



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION

ACEC NO. 21 OF 2018

THOMAS GITAU NJOGU.....1ST APPLICANT

TERESIA NJERI GITAU.....2ND APPLICANT

NJEGIT INVESTMENTS LIMITED.....3RD APPLICANT

TERESIA NJERI GITAU

T/A WANGMUG ENTERPRISES.....4TH APPLICANT

TERESIA NJERI GITAU

T/A NJETASH ENTERPRISES.....5TH APPLICANT

VERSUS

ETHICS AND ANTI-CORRUPTION COMMISSION.....RESPONDENT

RULING

1. This court delivered Judgment in this case against the defendants on 3rd December 2019 directing forfeiture of various assets which were found to be unexplained pursuant to Section 55 of the ACECA. Upon delivery of Judgment, the defendants sought orders for stay of execution for a period of 21 days pending filing of a formal application for stay. Consequently, the court allowed the application and granted 30 days stay of execution and directed supply of certified copy of the Judgment and typed proceedings which were available then in the court record.

2. On 22nd January 2020, the defendants moved this court through a Notice of Motion of even date pursuant to Order 42 rule 6(1)(2) & (4), Order 50 rule 1 and 3 of the Civil Procedure Rules, 2010 and Section 3A of the Civil Procedure Act seeking orders as hereunder;

a) That this Honourable Court does certify this application urgent and service of the same be dispensed with in the first instance.

b) That pending the interpartes hearing of this application, an order of stay of execution be and is hereby granted staying execution of the Judgment and decree issued on 3rd December 2019.

c) That an order of stay of execution of the judgment and decree issued on 3rd December 2019 be and is hereby granted pending the hearing and determination of the appeal filed in the Court of Appeal.

d) That this Honourable Court does make any other or further orders to safeguard the interests of the applicants.

e) That the costs of this application be provided for.

3. The application is premised upon grounds set out on the face of it and further amplified by an affidavit sworn on 22nd January 2020 by Thomas Gitau Njogu with authority of the other defendants in which they stated that they were desirous of challenging the appeal as evinced by; a Notice of Appeal to the Court of Appeal (annexture TGN 3); letter addressed to the Deputy Registrar dated 16th December 2019 seeking copies of certified copy of Judgment and typed proceedings (annexture TGN 4); draft of a Memorandum of Appeal (annexture TGN

6) and, a draft Decree for the Deputy Registrar's approval (TGN 5).”

4. They contended that the intended appeal raises serious grounds which ought to be ventilated before the Court of Appeal hence the need for stay. It was further deponed that the applicants will suffer substantial loss and irreparable damage if the decree is executed thus transferring the forfeited property to 3rd parties and cash to the state. They further contended that the respondents will not suffer any prejudice if the orders of stay were granted.

5. In response, the respondent/plaintiff filed a replying affidavit sworn on 25th February 2020 by Grace Maina an Advocate practicing in the plaintiff's office opposing the application on grounds that; there will be no substantial loss likely to be suffered if the assets were forfeited to the state; there is no imminent risk of execution since the decree has not been extracted; there is no proof that the state will not be able to refund the money or property forfeited to it; no security for due performance of a decree has been given by the applicants as required under Order 42 rule 6(2)(6) of the Civil Procedure Rules and lastly, Public interest demands that government resources be preserved.

6. During the hearing, Mrs. Njoroge holding brief for Mr. Kiragu for the applicants adopted the averments contained in the affidavit in support of the application. Counsel submitted that the appeal will be rendered nugatory if the application is not allowed. She contended that the delay in filing the appeal was partly occasioned by non-extraction of the decree and delay in supply of proceedings.

7. On her part, M/s Maina opposed the application reiterating the contents in their replying affidavit arguing that there was no proof of any likelihood that the applicants will suffer irreparable damage or substantial loss and that EACC is incapable of refunding the assets forfeited to the State should the appeal succeed. In support of her submissions, learned counsel relied on a bundle of authorities annexed to their replying affidavit and in particular the case of **Gatirau Peter Munya vs. Dickson Mwendwa Kithinji and 2 Others (2014)eKLR** in which the Supreme Court held that before granting a stay of execution order, the applicant must prove that:

“The intended appeal is arguable and not frivolous and that unless the order of stay is granted the appeal would be rendered nugatory and that it is in the public interest that the order of stay may be granted.”

Determination

8. I have considered the application herein, the response thereof and oral submissions by both counsel. Issues that crystallize for determination are;

- a) **Whether the applicant will suffer substantial loss if the order of stay of execution is not granted;**
- b) **Whether there is an arguable appeal which will be rendered nugatory unless stay of execution is granted;**
- c) **Whether it will be against public interest to grant orders of stay.**

9. The application herein is hinged on the requirements set out under Order 42 rule 6 of Civil Procedure Rules which provides conditions precedent for grant of stay orders as proof of; possibility that the applicant is likely to suffer substantial loss; application is made without unreasonable delay and, provision of such security as the court may impose. However, issuance of stay of execution orders is exercisable within the discretion of each individual presiding judge or magistrate (see **Selestica Ltd vs. Gold Rock Development Ltd (2015)eKLR**).

10. Similar position was held in **Portreitz Maternity vs. James Karanga Kabia Civil Appeal No. 63 of 1997** where the court held that;

“To grant or refuse an application for stay of execution pending appeal is discretionary in that the court when granting stay has to balance the interests of the appellant with those of the respondent.”

11. The applicants' argument is that, if the orders are not granted, there is a likely hood that the respondent will execute. Having perused the court record, it is clear that since 3rd December 2019, parties have not been able to extract the decree for execution. They seem to have exchanged a draft decree for approval and the eventual extraction but nothing has materialized.

12. It is not clear to me as what is the cause for the delay. If there was any error either in the Judgment or in the manner in which the draft decree was drawn, it could not take them that long to correct the same. I must say there has been some laxity on the side of both parties in having the decree extracted.

13. What substantial loss is the applicant likely to suffer in the event the orders are not granted? In the event the decree is extracted, there is a likelihood that the respondent will most likely execute. As indicated from the list of forfeited assets, there are some landed properties which if they change hands to 3rd parties, it will be cumbersome to start the process of revocation of the transfer in the event the appeal succeeds thus subjecting innocent 3rd parties to undue inconvenience and unnecessary expenses or costs among them paying huge interest rates in bank loans in the event of borrowed money and general transfer transaction fee.

14. Further, there is a possibility that the appeal will be rendered nugatory if the respondents decides to execute. See **Reliance Bank Ltd (in liquidation) vs. Nor Lake Investment Ltd Civil Appeal No. Nai 93/02 (UR)** and **Housing Finance of Kenya vs. Sharok Kher Mohamed Ali Hirji (2015)eKLR**.

15. In the circumstances of this case, substantial loss is a critical consideration in determining whether to allow the application or not. See **Silverstein N. Chesoni (2002) 1KLR 867**, where the court said:-

“...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

16. Although the delay in filing the appeal by the applicant has been occasioned partly by the applicant’s failure to collect typed proceedings in time despite being ready upon delivery of judgment, a period of 1 month and 19days delay in filing this application is not unreasonable nor inordinate.

17. Having held that the applicant is likely to suffer substantial loss, I do not find any prejudice to be suffered by the respondents if the applicants were given an opportunity to ventilate further their rights by exhausting the appeal process. Further, considering that currently court’s operations have been suspended due to Corona Virus, I will exercise leniency without strict application of the law as to time lines and therefore allow the application.

18. However, I must add that the Deputy Registrar should ensure that the Decree is extracted as soon as possible after delivery of this ruling in the event that it has not been extracted.

19. Concerning furnishing security by the applicants to the tune of 120 million, I am of the view that the assets are secure and the ownership documents in possession of the respondent. The respondent will not suffer any harm by maintaining the status quo. In any event, how many ordinary Kenyans can afford to deposit a sum of 120 million. To make such an order will amount to denying a litigant the right to fully access justice. Without appearing to curtail due access to justice, it will be an exercise in futility to make such an untenable order. For those reasons, I decline to make an order of depositing security.

20. For the above reasons stated, I am satisfied that the applicants have met the threshold for grant of stay pending appeal and therefore do extend the period within which to file the appeal to the Court of Appeal by a further 45 days in default the orders shall lapse. Regarding costs, I shall order that each party bears own costs.

DATED, DELIVERED AND SIGNED IN OPEN COURT AT NAIROBI THIS 9TH DAY OF APRIL 2020.

.....

J. N. ONYIEGO

JUDGE