



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CIVIL SUIT NO.2 OF 2019

NJIRU MICHENI NTHIGA (Suing as a Legal Representative and Administrator of the Estate of the Deceased Leonard R. I Nthiga).....PLAINTIFF

VERSUS

THE GOVERNOR,

THARAKA NITHI COUNTY GOVERNMENT.....1ST DEFENDANT/APPLICANT

COUNTY GOVERNMENT OF THARAKA NITHI.....2ND DEFENDANT/APPLICANT

THE MEMBER OF COUNTY ASSEMBLY,

MAGUMONI WARD.....3RD DEFENDANT/APPLICANT

THE CHIEF OFFICER, ROADS AND INFRASTRUCTURE

THARAKA NITHI COUNTY.....4TH DEFENDANT/APPLICANT

THE CHIEF OFFICER,

LANDS, PHYSICAL PLANNING AND URBAN DEVELOPMENT

THARAKA NITHI COUNTY.....5TH DEFENDANT/APPLICANT

WESTOMAXX INVESTMENT LTD.....6TH DEFENDANT/APPLICANT

RULING

1. This is a ruling in respect of an application dated **2nd July, 2021** by the 1st, 2nd, 4th, 5th & 6th Defendants seeking the following orders:
 - a) THAT there be a stay of execution of the judgement delivered herein on 15th June,2021, pending the lodging, hearing and determination of the 1st,2nd,4th,5th and 6th Defendants’ intended appeal to the Court of Appeal.
 - b) THAT costs of this application be provided for.
2. The application is based on the grounds that:-
 - a. the 1st,2nd,4th,5th and 6th Defendants are aggrieved by the judgement which was delivered on 15th June,2021, and have filed a notice of appeal and have applied for proceedings to enable them to lodge an appeal in the Court of Appeal;
 - b. unless the orders sought are granted, the 1st,2nd,4th,5th and 6th Defendants shall suffer substantial loss and their right to access justice, under article 48 of the Constitution, will be contravened in that:
 - i) during the pendency of the intended appeal, the plaintiff will execute the said judgement to their detriment: in it, orders

for payment of Kshs. 25,473,000/- in damages, a permanent injunction from ever trespassing on the suit property and an order for payment of costs were made;

ii) if the plaintiff executes the said judgement, both this application and the intended appeal will be rendered nugatory:

c. as the Court of Appeal has held in **Madhupaper International Ltd –v- Kerr [1985] KLR 840**, this Honourable Court has jurisdiction to grant an injunction following its dismissal of an earlier application or after delivery of judgment if the interest of justice will be served by the preservation of the subject matter of the appeal; in it, the law was stated as follows:-

I can see no real inconsistency in any of these cases. The questions that have to be decided on the two occasions are quite different. Putting it shortly, on a motion the question is whether the Applicant has made out a sufficient case to have the Respondent restrained pending the trial. On the trial, the question is whether the Plaintiff has sufficiently proved his case. On the other hand, where the application is for an injunction pending an appeal, the question is whether the judgment that has been given is one on which the successful party ought to be free to act despite the pendency of an appeal. One of the important factors in making such a decision, of course, is the possibility that the judgment may be reversed or varied. Judges must decide cases even if they are hesitant in their conclusions; and at the other extreme a judge may be very clear in his conclusions and yet on appeal be held to be wrong. No human being is infallible, and for none are there more public and authoritative explanations of their errors than for judges. A judge who feels no doubt in dismissing a claim to an interlocutory injunction may, perfectly consistently with his decision, recognize that his decision might be reversed, and that the comparative effects of granting or refusing an injunction pending an appeal are such that it would be right to preserve the status quo pending the appeal. I cannot see that a decision that no injunction should be granted pending the trial is inconsistent, either logically or otherwise, with holding that an injunction should be granted pending an appeal against the decision not to grant the injunction, or that by refusing an injunction pending the trial the judge becomes functus officio quoad granting any injunction at all.

d. the jurisdiction of this Honourable Court has been extended by Order 40 Rule 10 of the Civil Procedure Rules, 2010, which empowers the court to make such orders for preservation of any property which is the subject matter of a suit as it deems fit; in **Mombasa High Court Civil Suit No. 274 of 2009; Emma Muthoni Wambaa and Another -v- Joseph Kibaara Kariuki**, this Honourable Court granted the Applicants an order of injunction pending the hearing and determination of the Plaintiff /Applicants' appeal; injunctions pending appeal were also granted in **Nairobi Commercial & Admiralty Division, Civil Suit No. 627 of 2012: Technology Today & 2 Others –v- Adrian Noel Carvalho & 5 Others;**

e. as the Court of Appeal has held in **African Safari Club -v- Safe Rentals Ltd, Court of Appeal at Nairobi Civil Application No. Nai 53 of 2010**, after introduction in 2009 of the overriding principle by the Amendments to both the Civil Procedure Act and Appellate Jurisdiction Act, principles governing stays of execution and injunction have been modified fundamentally; courts are enjoined to act fairly and justly, to have regard to the substantive justice of the matters before them and weigh the relative hardships of the parties before them; the application of this principle results in the maintenance of the *status quo* at the time of the said judgment;

f. as held by the Court of Appeal in **Assanand –v- Pettit [1989] KLR 242**, the object of an injunction is to keep things in status *quo* so that if at the hearing of the appeal, the 1st, 2nd, 4th, 5th and 6th Defendants obtain a judgment in their favour, the Plaintiff will have been prevented from dealing with the subject matter in such a way as to make that judgment ineffectual; in it, the law was stated as follows:-

The object of an injunction is to keep things in status quo so that, if at the hearing the Plaintiff obtains a judgment in their favour, the defendants will have been prevented from dealing in the meantime in the property in such a way as to make the judgment ineffectual.

g. following the judgment of 15th June, 2021, there is nothing the Plaintiff cannot do to defeat the objects of both this suit and the intended appeal;

h. under Order 42 Rule 8 of the Civil Procedure Rules, no security is required for such an application as the one before the court; that Order reads as follows:-

No security to be required from the Government [Order 42, rule 8.]

No such security as is mentioned in rules 6 and 7 shall be required from the Government or where the Government has undertaken the defence of the suit or from any public officer sued in respect of an act alleged to be done by him in his official capacity.

i. this Honourable Court has jurisdiction to preserve the subject matter of a suit;

j. it is in the interest of justice for this Honourable Court to grant the orders sought so as to preserve the subject matter of the appeal.

3. The application is supported by the affidavit of LILIAN KIRUJA, the County Attorney of the 2nd Defendant which essentially repeats the above grounds.

4. In response to the application, the plaintiff herein has filed a replying affidavit dated 8th August 2021 and avers that the judgement in this

matter was delivered in open court on 15th June 2021 and the Defendant/Applicants being dissatisfied with the same have filed the said Application seeking stay of execution of the said judgement pending the lodging, hearing and determination of the 1st, 2nd, 4th, 5th and 6th defendants' intended appeal to the Court of Appeal.

5. The plaintiff avers that it is highly presumptuous and misleading of the Applicants to aver and baselessly claim that pursuant to delivery of the said judgement on 15th June 2021, there is nothing the plaintiff cannot do to defeat the objects of both this suit and the intended appeal. He alleges that imputing of improper motive on the part of the plaintiff by the defendants is both prejudicial, unwarranted and highly speculative.

6. The plaintiff contends that the provision for security for granting of the orders sought by the Applicant is a discretionary power of the Court to be dispensed in the interest and for the ends of justice.

7. The plaintiff avers that the provisions of order 42 Rule 8 of the Civil Procedure Act do not apply in this instant case considering the presumption that essence and the spirit of the reference to Government was and still is in regard to national government and has nothing to do with the devolved entities. He states that the said provisions of Order 42 Rule 8 of the Civil procedure Act do not apply in this case that is constituted of various defendants which include legal entities such as the 6th defendant which is a Limited Liability Company incorporated in Kenya under the Companies Act. He states that he opposes to grant of stay of execution of the judgement delivered on 15th June 2021.

8. The plaintiff avers that in the event that the Honorable court grants the order for stay of execution of the judgement delivered in this matter on 15th June 2021, the Defendants/Applicants be ordered to deposit security of a liquidated sum amounts equal to the total decretal sum awarded to the plaintiff/Respondent in order to ensure and safeguard the plaintiff's/respondent interests.

9. The plaintiff contends that the Defendants/Applicants have in no way whatsoever demonstrated the availability and/or existence of a prima facie case in the form of their intended appeal with any plausible chances of success and that the plaintiff/Applicant reasonably believes that the intended appeal is a mere academic exercise aimed at delaying dispensation of justice by way of unnecessary court processes and litigation endeavors. The plaintiff contends that the application ought to be dismissed with costs for reasons above mentioned.

ANALYSIS AND DETERMINATION

10. I have considered the pleadings, the authorities and the submissions filed by the parties to buttress their assertions. I have also taken into account the legal authorities proffered by the parties. What calls for determination in this matter is the issues for stay of execution by the defendants'/applicants and whether the government entities can provide security in an application for stay.

11. Stay of execution pending appeal is a discretionary power bestowed upon this court by the law. The Court of Appeal in the case of **Butt – vs- Rent Restriction Tribunal {1982} KLR 417** gave guidance on how a court should exercise the said discretion and held that:

“1. The power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal Court reverse the Judge's discretion.

3. A Judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The Court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The Court in exercising its powers under Order XLI rule 4 (2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

12. The principles upon which stay of execution pending appeal can be allowed are now well settled from the authorities from this court and from the superior courts. Generally, stay of execution is provided for under Order 42 Rule 6 of the Civil Procedure Rules. Sub-rule 1 gives the court discretionary powers to stay execution and provides as follows:

“6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) 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 undue 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.

13. As such, for an applicant to move the court into exercising the said discretion in his favour, the applicant must satisfy the court that substantial loss may result to him unless the stay is granted, that the application has been made without undue delay and that the applicant has given security or is ready to give security for due performance of the decree.

14. As for the applicants having to suffer substantial loss, in the case of **Kenya Shell Limited –vs- Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988)KAR 1018** the Court of Appeal pronounced itself to the effect that:

“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 rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.”

(See also the case of **Machira T/A Machira & Co Advocates –vs- East African Standard (No.2) (2002) eKLR 63**)

15. The applicants have a burden to show the substantial loss they are likely to suffer if no stay is ordered. This is in recognition that both parties have rights; the Appellants to their 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 which is not a question of discrimination. {See the case of **Absalom Dora –v-Turbo Transporters (2013) (eKLR)**}

16. As F. Gikonyo J stated in **Geoffery Muriungi & another v John Rukunga M’imonyo** suing as Legal representative of the estate of **Kinoti Simon Rukunga (Deceased) [2016] eKLR** and which wisdom I am persuaded with:-

“...the undisputed purpose of stay pending appeal is to prevent a successful appellant from becoming a holder of a barren result for reason that he cannot realize the fruits of his success in the appeal. I always refer to that eventuality as “reducing the successful appellant into a pious explorer in the judicial process”. The said state of affairs is what is referred to as “substantial loss” within the jurisprudence in the High Court, or “rendering the appeal nugatory” within the juridical precincts of the Court of Appeal: and that is the loss which is sought to be prevented by an order for stay of execution pending appeal...”

17. The applicants deposed that the intended appeal will be rendered nugatory if the stay is not granted, In their written submissions, they submitted that they are apprehensive that if the orders of stay are not granted, they will suffer irreparable loss and their right to access to justice under Article 48 of the Constitution will be contravened.

18. In **Century Oil Trading Company Limited vs. Kenya Shell Limited Nairobi (2008) eKLR**, it was stated that:-

“Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgment”.

19. It has been held by the courts that the applicant bears the legal burden to prove that substantial loss would occur. Further that mere claim that the respondent cannot refund the decretal sum is not sufficient. At least there must be reasonable grounds provided by the applicant to show that the applicant cannot make refund of the decretal sum; after which the respondent will be called upon to discharge his evidential burden. This is always in recognition that both parties have rights with the applicant having the right to appeal and the respondent having a right to enjoy the fruits of his judgment which must not be restricted or postponed except on a lawful and justifiable cause. The court as such has to balance these competing rights.

20. From the depositions on record, it is more probable that the issue at hand calls for status quo pending the hearing of the appeal. Indeed, if the respondent is left to execute the decree, it will complicate the situation further as the applicants if successful will have to commence other processes to seek refund of the decretal sum which is in excess of Kshs. 25 million (or part thereof depending on the outcome of the appeal).

21. That being the case, and in balancing the rights of the parties herein, the balance tilts in favour of the applicants. The respondent will not suffer prejudice which cannot be compensated by way of costs as in most cases, costs are awarded to the winning party. If at all the respondent wins the appeal, the costs awarded to him will be a reasonable panacea to him for the period he shall have to wait so as to enjoy the fruits of his judgment. This is further bearing in mind that interests are also awardable. In my view, the applicants stands to suffer substantial loss if there is execution herein.

22. As to the applicants giving security for due performance of the decree, the defendants/applicants have submitted that under Order 42 Rule 8 of the Civil Procedure Rules, no security is required for such an application as the one before the court. That rule reads as follows:

“No security to be required from the Government

No security as is mentioned in rules 6 and 7 shall be required from the Government or where the Government has undertaken the defence of the suit or from any public officer sued in respect of an act alleged to be done by him in his official capacity.”

23. It is clear from the plaintiff's submission that he is disputing that WestMaxx Investment Ltd does not fall within the purview of what is regarded as government. He contends that it is erroneous to construe that the defendants can benefit from the provisions Order 42 Rules 6 and 7 of the Civil Procedure Rules or any other applicable law. However, there is no denial that the 1st, 2nd, 4th and 5th Defendants are government entities/officers. I therefore exercise my discretion in the applicants' favor and allow the application for stay unconditionally based on the above provision.

24. In the end, the application is allowed with no order as to costs.

25. It is so ordered.

DELIVERED, DATED AND SIGNED AT CHUKA THIS 14TH DAY OF DECEMBER, 2021 IN THE PRESENCE OF:

C/A: Ndegwa

Kirimi for Respondent & h/b for Munyori for Applicants

C. K. YANO,

JUDGE