THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO.153 OF 2018

NATIONAL TRANSPORT AND SAFETY AUTHORITY.....APPELLANT

V.

ELISHA Z. ONGOYA.....1ST RESPONDENT

THE HON.ATTORNEY GENERAL.....2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTION.....3RD RESPONDENT

(Being an appeal from the judgment and Decree of Hon. D.A Alego (SPM) in C.M.C.C No. 125 of 2016 at Kapsabet Law Courts delivered on 29th October, 2018)

RULING

1. The applicant **(NATIONAL TRANSPORT AND SAFETY AUTHORITY)** filed this notice of motion application seeking the following orders:

i. Stay of execution of the judgment and decree delivered on 29th October 2018 pending the hearing and determination of the appeal herein.

ii. That costs of this application be provided for.

2. The application was premised on the grounds that there is an arguable appeal with a high probability of success and if the order of stay is not granted then the appeal shall be rendered nugatory. A 30 day order for stay of execution which had been granted had lapsed on 29.11.2018. The applicant is apprehensive that the 1st respondent will proceed to execute and this would result in irreparable loss. Further that there was no certainty as to whether the 1st respondent would be able to refund the decretal sum should he execute.

3. The application is supported by an affidavit sworn by Robert Ngugi (the Senior Deputy Director Legal Services) who avers that judgment had been entered in favor of the 1st respondent as against the appellant, 2nd respondent and 3rd respondent for a sum of Ksh 3,500,000/=as general damages and exemplary damages of Ksh 1,500,000/=. Being aggrieved by the decision, they had filed a memorandum of appeal though they were yet to be supplied with certified copies of proceedings.

4. The 1st respondent **(ELISHA Z. ONGOYA)** by an affidavit dated 21.2.2019 states that the application is an abuse of the court process since the 3rd respondent had filed a similar application before the Kapsabet Magistrate's court in **case no.125 of 2016**. The appellant/applicant had not met the principles one has to satisfy before being granted stay which include inter-alia:

- establish sufficient cause :- that the court has to be satisfied that substantial loss would ensue from a refusal to grant stay,
- applicant has to furnish security,
- application has to be made without undue delay, applicant has to show he will suffer substantial loss if execution is not stayed and;
- that substantial loss does not include execution since execution is a lawful process.

5. It is contended that there has been inordinate delay in filing the application since judgment was delivered on 29.10.2018 and 30 days stay was granted which lapsed on 30.11.2018, however the applicant has not given any explanation to that.

6. In addition the 1st respondent insists that he is not a man of straw and has a steady income thus can refund the decretal sum incase the appeal succeeds.

7. In a further affidavit the applicant replies to the 1st respondent's assertion, stating that by the time of filing this instant application the 2nd and 3rd respondents had not served any similar application upon them. The applicant being a government institution stands to suffer irreparable loss if stay is not granted as public funds may get lost once execution is effected. Further that it was a government institution thus it is exempted from furnishing security as provided by **Order 42, rule 8 of the Civil Procedure Rules**.

8. In addition to the above, there had been no delay in filing the application, as a request was made for the supply of certified copy of judgment and typed proceedings, and the 30 day stay granted on 30.10.2018 was still subsisting. Further the 1st respondent has not provided any evidence that he had proprietary interests in land and that he would suffer in the event the stay of execution is not granted by this court.

9. The application was canvassed through written submissions where the applicant argued that though an appeal does not automatically apply as stay this court has the discretion to grant the orders sought as provided by Order 42, rule 6(1) of the Civil Procedure Rules. This discretion is within certain parameters as provided by **Order 42, rule 6(2) of the Civil Procedure Rules** which states as follows:

> **(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 application has been made without unreasonable delay and**
> >
> > **b. Such security as the court for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.**

This condition was reiterated by the court in ***Kiplagat Kotut v. Rose Jebor Kipngok*** [2015] eKLR

10. It is contended that the application was brought within reasonable time, the court shouldnot look at how much time lapsed rather if the delay was reasonable whether justice could still be attained as held in ***Utalii Transport Company Ltd & 3 Ors v. NIC Bank Ltd & Anor***[2014] eKLR. The delay is described as not inordinate as explained in their supporting affidavit and further supporting affidavit.

11. The applicant states that it has demonstrate that substantial loss may be suffered if the orders are not granted as held in ***Cynthia Achieng' Marere v. Athanas Shibwom Asiavugwa*** [2015] eKLR. The appellant further argues that it has an arguable appeal with high chance of success and it is uncertain whether the 1st respondent would be able to refund the said sums. Being a government entity it was governed by the Public Finance under Article 201 of the Constitution, in particular Article 201(d) which required that public money is used in a prudent and responsible way.

12. The condition of furnishing security is contested as inapplicable to the government agency as provided by **Order 42, rule 8 of the Civil Procedure Rules**, and it is allocated money by Parliament under section **45 (d) of the National Transport and Safety Authority Act, 2012.**

13. The court is urged not rely only on Order 42, rule 6(2) of the Civil Procedure Rules but also give effect to the overriding objective stipulated in section **1A and 1B of the Civil Procedure Act,** as was held in ***Republic v. County Government of Migori Ex Parte INB Management & IT Consulting Ltd*** [2017] eKLR. If the appeal is rendered nugatory due to execution then the appellant's right to appeal, which is constitutional right shall be greatly prejudiced. The court was urged to allow the application since they had satisfied the requirement for grant of the order sought.

14. The 1st respondent submits that stay of execution of decree pending appeal is discretionary and conditional as was held in ***Antoine Ndiaye v. African Virtual University*** [2015] eKLR where the court has to establish that sufficient cause has been established by the applicant and in ***Machira t/a Machira & Co. Adv. V. East African Standard (No. 2)*** [2002] KLR 63 which espouses the guiding principles in making orders for stay.

15. That, the applicant had not established which substantial loss they shall suffer in the event grant of stay is not granted. Being a government institution it had operations country wide whose budget is appropriated by Parliament and it also collects levies to finance its operations. Therefore the applicant cannot not just state the decretal sum was huge and it would suffer if the same is paid out and referred the court to ***R v. The Commissioner for Investigations & Enforcement , 'Ex-parte' Wananchi Group Kenya Limited*** [2014] eKLR. The appellant/ applicant has to show which substantial loss shall be suffered, in ***Kenya Shell Limited v. Kibiru*** [1986] KLR 410, Platt, Ag. JA (as he was then) gave his considered opinion on the nature of substantial loss which he stated thus:

> **"the application for the stay made before the High Court failed because the first of the conditions set out in order XL1 rule 4 of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the applicant, either in the matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the respondents be unable to repay the decretal sum plus costs in two courts."**

It is further argued that the appellant's assertion that the 1st respondent would not be able to refund the decretal sum was untrue and fell short of the burden placed by the law on the applicant to prove, and he could not shift the same to the 1st respondent, in ***Antoine Ndiaye*** (supra) the court held that, "**the legal burden does not shift to the respondent to prove he is possessed of means to make a refund. Except, however, once the applicant has discharged his legal burden and has adduced such prima facie evidence such that the respondent will fail without calling evidence, the law says that evidential burden has been created on the respondent. And it is only where**

financial limitation or something of the sort is established that the evidential burden is created on the shoulders of the respondent, and he may be called upon to furnish an affidavit of means..."

16. It was further contested that a 90 day delay period was unreasonable. This instant application was made 60 days after the lapse of the temporary stay of execution. No formal application was made by any party before lapse of stay yet they had each filed an appeal. In ***Jaber Mohsen Ali & Anor v. Priscillah Boit & Anor*** [2014] eKLR where the court stated that unreasonable delay is dependant on the surrounding circumstances of each case.

17. The appellant/applicant is faulted for not furnishing any security, in their further supporting affidavit by relying on **42 rule 8** yet the application was brought under Order **42 rule 6** of the Civil Procedure Rules, the appellant was departing from their pleadings before leave of the court. **Order 42 Rule 8 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."*** The appellant/applicant is a body corporate capable of suing and being sued in its name and **section 25 of the National Transport and Safety Authority (Act no.33 of 2012)** provides for payment by the authority of compensation or damages to any person for any injury to him or his property. The court is urged to find that Rule 8 did not apply to the applicant.

18. In addition to the above, it is submitted that having an arguable appeal with high probability of success is not reason enough to grant the stay of execution. The court was urged to dismiss the application with costs.

Analysis and determination

19. The applicant has moved this court urging it to grant a relief for stay of execution pending appeal. This relief is governed by **Order 42 rule 6 of the Civil Procedure rules** and it is discretionary in nature, which has to be exercised judicially. As was held in ***Antoine Ndiaye*** (supra) that the discretion has to be exercised judiciousy and upon the defined principles of law, not capriciously or whimsically. It follows that stay of execution should only be granted where sufficient cause has been shown by the applicant, and in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under Order 42 Rule 6 of the Civil Procedure Rules.

20. For an application to succeed, the applicant has to satisfy the conditions set out under Order 42 rule 6(2) of the Civil Procedure Rules, 2010 which include:

i. That the application has been brought timeously

ii. That if the stay orders are not granted the applicant will suffer substantial loss

iii. The applicant has to give security of costs

21. The application was made 90 days after judgment was delivered. The judgment in the lower court case was delivered on 29.10.2018, and the parties were granted temporary stay of execution for 30 days. The applicant averred that there was delay in typing of proceedings and judgment, and that the delay was not so gross to make this court deny stay of execution. The temporary stay of execution granted on 29.10.2018 lapsed on 29.11.2018. The 2nd respondent had moved the trial court seeking stay of execution on 22.01.2018 which was granted. In ***Kiplagat Kotut v. Rose Jebor Kipngok*** [2015] eKLR the court highlighted the issue on computation of time. Order 50 rule 4 provides as follows: "except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included shall be omitted from any computation of time (whether under these rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act."

The applicant has demonstrated the reasons that led to the delay in filing the application, but I also take judicial notice of the challenges this court has in terms of personnel to effectively type proceedings in a timely fashion. The court is also alive to the provision in Order 50 rule 4 stated above.

22. On the issue of the applicant suffering substantial loss if the order is not granted, the applicant urged that the being a government institution the funds were for the public and it would suffer great loss. The court in ***Daniel Chebutui Rotich & 2 Ors v. Emirates Airlines*** Civil Case No. 368 of 2001, Musinga, J (as he then was) held that,

23. "Substantial loss is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that the applicant is therefore forced to pay the decretal sum.

24. In ***Kenya Shell Limited v. Kibiru*** (supra) the Court Of Appeal held as

> **"It is usually a good rule to see if order XL1 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 cornerstone 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."**

25. This is a money decree and the applicant's position is that they had an arguable appeal with high chances of success, that the 1st respondent would not be able to refund the decretal sums and it would spend public money. On the other hand, the 1st respondent argued that the applicant has not demonstrated what substantial loss they shall suffer. The 1st respondent states that he is a reputable advocate of the High Court of Kenya and a senior lecturer at Kabarak University Law School with a steady stream of income. That he also has multiple real properties in Machakos, Vihiga, Kajiado, Busia, Bungoma and Kakamega counties, so refunding a sum of Ksh. 5 million would not be

difficult for him were the appeal to succeed.

26. I take note that the applicant does not deny that the 1stvrespondent is a practicing advocate of significant repute, and that alongside that, he teaches law at Kabarak University. That alone is a demonstration that he has sources of income that would make it easy for the applicant to recover the money if the execution took place, even without paying attention to the land the 1st respondent alludes to, and for which no documents have been presented to confirm their existence. It is also not suggested that the income the 1st respondent draws from these two sources are so meagre as to cause anxiety about non-recovery were the appeal to succeed.

27. The applicant has the burden to prove that indeed if the stay order is not granted then it shall suffer loss, they could not just state and leave it at that. In ***Machira t/a Machira & Co. Advocates v. East African Standard*** [2002] eKLR the court held as, **"if the applicant cites as a ground substantial loss, the kind of loss likely to be sustained must be specified , details or particulars thereof must be given, and the conscience of the court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue and if it comes to pass, the applicant is likely to suffer substantial injury by letting the other party proceed further with what may still be remaining to be done or in execution of an awarded decree or order, before disposal of the applicant's business(e.g appeal or intended appeal)."**

The applicant has a duty to establish that it likely to suffer if the appeal is successful and that failing to grant the orders would render the appeal nugatory. This lament that the money to be used are public funds and that the larger public would suffer immensely rings hollow as it seems to suggest that even where a judgement is entered against the applicant it can run away from its responsibility by citing public interest and principles of finance.

In my view, prudent expenditure and management of finances does not in any way mean shirking away from responding to what is ordered against a public body. I understand Article 201 (d) of the Constitution of Kenya to mean that the applicant is required to be prudent and transparent and accountable in matters finance. Such prudence and accountability would then mean that it can explain the hows and whys of its financial activities, such as when it has to make payments for a decree

28. The other issue to consider is whether the applicant has offered security as a pre-requisite condition for the due performance of the decree as required by law. The applicant is established by section 3 of the National Transport and Safety Authority.

> **(1) There is established an Authority to be known as the National Transport and Safety Authority.**
>
> **(2) The Authority shall be a body corporate with perpetual succession and a common seal and shall, in its corporate name, be capable of—**
>
> > **(a) suing and being sued;**
> >
> > **(b taking, purchasing or otherwise acquiring, holding, charging or disposing of movable and immovable property;**
> >
> > **(c) borrowing money;**
> >
> > **(d) entering into contracts; and**
> >
> > **(e) doing or performing all other things or acts for the proper performance of its functions under this Act which may be lawfully done or performed by a body corporate.**

29. 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.

30. The applicant has not demonstrated the loss to be suffered if the relief sought is not granted, but if its argument is that it has a duty to protect public funds by pursuing an appeal and therefore its reluctance at releasing the funds now, then the decretal sum must be deposited in a joint fixed deposit earning account in the names of the applicant and the 1st respondent within 7 days from today**,** in default then the respondent is at liberty to execute.

DELIVERED, SIGNED AND DATED THIS 4TH DAY OF JUNE 2019 AT ELDORET

H. A. OMONDI

JUDGE