REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 105 OF 2006

DOSHI IRON MONGERS LIMITED.....PLAINTIFF

VERSUS

1. **KENYA REVENUE AUTHORITY**

2. **THE ATTORNEY GENERAL.....DEFENDANTS**

R U L I N G

1. Pursuant to the court's judgment delivered on the 23/07/2019, the defendant, as judgment debtor has preferred an appeal to the Court of Appeal and now prays that it be granted stay of execution pending appeal.

2. The reasons put forth for the application are that there is a threat 4 substantial loss in the nature of the appeal turning out nugatory, being visited upon the applicant and that being statutory body charged with collection of revenue the applicant has the capacity to settle the sum upon the determination of the appeal which appeal is said to have good chances to succeed. Those facts are reiterated in the supporting affidavit sworn by one JOHN GATHATWA, the manager- Customs Policy and International Affairs of the defendant. He averred that being aggrieved by the decision of the court, the applicant has preferred an appeal by filing a Notice of Appeal; is yet to obtain the certified copies of the proceedings but have crafted a draft Memorandum of Appeal which has been exhibited. Apprehension was then expressed that owing to the obtaining circumstances the Respondent was at liberty to take out execution proceedings unless stay is granted a situation that would visit upon it substantial loss in that it would be incapacitated in carrying out its statutory mandate of revenue collection and the appeal would then rendered nugatory.

3. The application was opposed by the plaintiff on the strength of the Replying Affidavit sworn by its director. In the Replying Affidavit it is contended that the judgment on record is several yet the 1st defendant has sought a blanket order of stay which would protect even the 2nd defendant who has not challenged the judgement.

4. On substantive loss to visit the applicant, the deponent took the view and position that there had not been a demonstration on how the payment of the sum in the decree would incapacitate the Respondent in the execution of its revenue collection mandate as the decree against it is in the paltry sum of just **Kshs.7,426,010/=.**

5. It was then contended that the decree-holder is financially sound with many assets and capable of effecting a refund should the appeal succeed. To demonstrate ability to effect refund, the respondent exhibited to court its latest financial statements which show the performance by the company for the years 2018 and 2019.

6. In arguing the application both counsel filed written submissions. The applicant's submissions are dated 2/12/2019 and filed on 4/12/2019 putting reliance on the decisions in ***G.N. Muema R/A Mt. View Maternity & Nursing Home vs Miriam Maalim Bishar & Another [2018] eKLR*** on what amounts to substantial loss, ***Jaffer Shariff Omar vs Commissioner of Customs and Excise NBI HCC No. 363 of 2000*** for the Proposition that under Section 3(2)a of the Kenya Revenue Authority Act, a suit against the commissioner is deemed a suit against the government and lastly ***Sicpa Securities So. Sa vs Okiya Omtotah Okoiti [2018]eKLR*** on when to invite the interest of justice in unique circumstances of a case and the employment of the proportionality test. Those submissions were highlighted to court by Mr. Nyaga on behalf of Ms. Odundo.

7. In his highlights the counsel stressed the fact that with a decree extracted the prospects and threat of execution was real and that the financial statements of the plaintiff disclosed it as an entity of unsound financial position having made a yearly loss of over 14 million in 2019. With such financial status the Applicant contended that if paid, the sum will be irrecoverable as there had been not demonstrated an ability to refund. It was pointed out that all the decisions cited by the Respondent and setting out the principles of grant of stay were to the effect that the decree holder had the onus to demonstrate ability to effect a refund among them the definition of substantial to include difficulty in achieving recovery of the decretal sum once paid.

8. On the security to be offered, counsel submitted that since the Applicant is by statute deemed the government, Order 42 Rule 8 exempted it for being called upon to offer security but that in any event it is upon the court to balance interest of the parties in an application of this nature.

9. For the decree-holder/respondent, counsel pointed out that there was an allegation of substantial loss without substantiation it being pointed out that there was no explanation offered or how the payment of Kshs.7,400,000/= would curtail the Applicant from executing its statutory mandate. He then submitted that the fact that the respondent had incurred trade losses was not evidence of inability to effect a refund because the financial statement revealed that the respondents had assets worth over 113 million which far exceeds the need to effect a refund in the unlikely event of the appeal succeeding.

10. The decision in Muema's case (supra) was said to be distinguishable because the respondent had not filed any Affidavit to show its means and that no averment had been made on the willingness to provide security. On Rule 8 of Order 42, counsel submitted that the court had held in ***KRA vs Jackson Ruiru [2019] eKLR*** that the provision does not apply to the Applicant.

11. In response to the opposition the counsel for the applicant submitted that there was power in the court to separate which part of the decree was to be stayed; that the security to be offered was at the discretion of the court and that the ratio decidendi in Muema's case was that hardship on recovery was a proof of substantial loss.

12. The second defendant/judgment debt did not file any papers but counsel attended and confirmed to support the application with an indication that she would be filing own application for stay.

Analysis and determination

13. Being an application for stay, the consideration is the need to balance the competing interests of the parties. The decree holder has a crystalized interest in the property in the decree which ought not to be disregarded as to pass for an arbitrary deprivation of property while the judgment debtor has the very important right to have access to justice unhindered and upon conclusion of the process not to be left with a worthless paper judgment. That is the balance the court has to strike and I take the view that the test to be applied is an Adjective one. It is thus a question of coming to a conclusion that secures the two completing interests.

14. In this matter however, the applicant goes beyond the usual standpoints and takes the position that the creating statute gives it the identity of a government and thus it enjoys protection accorded to government under Rule 8 of Order 42 not to be asked to provide security for the due performance of the decree. I think this should be the starting point for the determination. My view in this matter has been and remains that a statutory body once created must keep the stature and identity designed by parliament and should not get the excuse of running back to be shielded by the big and heavy government shadow.

15. This view is informed by previous decisions of the superior courts including the Court of Appeal. In ***Bob Thompson Dickens Ngobi vs Kenya Ports Authority [2017] eKLR*** this court had the chance to consider the provision and similar ones in other statutes and the court did hold while citing the decision of the ***Court of Appeal in Kenya Revenue Authority vs Habinana Said Hemed [2015] eKLR***:-

> **"I must say, as various superior courts in this country have said more than once, that a statutory provision that seeks to hinder any person's access to justice, seeks to impose hurdles on the way of citizens from seeking accountability, openness and efficiency in service delivery by government or government agencies must be seen to violate Article 48 and must be held to be unconstitutional for being antibusiness, oppressive, and I dare add, suppress the need to interrogate the constitutional values of accountability, transparency and efficiency expected of state agencies. The *Court in Kenya Revenue Authority vs Habimana* sued *Hemed & Another* [1]decided on 31/7/2015 made the position clear beyond doubt that the 3rd defendant ought to be the institution parliament sought to create under the statute and not to continue considering self as an abandage or extension of the government. The court said:-**
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> **"……it is not necessary that a party who finds itself on the wrong side of the appellant would be greatly prejudiced if they are shaded from accessing justice for a minimum of 30 days as happens many times".**
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> **"…….it is nonetheless an autonomous, cooperate, statutory body specifically with powers to sue and be sued. The appellant cannot hide behind the clock of the Attorney General when it is accused of breaking the law or otherwise violating people's rights purely in Order to take advantage of the 30 days statutory notice".**
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> **Even though the decision was strictly rendered with regard to the provisions of the Kenya Revenue Authority, I consider the 1st and the 3rd defendants to be created in the like manner, by acts of parliament and both have been given legal personally in that they are capable of suing and being sued independent of the office of the Attorney General. Infact the two statutes creating the two defendants are explicit that the two run as distinct corporates not as government department. I take notice that both recruit their personnel including the legal personnel independent of the office of the Attorney General whose involvement is limited to representation in the board of directors. No repetition is needed for the position that any statutory provision that seeks to hinder a citizen for accessing court merely because a notice has to be served upon the two defendants is undesirable for being illogical and unconstitutional.**
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> **For that reason, I am bound by the Court of Appeal [2] to add my voice to those of my brothers, Mbogoli Msagha[3], David Majanja[4], J.B. Ojwang[5] and Osieno JJ[6] and hold that a statutory corporation, unless the creating statute says otherwise, is not an appendage or department of the Government as contemplated under the Government Proceedings Act. One need not invite the application of the Government Proceedings Act when parliament in its own wisdom has spended time and public resources to enact a statute to regulate the body so desired to be created".**

16. I continue to hold that to be the position of the law and I am unable to depart from the same just like the judge in ***Kenya Revenue Authority vs Jackson Ruiru (supra)*** also held. That should now be the settled position of the law in the area.

17. That leaves the horizons clear for the application of the known principles of grant of stay pending appeal. Those principle are that there must be demonstrated a substantial loss that would result unless stay is granted. Substantial loss has been defined to be the kind that make the entire litigation worthless or merely academic. For a monetary decree like in this case, an appeal is deemed to be rendered nugatory where there are indication that the decretal sum if paid out would be irrecoverable. In ***Kenya Shell Ltd vs Kibiru [1986] eKLR*** the Court of Appeal said:-

> **"Having considered the matter to the full, and with anxious care, there is in my judgement no justification whatsoever for holding that there is a likelihood that the respondents will not repay the decretal sum if the appeal is successful and that the appeal will thereby be rendered nugatory. The first respondent is a man of substance, with a good position and prospects. It is true his house was, in his words, reduced to ashes, but I do not take that against him. Both seem to me to be respectable people and there is no evidence that either will cease to be so, in particular that the first respondent will not remain in his job until pensionable age.**
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> **Accordingly, while I have considerable sympathy for Kenya Shell on this application, I consider there is no other course consistent with the material on record, and with the justice of the case, than to refuse the application for a stay made before this court.**
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> **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 a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money".**

18. I understand the law to be that irrecoverability of the decretal sum once paid out is proved once there is demonstration that the decree-holder is a person of the straw or just incapable of effecting refund without undue hardship to the judgment debtor once it succeeds on appeal. When applied to the facts of this case, and while I note that there was never an allegation of impecuniosity on the part of the respondent, the respondent has voluntary laid itself bare exhibiting its financial statements. Those statement indeed shown that for the last two years the respondent did make losses rather than profits. In fact there is an upward trend in growth of the losses. However, the same statement reveal that the respondent has a networth in excess of 100 million. Indeed that on the face of it make the decretal sum here paltry as asserted by respondent.

19. However, what constitutes that networth is not revealed with specificity. I do find that it is not very clear to me what is the nature of the assets said to be worth over 100 million. I so find just like I do find that considering the stature and reputation of the Applicant, payment of a sum equal to the decretal sum herein possesses no threat toward curtailing or disrupting its operations.

20. That state of facts thus presents scenario that only invite the discretion of the court to balance the interest as the scales have not been outrightly tilted on any one side. It is in such situations that the proportionality test becomes handy. It calls for an order that protects both sides; secures the right to access justice as well at secures the property in the decree.

21. Doing the best I can in the circumstances, I think it is just to grant stay but on terms that the Applicant provides an irrevocable bank guarantee in the sum of Kshs.7,500,000/= to be valid during the pendency of the appeal, within 30 days from the date of this decision. On that term as to deposit, I do allow the application but on further condition that if there shall be default to comply the stay shall stand lapsed.

22. I however wish to make a position clear here. I do understand the law to dictate that a decree holder can only execute a decree once finally extracted and after the full decretal sum has been ascertained by having the costs taxed or agreed. Short of that one has to get a court order pursuant to Section 94 of the Act to execute before ascertainment of costs. I have perused the file and I have not been able to confirm that costs have been taxed or agreed.

23. On that account, I do not find the contention by the applicant that execution can issue at anytime to be legitimate. I think it is necessary that it be appreciated that any process taken toward execution before taxation and without a court order to that effect would be in violation of the law and ought not to stand.

24. That notwithstanding, stay is granted on the set out terms with an order that the costs of the application be in the costs in the suit once taxed.

Dated and delivered at Mombasa on this 5th day of February 2020.

P.J.O. OTIENO

JUDGE

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[1] [2015] eKLR

[2] Kenya Revenue Authority vs Habimana Sued Hemed [2015] eKLR

[3] Gurdoba Enterprises Ltd vs Kenya Revenue Authority, HCC No. 676 of 1998

[4] Kenya Bus Services Ltd & Another vs Minister for transport & 2 Others[2012]eKLR

[5] Menginya Salim Murgani vs Kenya Revenue Authority HCCC No. 1139 of 2002

[6] Habimana Sued Hemed vs Kenya Revenue Authority & Another HCCC No. 364 of 2001