



REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

PETITION NO. 49 OF 2012

DOSHI IRON MONGERS.....PETITIONER/RESPONDENT

VERSUS

1. KENYA REVENUE AUTHORITY

2. THE COMMISSIONER OF CUSTOM SERVICES

3. THE COMMISSIONER OF INVESTIGATION &

ENFORCEMENT.....RESPONDENTS/APPLICANTS

AS CONSOLIDATED WITH

JUDICIAL REVIEW NO. 98 OF 2010

REPUBLIC.....APPLICANT

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENTS

EX PARTE: DOSHI IRON MONGERS

RULING

Introduction

1. The Notice of Motion herein dated the **23rd October 2020** prays for the following orders:

(a) THAT this application be certified as urgent and service be dispensed with in the first instance.

(b) THAT there be a stay of execution of judgment delivered herein on the **25th September 2020** pending the hearing and determination of this application inter parties

(c) THAT there be a stay of execution of the judgment delivered herein on **25th September 2020** pending the hearing and determination of the appeal.

(d) THAT the costs of this application be provided for.

2. The motion is premised on grounds set out in the Motion as Supported by Affidavit of Justus Musau Kiuvu sworn on the **23rd October, 2020**.

3. The Petitioner/Respondent opposes the same via a Replying Affidavit of Ashok Doshi sworn on the

30th October 2020.

4. The said Replying Affidavit in summary states that the application as filed by the Respondent/Applicants is premature because the Respondent was granted time to comply with the orders of the court. Further, the Respondent states that order ‘f’ and ‘g’ relating to execution of the award of damages and costs can only take place after taxation is done and a certificate of costs is issued against the government. The Petitioner/Respondent thus believes the application filed and dated the 23rd October 2020 is premature.

5. The Respondent/Applicant further filed a reply to the Petitioner/Respondent’s Replying Affidavit on the **12th November 2020**, the same was sworn by one Justus Musau Kiuvu on the **11th November, 2020** persuading the court further on reasons as to why stay pending appeal should be granted.

6. Parties did not file any submission but the Respondent/Applicant filed its list of authorities on the 30th October 2020.

7. I have considered all the pleadings and issues raised by the parties.

In my view the only issue for determination is whether an order of stay of execution pending appeal should be granted.

8. Grant of stay of execution pending appeal is provided for under **Order 42 Rule 6 of the Civil Procedure Rules, 2010**. The Respondent/Applicant is required to satisfy the court that the intended appeal is arguable and that if the court does not grant the stay, the intended appeal will be rendered nugatory.

9. In **CHRIS MUNGA N. BICHAGE –VS- RICHARD NYAGAKA TONGI & 2 OTHERS eKLR**, the learned judges stated the principles to consider whether to grant a stay of execution or not as thus: -

“...The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated...”

10. Additionally, in Stephen Wanjohi...Vs...Central Glass Industries Ltd, Nairobi HCC No.6726 of 1991, the Court held that: -

“For the court to order a stay of execution there must be: -

i. Sufficient cause

ii. Substantial loss

iii. No unreasonable delay

iv. Security and the grant of stay is discretionary”.

11. The Respondent/Applicant is apprehensive that the Respondent/Petitioner will commence execution of the judgment/decree to their detriment, and should this happen the intended appeal will be rendered nugatory.

12. I have looked to paragraph 12 of the Applicant’s Supporting Affidavit sworn by Justus Musau Kiuvu on 23rd October 2020. The Respondent is agreeable to a stay being granted on the condition that the Applicant provides a bank guarantee for the judgment debt. The Applicant is also not averse to this.

Paragraph 12 of the Applicant's Supporting Affidavit states:

“The Respondents are willing to provide security in the form of a Bank Guarantee in favour of the Petitioner/Respondent or any other form of security as may be ordered by this Honourable Court for the performance of the Decree in the event that the appeal may not succeed.”

13. The Petitioner/Respondent objected to the grant of stay but indicated to the court, that they do not object to stay provided the Applicant complies with their paragraph 12 of the Supporting Affidavit as sworn by Justus Musau Kiuvi on the 23rd October 2020.

14. In view of the of the above, the Court grants the Applicant stay of execution pending appeal on the condition that the Applicant shall within 30 days from the date hereof provide a bank guarantee in the sum adequate to cover the entire decree with costs, or in the sum of Kshs. 2,700,000/=, whichever is the lower.

15. Costs herein shall be for the Respondent/Petitioner.

It is so ordered.

Dated, Signed and Delivered at Mombasa this 4th Day of February, 2021.

E. K. OGOLA

JUDGE

Ruling delivered via MS Teams in the presence of:

Ms. Mwongera holding brief Ms. Odundo for Applicant

Ms. Peris Court Assistant