



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

ELC APPEAL NO. E002 OF 2021

TANA WATER SERVICES BOARD.....APPELLANT

VERSUS

AUGUSTINE NJERU KATHANGU.....RESPONDENT

(Being an appeal against the Judgement and order of Hon. J.W. Gichimu

(Senior Resident Magistrate) dated 19th January 2021 in Runyenjes

ELC No. 10 of 2018)

RULING

INTRODUCTION

1. This is determination of a notice of motion dated 26th February 2021 filed by the Applicant on even date. The Application is expressed to be brought under Sections 1A & 3A of the Civil Procedure Act, Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules 2010. The Applicant is TANA WATER SERVICES BOARD, the appellant in the appeal, while the Respondent in both the application and the appeal is AUGUSTINE NJERU KATHANGU.

THE APPLICATION

2. The motion came with five (5) prayers but prayer 1 and 2 are moot now. The prayers for consideration are therefore three (3) – prayers 3,4 and 5 – and they are as follows:

- a) **THAT** there be a stay of execution of the decree emanating from the said Judgment pending the hearing and determination of the Applicant's appeal in ELC EMBU CIVIL APPEAL NO. E002 OF 2021.
- b) **THAT** this Honourable Court do issue such further orders or directions that it may deem fit to grant.
- c) **THAT** the costs of this application be in the cause.

3. The grounds advanced in support of the application include, *inter alia*, that judgment was entered on 19th January 2021 against the applicant in the sum of Kshs. 7,450,000/=; that the applicant was dissatisfied with the judgment and has lodged an appeal before this court; that it had been granted 45 days stay of execution which is bound to lapse before the determination of the appeal; and that unless orders for stay of execution are granted the respondent will proceed with execution causing irreparable loss and damage to the applicant. That is likely to render the application and appeal useless.

4. The applicant has further expressed it's willingness to provide such security as the court may order for the due performance of the decree. It is it's case that the application has been brought without undue delay and it will occasion no prejudice to the respondent. Filed with the application is a supporting affidavit sworn by Lillian Kamau, the legal officer of the applicant. The supporting affidavit generally reiterates the grounds in the application and provides that the execution will greatly affect the service delivery of the applicant and prejudice it as it involves a huge sum of money which will cause irreparable loss and damage.

5. The respondent opposed the application via a replying affidavit dated 1.3.2021. He confirmed that judgment was entered against the applicant in the sum of Kshs. 7,450,000/=. However, he contended that the amount as at date of filing the replying affidavit was Kshs.

13,251,000/= owing to the interest accrued, which he averred should be deposited in a joint interest earning account in the names of the advocates on record.

SUBMISSIONS

6. The application was canvassed by way of written submissions. The applicant filed its submissions on 29.4.2021. It reiterated the grounds in its application and opposed the Respondent's assertion that interest started accruing from the date of filing the suit. It averred instead that it should be from the date of judgement. That such interest can only be assessed by the court and cannot be part of the security for due performance of the decree. The Applicant averred that the amount of security to be deposited is purely at the discretion of the court and cannot be dictated by the parties.

7. The respondent's submissions were filed on 3.5.2021. The respondent equally reiterated the averments in his replying affidavit. According to the respondent, the applicant's sole purpose of filing the appeal was to buy time and prevent the Respondent from enjoying the fruits of its judgment as it was unable to pay the decretal sum. This, the respondent averred, was based on the statements in the supporting affidavit wherein the applicant averred it would be affected in its service delivery to the public and that it involved huge sums of money which would cause irreparable loss and damage. The Respondent reiterated that stay was conditional and urged the court to order the applicant to deposit a sum of Kenya Shillings Thirteen Million Two Hundred and Fifty One Thousand (Kshs. 13,251,000/=) as security.

ANALYSIS AND DETERMINATION

8. I have considered the application, the response made, and the rival submissions. I have also looked at the court record. The sole issue for determination is whether the order of stay of execution should be granted.

Grant of stay of execution pending appeal is provided for in Order 42 Rule 6(2) of Civil Procedure Rules, 2010, which states:

No order for stay of execution shall be made under sub rule (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.

9. In the case of *Halai & another v Thornton & Turpin (1963) Ltd [1990] eKLR* the court of appeal stated as follows:

“Thus the Superior Court’s discretion is fettered by three conditions. Firstly, the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security. The application must, of course, be made without unreasonable delay.”

One would also find these requirements expressed in the decided case of Peter Ondade T/A Sprearwet Chemis Vs Josphine Wangari Karanja [2006] eKLR, among others.

10. On the issue of substantial loss the Applicant has averred that in the event of execution it will greatly affect its service delivery and prejudice it as it involves a huge sum of money which will cause irreparable loss and damage. The Respondent has termed the applicant's assertion as a delaying tactic preventing to enjoy the fruits of its labour.

11. What is substantial loss was discussed in the case of James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR, that:

“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 CPR. 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. 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.”

12. Further in the case of *Kenya Shell Limited vs. Kibiru [1986] KLR 410, Platt, Ag. JA* (as he then was) at page 416 expressed himself as follows:

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss, in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money”.

On the part of **Gachuhi, Ag.JA** (as he then was) at Page 417:

“It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the

money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement.” (See also the holding by Odunga J. in Socfinac Company Limited V Nelphat Kimotho Muturi, supra.)

13. The appellant has stated that the decretal sum of Kshs. 7,500,000/= is too high and the same will affect its service delivery, I find that the applicant should have done more to prove how such delivery of service would be affected. But I also note that the applicant has expressed willingness to provide security on such terms as the court may order. This works in the applicant's favour.

14. With regard to security for costs, the court in *Absalom Dova vs. Tarbo Transporters [2013] eKLR*, stated:

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”

Still on this issue the case of *Gianfranco Manenthi & another vs. Africa Merchant Assurance Company Ltd (2019) eKLR*, has these observations:

“... the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails.

Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal ... Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine....”

15. I note that the applicant has offered to give security as a precondition for grant of stay, this seems as an act of good faith and the respondent has also agreed to such deposit of security and the only contention by both parties is on the amount to be deposited. The Respondent has proposed that the applicant deposit the judgment amount together with interest from date of filing suit which would be Kshs. 13, 251,000/=. I wish to associate myself with the cases above that the issue of security is of utmost importance. Further, it is discretionary and it is for the court to determine the amount to be deposited as security.

16. The Respondent has wished that the court considers interests. I note however that interest is still accruing and even if the court would wish to factor interest and cost of suit, the respondent's bill is yet to be taxed. The court cannot therefore determine the amount of cost of suit or interests at this stage. Considering the interest of both parties - that of the applicant not to render his appeal nugatory and that of the respondent that he is entitled to the fruits of his judgment, I find that deposit of the money ordered to be paid in the judgement suffices. That amount is Kshs. 7,450,000/-

17. The other issue for the court's consideration is whether there was undue delay in filing the application. From the court record, Judgment in the matter was delivered on 19th January, 2021. The present application for stay was filed on 26th February 2021. The application was filed slightly over a month from date of Judgment. It's the court finding that the application was filed without undue delay. It would rather rash and harsh to impute or insinuate undue delay in this matter.

DECISION

18. Accordingly, I grant stay of execution on condition that the Judgment amount of Kshs. 7,450,000/= be deposited in a joint interest earning account held in the names of both advocates on record within 30 days from the date of this ruling and in default the stay lapses. As for costs I order they should abide the outcome of the appeal.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 28TH DAY OF SEPTEMBER 2021.

A.K. KANIARU

JUDGE

28.09.2021