



Thelmax Contractors Limited v Kenya National Highway Authority & 2 others (Miscellaneous Criminal Application 58 of 2015) [2023] KEHC 20576 (KLR) (21 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20576 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
MISCELLANEOUS CRIMINAL APPLICATION 58 OF 2015**

WM MUSYOKA, J

JULY 21, 2023

BETWEEN

THELMAX CONTRACTORS LIMITED APPLICANT

AND

KENYA NATIONAL HIGHWAY AUTHORITY 1ST RESPONDENT

THE OFFICER-IN-CHARGE BUSIA WEIGHBRIDGE 2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS 3RD RESPONDENT

RULING

1. On July 8, 2022, I delivered a judgment herein, where I allowed the claim by the applicant, and ordered compensation, by way of damages, against the respondents.
2. The 1st respondent has filed a motion, dated September 27, 2022, where it principally seeks stay of execution of the award made on July 8, 2022, on grounds that it is aggrieved by that award, and intends to appeal. It is argued that the applicant is likely to take steps to execute the award, before the appeal is heard and determined, which would prejudice the 1st respondent, which is a Government entity, entirely dependent on funding from taxes paid by the citizens of the Republic of Kenya. It is argued that if the decretal sum is paid, and the appeal subsequently succeeds, the applicant would not be able to reimburse the 1st respondent. It has attached documents to show that it filed a notice of appeal, and requested for typed copies of the proceedings.
3. The applicant has responded to the application, through an affidavit, sworn on October 17, 2022, by Samwel Omusula Libuyi, its Managing Director. He avers that the date for delivery of the judgment had been communicated a day prior, through a bar-bench WhatsApp group platform in which the Advocate for the 1st respondent, Mr., Aringa, was a member. He states that it had not been demonstrated that the applicant would be unable to reimburse the judgment amount, were the same to be paid to it, and the appeal proves successful. He asserts that the applicant is a reputable company,



with serious contractual businesses in Kenya, and, therefore, capable of easily repaying the decretal sum should need arise. He asserts that no reasons have been advanced to warrant grant of the stay sought. He argues that if the court is inclined to consider granting one, then let it be a conditional one, where the 1st respondent deposits half of the decretal amount with the Advocates for the applicant, and provide a banker guarantee for the rest.

4. The matter was first placed before me on October 17, 2022. The Advocates for the applicant and the 1st respondent were in attendance. I allowed prayer 2 of the motion, with respect to stay pending hearing and determination of the motion. I directed the applicant to file a response, and fixed December 7, 2022 as the date for mention. On December 7, 2022, only Mr. Mbaka, Advocate for the applicant, was in attendance. He asked me to allocate another date for mention, to allow him engage the Advocates for the 1st respondent, and to file written submissions, in the event the parties fail to agree. The matter was fixed for mention on January 19, 2023, at which only Mr. Mbaka attended, and indicated that he had filed his written submissions, which I have read through and noted the arguments made.
5. The 1st respondent asserts that it is a Government agency, in the sense that it is fully funded from Government resources, and it runs on public funds. If that is so, then the law that should apply to these proceedings ought to be the [Government Proceedings Act](#), cap 40, Laws of Kenya, which provides for satisfaction of orders made against the Government. Under section 21(4) of the [Government Proceedings Act](#), no execution or attachment or a similar process can issue against the Government or its agencies. That would mean that the issue of seeking stay of execution of the decree herein should not arise, for there is no chance of the decree herein being executed against the 1st respondent in the manner provided for under the [Civil Procedure Act](#) and the [Civil Procedure Rules](#). The 1st respondent should have moved the court under the [Government Proceedings Act](#), rather than the [Civil Procedure Act](#) and the [Civil Procedure Rules](#). There is no risk of execution being levied against the 1st respondent, if it is a Government agency, except through the provisions of the [Government Proceedings Act](#), by way of a mandamus order, obtained in Judicial Review proceedings, properly mounted under the [Law Reform Act](#), cap 26, Laws of Kenya, and order 53 of the [Civil Procedure Rules](#).
6. Accordingly, the application herein is not properly conceived, and it is premature. It is for dismissal, and I hereby dismiss it, with costs. The interim order of stay of execution, made on October 17, 2022, is hereby discharged.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS 21ST DAY OF JULY 2023

WM MUSYOKA

JUDGE

Erick Zalo, Court Assistant.

Appearances

Mr. Mbaka, instructed by Omwando Mbaka & Company, Advocates for the applicant.

Mr. Mbogo, instructed by Robson Harris Advocates LLP, Advocates for the 1st respondent.

