; and

g) It is fair and just and in the public interest for this application to be allowed.

3. The Plaintiff- Green Power Generation Company Ltd, is opposed to the application. By an Affidavit in Reply sworn by its Managing Director Dr. Ngiri Murachia and filed herein on 30th July 2020, the Plaintiff avers that while the 1st Defendant has all along professed to occupy and use the suit land as an agent of the Government, the latter has not appealed the decision of the Court in this suit and a confessed agent should not purport to appeal against a decision about which its principal is apathetic.

4. The Plaintiff further avers that the application is in any event premature as execution of the decree has not and cannot be set in train before taxation of costs and settlement of decree. It is further the Plaintiff's case that the application is premised on scandalously insensitive and belittling grounds including the allusion to the Plaintiff's inability to refund the decretal sum in the event the intended Appeal succeeds yet the Applicant has not exhibited any financial statements or operational status report of the Plaintiff company.

5. The Plaintiff avers that the offer to deposit Kshs 10 Million in a Joint interest earning account as a basis for stay would allow the Applicant to continue polluting and wrongfully occupying the suitland and the said offer is thus cynical, unconstitutional, unconscionable and smacks of arrogance and high handedness in dealing with a serious environment matter.

6. I have given full consideration to the 1st Defendant's application and the response thereto by the Plaintiff. I have equally perused and considered the rival submissions as filed herein by the Learned Advocates for the parties. The Honourable the Attorney General (the 2nd Defendant) did not object to the application and indeed voiced its support therefor.

7. As was stated by the Court of Appeal in *RWW –vs- EKW (2019) eKLR*: -

“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 appellants who are exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the Court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her Judgment. The Court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondents.”

8. The conditions for consideration in granting such an application are provided under Order 42 Rule 6 (2) of the Civil Procedure Rules which requires the applicant to satisfy the Court that: -

i) The applicant will suffer substantial loss unless the order of stay is granted;

ii) The application has been made without undue delay; and

iii) Such security for the due performance of the decree or order as may ultimately be binding on him has been given by the applicant.

9. For a start, the application before me was filed some 52 days after the delivery of Judgment herein. It was however not lost on this Court that some two months before the decision was delivered on 6th May 2020, the Covid-19 Pandemic had descended upon the World and the Judiciary in this Country had, in keeping with other acceptable safe practices, substantially downscaled its operations and suspended physical Court appearances. In this respect, the 1st Defendant avers that it did not receive a copy of the Court's Judgment until some nine days thereafter when it received a copy by email. Given the prevailing conditions at the time, I did not find the 59 days taken before the institution of this application to be inordinate and or unreasonable.

10. As to whether the 1st Defendant will suffer substantial loss, I am reminded of the sentiments of Gikonyo J., in *James Wangalwa & Another –vs- Agnes Naliaka Cheseto, Misc Application No. 42 of 2011 (2012) eKLR* where the Learned Judge pronounced himself as follows: -

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the Civil Procedure Rules. This is so because execution is a lawful process.

The Applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that

was aptly discussed in the case of Silverstein –vs- Chesoni (2002) I KLR 867, and also in the case of Mukosa –vs- Abuoga quoted above. The last case referring to the exercise of discretion by the High Court and the Court of Appeal in the granting of stay of execution, under Order 42 of the Civil Procedure Rules and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus: -

“.....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 loss would render the appeal nugatory.”

11. In the matter before me, the 1st Defendant submits that it is apprehensive that unless an order of stay is granted, the Plaintiff will proceed to execute the Judgment by evicting it from the suit property. The 1st Defendant contends that such an eviction will not only affect its statutory duty of supplying electricity to the residents of Mpeketoni and its environs but it will also wreak havoc on the lives of hundreds of thousands of Kenyans who rely on the Substation located on the suit property for supply of electricity.

12. The 1st Defendant further asserts that unless the order is granted, the delicate and valuable power transmission equipment which are public property, may also be destroyed in the process of eviction to the detriment of every Kenyan. The 1st Defendant submits that if its Appeal succeeds and the order of eviction is reversed, the negative effects thereof cannot be undone or be compensated by way of damages.

13. In addition, the 1st Defendant submits that the award of Kshs 10,000,000/- in general damages plus interest is substantial and if the Appeal succeeds after the payment is made, the 1st Defendant shall suffer substantial loss as the Plaintiff has not shown any source of income or financial stability to refund the sum.

14. From the record herein, the Plaintiff which is presently the registered proprietor of the suitland brought this action accusing the 1st Defendant of trespass onto its property. At the trial herein, the Plaintiff further accused the 1st Defendant of polluting and degrading the suit property and thereby diminishing its value. The 1st Defendant's defence was that the process of sub-division of the original land and the eventual allotment of the suit property to the Plaintiff was illegal and/or fraudulent.

15. The 1st Defendant however admitted that it had no legal or equitable rights over the suitland having merely been allowed upon the land by the Government of Kenya as represented by the 2nd Defendant herein. Upon hearing the dispute, this Court determined that the 1st Defendant had no interest in the suitland and that it was therefore a trespasser thereon from the date of registration of the suitland in the name of the Plaintiff.

16. It is apparent from the material placed before me that the 1st Defendant was occupying the suitland as an agent of the 2nd Defendant. Despite being represented in these proceedings, the 2nd Defendant has not contested or appealed this Court's finding that the suitland belongs to the Plaintiff. Save for the agency relationship that it had with the 2nd Defendant, the 1st Defendant did not claim any independent right, lease or licence to occupy the suitland.

17. From the record, and contrary to its submissions on the likely effects of failure to grant an order of stay herein, the 1st Defendant's witness did confirm that the substation is no longer used for diesel generated electric power for which it was established after the Mpeketoni area and its environs was connected to the national electric grid. It was also their case that the generators on the suitland were donated to the Plaintiff's predecessor in title by the National Government as represented by the 2nd Defendant.

18. Arising from the circumstances herein, it was evident to me that even if the 1st Defendant were to succeed in the intended Appeal, the sale of the suitland to the Plaintiff by its predecessor in title would not be affected as the said predecessor's title had not been challenged in these proceedings.

19. This Court further takes note that the Plaintiff has made serious claims of pollution and degradation of the suit property by the 1st Defendant. In this respect, I am in agreement with the submissions of Mr. S.M Kimani Learned Advocate for the Plaintiff that in considering the aspect of security for costs as provided under Order 42 Rule 6 of the Civil Procedure Rules, the Constitutional provisions with regard to protection of the environment and the removal of strictures on standing are testimony to the urgent need to fashion the law under Order 42 in regard to stay of execution in cases touching on pollution or environment degradation.

20. In this respect, the power of the Court under Rule 6 of Order 42 ought to be contrived to realise the objects of Article 70 of the Constitution in regard to the enforcement of environmental rights. Provision of security for costs could not have been intended to serve as a trespass or pollution Charter.

Otherwise, financially able litigants would offer or post security and arrogantly continue with obvious breaches of the law. Accordingly, Article 42 and 70 of the Constitution requiring the Court not to disregard environmental protection and fulfilment of obligations relating to the environment must take centre stage in the criteria for the grant or refusal of an order of stay of execution or of proceedings.

21. In the premises, given the failure of the 1st Defendant to persuade this Court of any substantial loss it is likely to suffer and in light of the suspected environmental degradation going on on the suitland, I decline to grant an order of stay of execution as sought in the Motion dated 30th June 2020. It is dismissed with costs to the Plaintiff.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 28TH DAY OF MAY, 2021.

J.O. OLOLA

JUDGE