



**REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO. 928 OF 2009**

**PAUL .T. GICHUHI T/A SAPAMO**

**CONSULTING ENGINEERS.....PLAINTIFF/RESPONDENT**

**VERSUS**

**KENYA PIPELINE COMPANY LIMITED.....DEFENDANT/APPLICANT**

**RULING**

1.The application for consideration is the Defendant's/Applicant's Notice of Motion dated 30<sup>th</sup> day of June, 2020 brought under **Article 159(2)** of the **Constitution of Kenya 2010, Sections IA, IB** and **3A** of the **Civil Procedure Act Cap 21 of the Laws of Kenya, Order 42 Rule 6, Order 51 Rule 1** of the **Civil Procedure Rules 2010** and all enabling provisions of the law. The Application seeks the following three main orders **THAT**:

*a)The Honourable Court be pleased to stay the execution of the judgment dated the 30<sup>th</sup> day of April, 2020 delivered through email to the parties on the 19<sup>th</sup> day of May, 2020 and the decree thereto pending the hearing and determination of the appeal; and*

*b) Costs of and incidental to the application be provided for.*

2. The application is based on the grounds on the face of it and supported by the Affidavit of one **FLORA OKOTH**, the Applicant's Company Secretary and head of the Legal Department sworn on even date. She averred that the Applicant was dissatisfied with the whole judgment of the Honourable Court of the 30<sup>th</sup> day of April, 2020 and had since initiated appellate proceedings and applied for certified copies of proceedings and judgment. The Notice of Appeal dated the 20<sup>th</sup> day of May, 2020 and the letter requesting for certified copies of the judgment and proceedings dated the 19<sup>th</sup> day of May, 2020 were annexed.

3. She averred that thee intended appeal is not frivolous and raises grounds which have high chances of success and outlined the summary of the grounds and/or themes. She further averred that it was apprehensive that the Respondent would at any time initiate enforcement and/or execution proceedings against the Applicant as there was no pending taxation and/or assessment of costs.

4. The Applicant averred that it stood to suffer substantial and/or irreversible loss in the event that the Respondent proceeded to enforce and/or execute in the absence of orders staying the said execution and/or enforcement.

5. It is the averment of the Applicant that is a State Corporation wholly owned by the government thus capable of settling the judgment sum and incidental costs in the event that its intended appeal which would be rendered nugatory if the orders for stay pending appeal are not granted.

6. The Applicant further averred that it was prepared to furnish security by way of guarantee or as directed by the Honourable Court to secure the decree if the appeal fails.

7. In response, the Respondent filed a Replying Affidavit sworn by one **PAUL .T. GICHUHI** sworn on the 20<sup>th</sup> day of August, 2020 which on the face of it was not opposed to the application save that the Applicant does furnish security pending appeal, depositing the decretal sum in a joint interest earning account to be held in the names of the Company Secretary of the Applicant and the Respondent.

**Submissions**

8. This Application was canvassed by way of written submissions. The Applicant through the firm of Wekesa & Simuyu Advocates filed its submissions dated the 7<sup>th</sup> day of July, 2020, The submissions by the Applicant were primarily that it had met the requirements for granting of the orders of stay pending appeal as prayed thus the Honourable Court ought to exercise its discretion in its favour and allow the Application.

9. The Applicant made reference to the threshold in ***Butt v Rent Restrictions Tribunal (1982) eKLR*** where the court held that stay can be granted pending appeal in absence of overwhelming hindrance so as to avoid an appeal being rendered nugatory should it be successful and/or the decision is reversed.

10. The Applicant further submitted that it would suffer substantial and irreparable loss if the order for stay pending appeal is denied and the Respondent proceeds to execute and/or enforce the decree against it. The Applicant submitted that in the event that it causes payment of the judgment/decretal sum and it succeeds on appeal, recovery of the said sums would be strenuous and/or impossible as there are third parties such as the Kenya Revenue Authority which will be involved, the Respondent may be incapable of refunding the same owing to its unascertained financial status and the same if at all recovered will not have attracted any interest. Further, the Applicant submitted that as a sign of good gesture it was willing to deposit security by way of a guarantee for due performance of the judgment and/or decree.

11. The Applicant in support of its submissions cited various authorities for consideration by the Honourable Court including but not limited to ***JMM V PM (2018) Eklr, Co-operative Bank of Kenya Ltd v Banking Insurance & Finance Union Kenya (2014) Eklr, Reliance Bank Ltd v Norlake Investments Ltd (2002)1EA 232, Attorney General v Apollo Mboya & 15 others (2018) eKLR Focin Motorcycle Company Limite v Ann Wambui Wangui & Another (2018) Eklr*** and ***Michael Kareko Gatere v Cooperative Merchant Bank Limited & 3 others (2017) Eklr***.

12. The Respondent vide its replying affidavit was not opposed to granting of the stay as prayed by the Applicant and only urged that the Applicant furnishes security pending appeal which said security being the decretal sum deposited in an interest bearing account to be held in the names of the Company Secretary of the Applicant and the Respondent. In this regard, the Applicant sought and was granted leave to put in Supplementary submissions with the Respondent being granted corresponding leave to respond to the Supplementary submissions by the Applicant upon service.

13. The Applicant filed supplementary submissions dated the 14<sup>th</sup> day of December, 2020 in which it addressed the contended issue of security for the judgment/decretal sum.

14. It is the Applicant's submission that the Applicant being a State Corporation by virtue of the State Corporations Act and being wholly owned and/or financed by the government, the Applicant is a Government Institution and is exempted from furnishing security pending appeal as per the provisions of **Order 42 Rule 8 of the Civil Procedure Rules, 2010**.

15. The Applicant submitted that it qualifies to be an instrumentality and/or agency of the government and cited the case of ***Association of Retirement Benefits Scheme v Attorney General & 3 Others (2017) Eklr***, cited with the approval of the Supreme Court of India in the case of ***International Airport Authority(R.D Shetty) vs The International Airport Authority of Indian & Ors***, where the Court set the test for determining whether an entity is a Government body or not and as follows"-

***(a) consider whether any share capital of the corporation is held by the Government and if so that would indicate that the corporation is an instrumentality or agency of Government;***

***(b) where the financial assistance of the State is so much as to meet almost the entire expenditure of the Corporation, that fact would afford some indication of the corporation being impregnated with Governmental character;***

***(c) it may also be relevant to consider whether the corporation enjoys monopoly status conferred by the State***

***(d) whether the body has deep and pervasive State control,***

***(e) whether the functions of the corporation are of public importance and closely related to Governmental functions then that would be a relevant factor in classifying the corporation as an instrumentality or agency of Government and***

***(f) if a Department of a Government is transferred to a corporation then it becomes an instrumentality or agency of the Government.***

16. The Applicant further cited the case of ***Kenya Union of Domestic, Hotels, Education and Allied Workers (Kudhehia Workers) v Salaries and Remuneration Commission (2014) Eklr*** where the court stated that state corporations are entities comprised in the national government.

17. Further, the Applicant cited the cases of ***B.O.M Baba Dogo Secondary School v E.K. Maina t/a Chem Equipment Enterprises Limited (2019) Eklr*** and ***Teacher's Service Commission v Benson Kuria Mwangi (2020) eKLR***, where the courts held that state corporations are not required to deposit security by virtue of Order 42 Rule 8 of the Civil Procedure Rules, 2010.

18. In response to the Supplementary Submissions by the Applicant, the Respondent filed its submissions dated the 10<sup>th</sup> day of May, 2021 in which it agreed with the Applicant as far as paragraphs 4, 5, 6 and 7 are concerned. However, the Respondent disagrees that the Applicant ought to benefit from the provisions of Order 42 Rule 8 of the Civil Procedure Rules as it entered appearance and proceeded to defend the suit without relying on the Attorney General.

19. The Respondent further submitted that it was too late in the proceedings for the Applicant to claim that it cannot issue a security because

it is an instrumentality and/or agency of the government.

20. It was the Respondent's further submission that the Applicant is hiding behind Government at stage where the matter has been dealt with substantively and the nature of the claim being commercial, it is against public policy and highly prejudicial to the Respondent to any party that engages in business with the Applicant. The Respondent submits that if the said privilege with regards to not being required to furnish security was to be accorded to the Applicant, the Government would not have set the Applicant as an independent State Corporation with the powers to sue and be sued and also with powers to engage in the business it does with all its attendant consequences.

21. The Respondent cited the case of **TONONOKA STEELS LIMITED v EASTERN AND SOUTHERN AFRICATRADE AND DEVELOPMENT BANK [1999] eKLR** in which the court found that a foreign government which enters into ordinary commercial transactions ought to honour its obligations like other traders and in the event of failure is subject to the same laws and amenable to same tribunals as them.

### **Analysis and Determination**

22. I have carefully apprised myself with the Applicant's application, the affidavit in support, the Replying affidavit in response to the Application and the rival submissions being the submissions by the Applicant, the Supplementary Submissions by the Applicant and the submissions in response to the supplementary submissions. The only issue that arises for determination is whether the Applicant should furnish security pending appeal as the granting stay of execution and/or enforcement of decree/judgment pending appeal has not been opposed by the Respondent.

23. I note that the Respondent has conceded to the Applicant being a State Corporation established under the State Corporations Act.

24. Order 42 Rule 6 of the Civil Procedure Rules requires that a party having met the threshold for granting stay pending appeal ought to furnish security for due performance of the decree/judgment as directed by the Court. The said provision states as follows in this regard;

***“(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 subrule (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.***

***(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.”***

25. I pay attention to Order 42 Rule 8 which is the point of contention by the parties. It provides as follows:

***“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.”***

26. The Applicant's Company Secretary and Head of Legal Department one FLORA OKOTH in the Supporting Affidavit at paragraph 13 stated that the Applicant is willing to furnish security by way of guarantee or as directed by court to secure performance of the decree/judgment if the appeal fails.

27. In an effort to understand who a State Corporation is, I have had regard to case of **Kenya union of Domestic hotels Education and Allied Workers (Kudhehia Workers) v Salaries and Remuneration Commission {2014}e KLR**, the court stated that:

***“It cannot be denied therefore that in the above context, Moi Teaching and Referral Hospital as well as Kenyatta National Hospital are State Corporations established under Section 3 of the State Corporations Act. Public Universities such as Moi University, University of Nairobi, Egerton University etc are established by Acts of Parliament as public universities. Although these institutions do not receive monies from the Consolidated Fund, they are empowered by Parliament through legislation to raise income through levies and other commercial ventures. Further, state corporations receive funds from Parliament through their respective Ministries and fit the description in Article 260 regarding funds from Parliament.”***

28. There is a meeting of the mind that the Defendant/Applicant is a State corporation as it derives its instrumentality from the government as enunciated in the case of **International Airport Authority(R.D Shetty) vs The International Airport Authority of Indian & Ors (supra)**

29. I should now grapple with the question of whether Order 42 Rule 8 applies to the Applicant. That is, address the parameters under which

a State Corporation and/or instrumentality of the government would be excluded or protected by the foregoing provisions on furnishing security upon granting of stay pending Appeal.

30. I make reference to the case of *National Transport and Safety Authority v Elisha Z. Ongoya & 2 others [2019] eKLR* in which the court in ascertaining why the Applicant cannot ride on the provisions of Order 42 Rule 8 stated:

***“The applicant cannot ride on the Order 42 rule 8 that being a government institution it cannot provide security. Section 3 of the National Transport and Safety Authority gives it a mandate as an entity which can sue and be sued. The consequence of being sued is that it can be ordered to pay damages. It cannot therefore run away from its liabilities and hide under the veil of Order 42 rule 8 of the Civil Procedure Rules.”***

31. The foregoing position was further upheld in *Endebess Development Company Limited v Coast Development Authority [2021] eKLR* where the Court stated:

***“Section 3 of the Coast Development Authority Act, 1990, reads as follows:***

***3. Establishment of the Authority***

***There is hereby established an Authority which shall be a body corporate by the name of Coast Development Authority, with perpetual succession and a common seal, and which shall be capable in its corporate name of:-***

***a) Suing and being sued***

***b) Taking, purchasing or otherwise acquiring, holding, charging and disposing of movable and immovable property;***

***c) Borrowing and lending money***

***d) Entering into contracts.***

***e) Doing or performing all such other things or acts necessary for the proper performance of its functions under this Act which may lawfully be done or performed by a body corporate.***

***19. The said gives the Defendant/Applicant a mandate as an entity which can sue and be sued. The consequence of being sued is that it can be ordered to pay damages. It cannot therefore run away from its liabilities and hide under the veil of Order 42 rule 8 of the Civil Procedure Rules.”***

32. It is undisputed that the Applicant is a State Corporation established under the institutions and instrumentalities of the State Corporations Act, Chapter 448, Laws of Kenya. The Act in Section 3 on establishment of State Corporations provides:

***“3. Establishment of state corporations by the President***

***(1) The President may, by order, establish a state corporation as a body corporate to perform the functions specified in that order.***

***(2) A state corporation established under this section shall—***

***(a) have perpetual succession;***

***(b) in its corporate name be capable of suing and being sued;***

***(c) subject to this Act, be capable of holding and alienating movable and immovable property.”***

32. In view of the foregoing, I find that the Applicant is a body corporate able to sue and be sued as well as enter into commercial transactions thus cannot hide under the veil of and/or be protected by Order 42 rule 8. It is therefore subject to furnishing security on such terms as the court may direct.

**Deposition**

33. Accordingly, I find that the Applicant’s application dated the 30<sup>th</sup> day of June, 2020 is merited and I make the following orders: –

**1) An order be and is hereby issued for stay of execution of judgment and all consequent orders pending the hearing and determination of the intended appeal.**

**2) The stay is conditional that the Applicant will not deposit security if the Appeal is filed within thirty (30) days from the date of this Ruling.**

3) The Applicant shall however provide a bank guarantee for Kshs.10, 547,318.50 from a reputable bank within fifteen (15) days after expiration of the period stipulated in (b) above. Thereafter, the stay shall automatically lapse and the Plaintiff/Respondent shall be at liberty to execute without further reference to the court.

4) Costs of this application shall abide the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF JULY, 2021

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Wesonga h/b for Wekesa for the Defendant/Applicant.*
2. *Wesonga h/b for Mrs. Gitonga for the Plaintiff/ Respondent.*