



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARSEN**

**PETITION NO. 5 OF 2019**

**IN THE MATTER OF ARTICLES 1,10,174,175,176,209 & 210 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS AND ENFORCEMENT OF THE CONSTITUTION) PRACTICE AND PROCEDURE RULES 2013 AND ALL OTHER ENABLING POWERS AND PROVISIONS OF THE LAW**

**AND**

**IN THE MATTER OF THE LAMU COUNTY FINANCE ACT, 2016**

**H. YOUNG & CO. (E.A) LTD.....PETITIONER**

**VERSUS**

**THE COUNTY GOVERNMENT OF LAMU.....RESPONDENT**

**CORAM: Hon. Justice Reuben Nyakundi**

**Maina & Onsare Partners Advocates LLP for the Petitioner**

**Kilonzo & Aziz Company Advocates for the Respondent**

**R U L I N G**

This is a Motion on Notice dated 10<sup>th</sup> June, 2021 and filed in Court on 18<sup>th</sup> June, 2021, brought pursuant to section 1A, 1B and 3A of the Civil Procedure Act, Order 42 Rule 6 of the Civil Procedure Rules 2010. The Applicants is praying for an order staying the execution of the order of this Honourable Court contained in the judgment delivered on 3<sup>rd</sup> June, 2021 pending the final determination of the appeal. The grounds upon which this application is brought are;

- 1. The Honorable Judge, Lady Justice R.Lagat – Korir delivered judgement in the matter on 3<sup>rd</sup> June, 2021 to wit dismissing the Petition by the Petitioner with costs to the Respondent.***
- 2. The cumulative effect of the Judgement was that the interim orders issued on 28<sup>th</sup> June, 2019 were discharged. The impending danger currently facing the Petitioner is that the Respondent will proceed and demand cess from the Petitioner over soil used in the construction of the Garsen – Witu – Lamu Road.***
- 3. The Central issue in the Petition being the demand for cess over soil by the Respondent being unconstitutional and without statutory basis. This being the case, the appeal will be rendered nugatory in lieu of the orders sought.***
- 4. The Petitioner has written to the Deputy Registrar of the Garsen High Court requesting for a certified copy of the proceedings, decree and judgement. Simultaneously, it has lodged a Notice of Appeal with this Court.***
- 5. Justice demands that the order sought do issue to preserve the subject of the appeal.***
- 6. That this is a meritorious application and it is in the interest of justice for it to be allowed as the Respondent will suffer no prejudice if the orders sought are granted noting that any monies found to be legally due and owing will be settled by the Petitioner.***

**7. That the Petitioner is ready to abide by any conditions that may be given by this Honourable Court for granting the orders sought.**

It is also accompanied with an affidavit comprising 12 paragraphs sworn by Maurice Kongo dated 17<sup>th</sup> June, 2021. The Respondent have also filed grounds of opposition dated 30<sup>th</sup> June, 2021 in which they founded their opposition to the application as follows;

**a) That this Honourable Court lacks the Jurisdiction to entertain the instant Application as the Court can only grant the orders sought herein if it is sitting in its appellate jurisdiction hence the instant application is improperly before this Court and ought to be dismissed with Costs to the Respondent.**

**b) The Petitioner's Application is untenable as the Petitioner have failed to sufficiently to demonstrate that they will suffer substantial loss if the Orders sought are not granted hence the instant Application ought to be dismissed with costs. There is no evidence that has been produced to show that the Respondent is demanding any cess fees from the Applicant or have impounded any of the Petitioner's equipment and trucks.**

**c) The Application is incompetent both in form and substance in that the Petition was dismissed and hence there is no positive order that is capable of being stayed and in the gist of it, it ought to be dismissed with costs to the Respondent.**

**d) The Application is devoid of merit as it does not satisfy or meet the requisite conditions for injunction pending Appeal as provided for under Order 42 Rule 6 of the Civil Procedure Rules hence in the gist of it, it ought to be dismissed with costs.**

**e) The Petitioner's Notice of Motion herein dated 10<sup>th</sup> June, 2021 is thus incompetent, misconceived, lacks merits and a total abuse of the process of this Honourable Court and in the gist of it, it ought to be dismissed with costs by this Honourable Court.**

There is also a Replying Affidavit of John Mbaru. Both Counsels also filed written submissions along with the Notice of Motion. Mr Onsare Esq, Counsel for the Applicant in his written submissions relied on the dispositions contained in the affidavit in support and adopts the argument that the Applicant has met the criterion as set out under Order 42 Rule 6 (1) of the Civil Procedure Rule to be granted the orders. In arguing this sole issue on Stay of Execution Counsel went on to submit that this is an application if declined would occasion substantial loss to the Applicant.

Further Counsel submitted that the issues raised in the intended appeal are not frivolous or time wasting but borne genuinely in line with the principles of law and the interest of justice. Counsel referred to the following authorities; **-Samradda Resources (Kenya) Ltd V County Government of Taita Taveta[2020]eKLR, Nairobi Metropolitan PSV Saccos Union & 25 others V County Government of Nairobi, Justice Chai Mbaru & 12 others V County Government of Mombasa[2021]eKLR** and submitted that this Court can grant Stay of Execution for the Applicant has supplied sufficient grounds and materials warrant favor from the Court.

Counsel for the Respondent also submitted in opposition to the grant of stay/injunction for that matter pending an appeal relying on the following authorities; **-Samuel Kamau Macharia V KCB Ltd & 2 others CA No. 2 of 2011** on the legal proposition that this Court lacks the jurisdiction to entertain the Notice of Motion. Further Counsel relied on the provisions of Order 42 Rule 6 of the Civil Procedure Rule and authorities in **Bartholomew Mwanjumu & 3 Others V Florence Dean Karimi[2019]eKLR, Justice Mbaru(supra), James Wangalwa & another V Agnes Naliaka Cheseto[2021]eKLR, Macharia T/A Macharia & Co. Advocates V East African Standard No. 2 [2002] eKLR 63, Charles Munyendo Ohingo V Salim Cherech Mukhola & another[2019]eKLR** to argue that there is no evidence on substantial loss or any special circumstances in the matter for a proper exercise of discretion to be accorded the Applicants according to law. Counsel contended that the assertions that if the stay is not granted the applicants will suffer substantial loss or the appeal rendered nugatory is worthless on account of the nature of the petition determined by the Court on the merits. In concluding his submissions Counsel urged the Court to refuse the application.

### **Determination**

I have before me the motion, affidavits in support and in opposition of the reliefs being sought by the applicants. Further, the written submission of Counsel for both sides have also been conceptualized. What this Court is to determine is whether, the application for Stay of Execution is based on serious, arguable grounds of appeal, substantial loss, for the appeal being rendered nugatory – or if not granted they will suffer loss of revenue paid out to the Respondents and it happens that at the end appeal succeeds in their favor.

It is trite law and a principle of legal notoriety that a successful party or litigant must not be deprived or denied the reaping of the fruits of his or her judgement at the instance of an unsuccessful party.

For a Court to order a Stay of Execution which amount to denying a successful party, even temporary the terms of the decree of his or her judgment the applicant must pass the hurdle on sufficient cause, substantial loss, appeal being rendered nugatory, and existence of compelling circumstances. **(See George Oraro V Kenya Television Network Nairobi Civil Case NO. 151 of 1992), Damji Prajji Mandavia V Sara Lee Household and Body Care(K) Ltd CA No.345 of 2004, Githunguri V Jimba Credit Corporation Ltd919980KLR 838.**

The grounds of a Stay of Execution is a matter of exercise of discretionary power of the Court and the Court must be guided by the well established guiding principles for the exercise of the discretion. In order to obtain stay or injunction pending an appeal against a successful party the applicant must discharge the burden of proof on all those condition precedents set out in the law and authorities construing those provisions. That is the basis why Courts of equity are enjoined to consider the facts and law so as not to grant such a relief unless each of the criteria has been satisfied.

Applying the aforementioned principles of law to the Notice of Motion at hand, it is clear from the impugned judgement that the orders made

by the Court can be categorized into two;- one, there is the order for immediate reinstatement of the parties back to their respective positions to which they were before the Petition was filed and interim orders issued to the Applicant. The second is the order for dismissal of the Petitioner for want of merit.

I am satisfied from the evidence before me that those orders will not have any adverse effect on the Applicant. In the event the appellant succeeds on appeal it could be at liberty to pursue the claim against the respondents for any illegal monies paid out and under the Lamu County Finance Act. I am not in agreement with the applicant's that if payment is made recovery may be difficult, if at the end of the appeal they succeed in reversing the judgment of the trial court. Collateral to that, it is interesting to observe that although, the Courts attention was drawn on jurisdictional issues by Counsel for the Respondent, the application for stay pending an intended appeal is properly before me. The broad principles that guide the Court in an application under Order 42 Rule 6 (1) of the Civil Procedure Rules are as crystallized before and during the hearing of the current motion. The jurisdiction of the Court is not ousted by virtue of the appeal arising from its own decision. The task before the Court is primarily to determine which of the varied approaches for stay of execution pending appeal is more preferable as representative of what is described as the justice of the matter. Having noted the nature of the jurisdiction as that which can be termed as procedural jurisdiction, it follows that the objection by counsel on this issue lacks merit.

In sum, after carefully interrogating the matter, before me and applying the principles on exercise of discretion, I reach an appropriate finding that the ends of justice is better served by declining the Notice of Motion dated 10<sup>th</sup> June, 2021 with costs to the Respondent.

**DATED, SIGNED AND DELIVERED *via Email* AT MALINDI THIS 15<sup>TH</sup> DAY OF JULY, 2021.**

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**R. NYAKUNDI**

**JUDGE**

**NB:** In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling/judgement has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

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