



**REPUBLIC OF KENYA**

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

**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION**

**ACEC MISCELLANEOUS NO. 73 OF 2017**

**IN THE MATTER OF: AN APPLICATION FOR ORDERS UNDER SECTION 81 AND 82 OF THE PROCEEDS OF CRIME AND ANTI MONEY LAUNDERING ACT (POCAMLA) AS READ TOGETHER WITH ORDER 51 OF THE CIVIC PROCEDURE RULES**

**IN THE MATTER OF: PRESERVATION ORDERS FOR KSHS 19,688,152.35**

**HELD IN BANK ACCOUNT NUMBERS [...], [...] AND [...] IN THE NAME OF PAMELA ABOO AT EQUITY BANK LIMITED, DONHOLM BRANCH NAIROBI**

**BETWEEN**

**ASSETS RECOVERY GENCY.....APPLICANT/RESPONDENT**

**VERSUS**

**PAMELA ABOO.....RESPONDENT/APPLICANT**

**AND**

**ETHICS & ANTI CORRUPTION COMMISSION.....INTERESTED PARTY**

**RULING**

1 The Respondent/Applicant filed the Notice of motion dated 20<sup>th</sup> November 2018 whose main prayer seeks the grant of orders of stay of execution of the judgment delivered on 14<sup>th</sup> November 2018 pending the hearing of an Appeal. The Application is supported by the grounds on its face and the supporting affidavit of the Respondent/Applicant sworn on 20<sup>th</sup> November 2018.

2 The main ground is that there is danger of the Applicant/Respondent taking the sum of Kshs 19,689,152.35 held in the Applicant's Bank accounts Nos. [...], [...] and [...] at Equity Bank Donholm branch in view of this court's judgment of 14<sup>th</sup> November 2018. In her supporting affidavit the Applicant avers that being dissatisfied with the judgment herein she filed a notice of appeal on 16<sup>th</sup> November 2018(PA1). The same is dated 15th November 2018. A request or certified copies of typed proceedings and judgment was made on 16<sup>th</sup> November 2018 (PA2).

3 It was her case that having moved so fast after delivery of the judgment she was sure of ensuring that the appeal is heard expeditiously. She annexed a draft copy of the Appeal (PA3). She fears that if the money in her accounts is forfeited to the Respondent it may be difficult getting it in the event of a successful Appeal. She supports this by alleging that if forfeited the Government which funds the Respondent would use the money to finance its 2018/19 budget deficit of Kshs 558.9billion (PA4).

4 In her further affidavit sworn on 15<sup>th</sup> January 2019 the Applicant confirmed filing the Appeal and record of Appeal vide Court of Appeal No 452 of 2018 **Pamela Aboo v Asset Recovery Agency** (PA5).

5 Mr Odoyo for the Applicant filed written submissions and a bundle of authorities which he highlighted. He submitted that the Applicant would suffer substantial loss if the orders of stay of execution are not granted. He relied on the case of **Housing Finance Co. of Kenya v Sharok Kher Mohamed Ali Hirji and Another [2015] eKLR** civil Application No 74 of 2015 where the court of Appeal held thus:

**Turning to the second limb as to whether the appeal could be rendered nugatory if stay orders are not granted, we note that this is a money decree. Whereas the judgment was for an aggregate sum of Shs.20,434,226.54, the amount due as sought in**

the warrants of attachment and sale of property in execution of the decree is Shs.722,581,646.60. This is a colossal sum and there is reasonable apprehension as to the ability of the 1<sup>st</sup> Respondent to repay the same in the event that the appeal is successful as no material is availed in proof thereof. In relation to a money decree, this Court in the case of Kenya Hotel Properties Limited v Willesden Properties Limited Civil Application Nai. No. 322 of 2006 (UR 178/06) stated thus:-

*“The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the Respondent is not a “man of straw” but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the Applicant. However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the Applicants if stay is refused purely on grounds that the decree is a money decree”.*

The 1<sup>st</sup> Respondent did not indicate his willingness and/or ability to repay the decretal amount in the event the appeal was successful. Considering that the computation of the decretal sum is subject to the intended appeal, we are of the view that there is a likelihood of the appeal being rendered nugatory if we do not intervene at this stage.”

6 Counsel also referred to the cases of:

(i) Stanley Karanja Wainaina & Another vs Ridion Anyangu Mutubwa [2016] eKLR Nairobi High Court Civil Appeal No 427 of 2015.

(ii) Vulcan Equipment vs Sch Equipment Production Und & Another [2018] eKLR Nairobi High Court ACEC case No 27 of 2016.

He therefore submitted that the stay of execution pending appeal sought was to preserve the subject matter so that the right of appeal can be exercised without prejudicing the Applicant in the event of a successful appeal.

7 On unreasonable delay he submitted that the Applicant had moved very fast after the pronouncement of the judgment. He added that the Applicant has already been issued with a Case Management Notice for 13<sup>th</sup> February 2019 by the Court of Appeal

8 On security he submitted that the money preserved in the Applicant’s accounts was sufficient security, and that the sum of Kshs 19M was a colossal sum of money.

9 The application was opposed by the Respondent who filed grounds of opposition dated 28<sup>th</sup> November 2018 and submissions which Mr Githinji highlighted. In the grounds the Respondent states that the application did not disclose any appealable grounds against the judgment nor any imminent threat posed by the Respondent. Lastly it termed the Application as being an abuse of the court process.

10 Counsel submitted that the Applicant had not shown that she would suffer substantial loss if stay was not granted. He dismissed the Applicant’s averments in para 11 and 12 of her supporting affidavit as mere statements. He contended that substantial loss is the cornerstone in an application of this nature. He referred to the case of Winfred Nyawira Maina v Peterson Onyiego Gichana [2015] eKLR where the Court stated:

**“The substantial loss under order 42 rule 6 of the Civil Procedure Rules especially where money decree is involved lie in the inability of the Respondent to pay back the decretal sum should the appeal succeed. The legal burden of proving this inability lies with the Applicant and it does not shift. But it is not enough for the Applicant to merely state that the Applicant cannot refund the sum paid. There must (sic) cogent evidence which show (sic) the inability or financial limitation on the part of the Respondent to refund the decretal sum. And, it is only when such prima facie evidence is laid before the court by the Applicant that the evidential burden shifts to the Respondent.”**

11 He submitted further that there was no evidence to show that the Respondent would not refund the money in the event of a successful Appeal. There was equally no evidence to show that the funds in the accounts would be used to support budgetary deficits.

12 The interested party in opposing the application filed 10 grounds of opposition saying the Applicant has not established the threshold for granting of stay of execution pending Appeal under Order 42 Rule 6 Civil Procedure Rules. It was feared that the Applicant would deal with the money in the manner she wanted since there were no preservation orders in place.

13 M/s Jemutai also filed written submissions and a bundle of authorities to support the interested party’s position. She submitted that it had been clearly shown that the funds forming the subject matter of this case were found to have been acquired through corruption. She therefore opposed the granting of the orders sought. She took this position while heavily relying on the case of Kenya Anti Corruption Commission v James Mwathethe Mulewa and Another [2018] eKLR where Justice Ogolla E.K.O stated.

**“The only issue I raise for determination is whether this is a proper case in which to grant the order of stay pending appeal.**

**This question is pertinent because in ordinary cases an application for stay of execution under Order 42 Rule 6 only requires that the Application is made in good time, appears meritorious, and where necessary, security is provided for the suit property. Order 42 Rule 6 underpins the fact that a right of appeal is available to a person who may still have under his control the suit subject matter.”**

14 The Hon Judge went further to state thus:

**“It is clear therefore that the suit property has never really been available to the Applicant to deal with as he pleased. They have always had a caveat, and have been preserved for the final outcome of the suit. In other words, this is not an ordinary case where the suit property was always free and where execution could be stayed pending the finalization of an appeal.**

**This Court acknowledges that the Applicant indeed has the right of appeal under the constitution and that right is not any diluted because these proceedings arose under the Anti-corruption and Economic Crimes Act. Far from it, the right to access justice and the right to fair trial under Article 50 of the constitution cannot be limited. What remains constant, however, is the need to preserve the suit property for the final winner of the matter in court.”**

15 Counsel further submitted that this was not a proper case in which the court should grant an order of stay pending appeal. She still referred to the Mulewa case (supra) where the Hon judge held:

**“At the second level, and this is more important for this Ruling, it is my view that there is a moral lesson to be learnt under the law under which the suit properties are being recovered. The lesson is that a property suspected to have been acquired by corrupt practices is itself to be recovered to deter any future attempt at corruption. The law specifically targets that property for forfeiture. The owner of the said property, if guilty, is required to forfeit that very property to enable the moral lesson to be internalized. That property to be forfeited cannot be traded with any other property. Indeed if that were to be the case, then the virtue of Section 55 of the Anti-Corruption and Economic Crimes Act would be lost, because persons suspected of corruption would freely trade the proceeds of corruption with other less valuable assets. The idea here is not that the Ethics and Anti-Corruption Commission wishes to trade in exchange of properties and thereby to make money. The idea is to forestall corruption by scorning on the act and forfeiting wealth acquired by corruption. It is not a trading floor. In my view, the suggestion by the Applicant to provide security in lieu of attached property reduces the matter herein to a local commercial dispute which it is not.**

**In these proceedings the moral of the Anti-Corruption and Economic Crimes Act, and the objectives of the Ethics and Anti-Corruption Commission, and the need for every Kenyan to internalize the need to deter and fight corruption must remain alive as the central pillar.”**

16 M/s Jemutai contended that the Applicant had not shown that she would suffer substantial loss. She referred to the case of Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 Others [2015] eKLR where Justice Gikonyo observed:

**“But I need to state once again, that, in an application for stay of execution, it is not the business of the High Court under Order 42 rule 6 of the Civil Procedure Rules to gauge the prospects of the appeal as that is within the precincts of the Court of Appeal. The High Court is only supposed to be satisfied that substantial loss will occur unless stay of execution is granted; that is the cornerstone of the jurisdiction of the High Court.”**

She also referred to the cases of:

**(i) Charity Muthoki Mulei v William Mutisya Muindi [2009] eKLR**

**(ii) Jason Ngumba Kagu & 2 others v Intra Africa Assurance Co. Ltd [2014] eKLR**

17 Finally on security she argued that the Applicant had failed to address the court on that issue. She asked this court not to consider the submissions on the arguability of the Appeal as that is not one of the conditions under Order 42 Rule 6 Civil Procedure Rules.

18 In a rejoinder Mr. Odoyo submitted that being a body corporate was not sufficient ground to say the Respondent was able to refund the money.

### **Determination**

19 I have considered the application, affidavits submissions and the cited authorities. The application stems from a judgment of this court delivered on 14<sup>th</sup> November 2018. There is evidence that the Respondent/Applicant has filed an Appeal against the said judgment. She is therefore praying for stay of execution of the judgment and any orders stemming from it.

20 Issues of stay of execution pending Appeal are governed by Order 42 rule 6(2) Civil Procedure Rules which provides:

**“(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 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.**

21 The issue falling for determination is whether the Applicant has satisfied the conditions for grant of stay of execution pending appeal.

22 There is no dispute that the Applicant acted without any delay in moving to challenge this court's judgment of 14<sup>th</sup> November 2018. She has already filed the Appeal and she cannot therefore expect this court to reevaluate its own judgment and decide whether the Appeal is arguable or not.

23 The record shows that on 21<sup>st</sup> July 2017 the Respondent obtained preservation orders in respect of the Applicant's accounts No [...] and [...] Equity Bank Kenya ltd Donholm branch Nairobi. The substantive suit for forfeiture was then filed on 31<sup>st</sup> October 2017 with an additional account namely account no [...] Equity Bank Donholm. The total amount in the three(3) accounts is Kshs 19,688,152/35. This whole amount was forfeited to the Government and transferred to the Respondent following the judgment of 14<sup>th</sup> November 2018. It is this order of forfeiture that the Applicant wants stayed pending the hearing and determination of the Appeal.

24 The Applicant has raised fears about the refund of this money in the event of a successful appeal. She says the Government of Kenya will most likely take up this money to meet its financial needs since it has a deficit of Kshs 558.9billion in its budget. She annexed an extract of the 2018/19 budget (PA4) for that purpose.

25 The order by this court in its judgment was that the funds in the three accounts should be forfeited to the Government of Kenya and transferred to the Respondent. The money is therefore to be transferred to the Respondent (ARA) since according to Government procedures it cannot be forfeited direct to the Respondent. The ultimate beneficiary is therefore the Asset Recovery Agency (ARA) and not the Government of Kenya.

26 The Applicant had a duty to demonstrate to this court that the Respondent cannot refund the money in the event of a successful Appeal. The Respondent has argued that it is in a position to refund the money if there is need to. The Respondent is a body corporate established under section 53 of the Proceeds of Crime and Anti Money Laundering Act (POCAMLA) with a clear mandate of identifying, tracing, freezing and recovering proceeds of crime.

27 The annexure (PA5) is about the budget by the National Treasury. Ways and means are expected to be put in place to ensure that the deficit is addressed by the Government of Kenya and not the Respondent. To come up with a narrative that once forfeited the money will not be transferred to the Respondent but will instead be used to meet the Government's deficit of 558.9 billion is speculative and not supported by any evidence at all.

28 The Evidence Act clearly provides that any person who alleges a fact must prove it. This is found in section 107-109 of the Evidence Act. The Applicant had the legal burden to prove the Respondent's inability to refund the funds in question in the event of a successful appeal. What the Applicant is in effect alluding to is that the Government of Kenya and the Respondent are broke. Having a deficit does not necessarily mean one is broke.

29 The decided cases cited herein by all the counsel appearing, some of which I have alluded to clearly show that it is not enough to say that money will not be refunded. Its key to explain what the Applicant knows about the Respondent's financial status that makes him/her to come to the conclusion that the Respondent would not be in a position to refund any money paid out to it.

30 The Applicant referred to the case of **Vulcan Equipment** (supra) which was handled by this court and stay of execution pending appeal was granted. That case can be distinguished from this present one because in the Vulcan equipment case the decree holder was a private company which failed to prove its liquidity. In the present case the decree holder is a body corporate and an Agency under the Attorney General's office tasked with tracing, freezing and recovering proceeds of crime. All the recovered proceeds are in the Agency's escrow account. Several forfeitures have been made and the Respondent cannot be said to have no money without solid proof.

31 I find that the Applicant has failed to discharge her burden of satisfying any substantial loss she will suffer, if stay of execution is not granted. The result is that the application lacks merit and I dismiss it with costs.

Right of appeal explained.

Orders accordingly.

**Delivered, signed and dated this 1<sup>st</sup> day of February 2019 in open court at Nairobi.**

**HEDWIG I. ONG'UDI**

**JUDGE**