



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCA NO. 44 OF 2018

TANATHI WATER SERVICES BOARD.....APPELLANT

-VERSUS-

QARA AGENCIES LTD.....RESPONDENT

RULING

INTRODUCTION

1. By a Notice of Motion dated 20/06/2018, the Applicant seeks orders for extension of time to lodge an appeal and stay of execution of decree in Kilungu CC 160 of 2016 entered on 18/05/2018.
2. The same is based on grounds that the Judgment issued is *per incurium*, that appeal is arguable with high probability of success.
3. That if leave and stay sought are denied, Applicant will suffer irreparable damage.
4. The Applicant is ready to deposit decretal sum in court as a condition for stay and that Application has been made without unreasonable delay.
5. The Application is supported by the affidavit of Ronald N. Oyagi Advocate which reiterate the above grounds.
6. The Application is opposed and two Replying Affidavits (R/A) have been filed by James Karanja Mwangi Advocate sworn on 18/07/2018 and another by Daniel Kilonzi Muthami sworn on same date 18/07/2018. However during submissions the Respondent Advocate stated that grant of leave to appeal out of time is not opposed.
7. Thus the court will focus on Application for stay pending Appeal.
8. The Respondent in short states that, the Appellant hasn't demonstrated that the Respondent has no means to refund the decretal sum and costs if the appeal is successful. The prayer for stay of execution is therefore not merited.
9. The Appellant hasn't satisfied the grounds for stay of execution pending appeal namely; there's no sufficient cause it has disclosed why a stay should be granted, it hasn't shown the substantial loss it will suffer if the decree is satisfied and hasn't provided security for the due performance of the decree.
10. That the Respondent is a reputable borehole contractor who delivered on contract to drill a borehole 8 years ago. And it hasn't since been paid for services rendered. The Appellant hasn't demonstrated why it shouldn't pay. To deny it the fruit of litigation would be unjust in the extreme considering that this is a court of equity. An order of stay of execution would be oppressive in these circumstances.
11. That the minimum the court can do is to let the execution process to proceed if the Appellant fails to satisfy the decree willingly. If this happens, the Appellant may be granted leave to appeal out of time. If the Appellant is successful in its appeal, the Respondent will refund the decretal sum and costs. Otherwise there is no good reason to grant a stay of execution and extend time for filing the appeal out of time.

SUBMISSIONS

12. The parties did canvass the Application via oral submissions reiterating the above grounds. The appellant submitted that on condition of stay, Applicant says that it is ready to deposit security. Thus aspect on security is satisfied.

13. On sufficiency of cause, if amount is paid it is contended that, the Applicant will be inconvenienced as no property of Respondent is disclosed which can enable recovery of decretal amount thus substantial loss may result.
14. The Applicant submits that if it is to deposit security, it be given ninety (90) days due to the financial process of the Application.
15. The Respondent submitted that, the Application does not comply with provisions of Order 46 Rule 6 of Civil Procedure Rules. That is conditions for stay are not met. See case of **WANJOHL. -VS- CENTRA B.**
16. In that, no sufficient cause has been shown for stay, no substantial loss is demonstrated, nor security is provided.
17. On the other hand Respondent submitted that it had demonstrated ability to refund the decretal amount. See case of **CARTER & SONS.**
18. The Respondent submits that it has never been paid a coin (penny) since 2010. It is unjust to grant stay of execution. This is a court of equity. See **Hayanga J. in Stephen Wanjohi** case stay ought to be denied.

ISSUES, ANALYSIS AND DETERMINATION

19. The only issue arising herein is whether the conditions for stay pending appeal have been established as required by law?
20. This is an Application that invokes the discretionary powers of the court. Of course discretionary powers must be exercised judiciously. It is brought under Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 which empowers this court to stay execution, either of its judgement or that of a court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided by the Rule 6(2) as follows:-

“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.”

21. The Court of Appeal in ***Butt v Rent Restriction Tribunal [1982] KLR 417*** gave guidance on how a court should exercise discretion and held that:-

“1. The power of the court to grant or refuse an Application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the Applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an Application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon Application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

22. The above cited case captures the applicable principles in deciding whether or not to grant a stay of execution pending Appeal.
23. It is not disputed that the decretal amount plus interest from 2010 as granted shall exceed Kshs. 2 million which is a large amount by any standard.
24. The Respondent has not demonstrated whether it would raise same in event same is paid and the appeal succeeds. The inability to recover the same would occasion Applicant substantial loss.
25. The Applicant has indicated that it is ready to offer security but only seeks a period of 90 days to enable the processing to take place in tandem with regulations applicable to financial matters of the Applicant.
26. The court finds no prejudice to be occasioned to the Respondent by the court granting conditional stay of execution and then expedite hearing of the appeal.

27. Thus the court makes the following orders;

i. Leave to appeal out of time is granted and same to filed and served within 14 days.

ii. The stay of execution is granted subject to deposit of Kshs. 822,000/= in joint interest earning account in the names of the parties Advocates on record within 90 days from dates herein.

iii. Costs to the Respondent to be paid after determination of the appeal.

SIGNED AND DATED AT MAKUENI THIS 3RD DAY OF OCTOBER, 2018 IN OPEN COURT.

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C KARIUKI

JUDGE