



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

MISC. APPLICATION NO. 93 OF 2011 (O.S)

IN THE MATTER OF: PACRCELS OF LAND NOS. MN/1/13483;

MN/1/15351 AND MN/1/15275

IN THE MATTER OF: BANK ACCOUNTS NUMBERS SV

1520400816 & TD 15267000443-FINA BANK, MOMBASA, NKURUMAH ROAD BRANCH

IN THE MATTER OF: THE ANTI-CORRUPTION & ECONOMIC

CRIMES ACT, NO. 3 OF 2003

BETWEEN

KENYA ANTI-CORRUPTION COMMISSION.....PLAINTIFF

AND

JAMES MWATHETHE MULEWA.....1ST DEFENDANT

SHARKAT COMPANY LIMITED.....2ND DEFENDANT

RULING

1. The Notice of Motion application before the court dated 3rd October, 2018 prays for the following orders:

- (i) That this application be certified as urgent and service be dispensed with at the first instance.
- (ii) That the firm of Wameyo Onyango & Associates be given leave to file a notice of change of advocates.
- (iii) That there be a stay of execution of the Judgment of this court delivered in Mombasa on the 18th day of September, 2017 pending the hearing and determination of this application.
- (iv) That there be a stay of execution of the Judgment of this court delivered in Mombasa on the 18th day of September, 2017 pending the hearing and determination of appeal.
- (v) That the time for filling of the Notice of Appeal be extended and the Notice of Appeal filed herein be deemed as duly filed.
- (vi) That pending the hearing and determination of this application this Honourable court be pleased to direct that since the orders given on the 13th April, 2011 have long lapsed all the properties and assets named therein be released to the 1st Respondent.
- (vii) That in the alternative the orders of this court given on 13th day of April, 2011
 - (a) Restraining the 1st Respondent by himself, his agents, servants and/or employees from alienating, selling, clearing, leasing, transferring, wasting or in any other way dealing with all the under listed parcels of land namely

· Parcel of land No. MN/I/13483

- Parcel of land No. MN/I/15351
- Parcel of land No. MN/I/15275, and

(b) Restraining the 1st Respondent by himself, servants, agents, and/or employees from withdrawing funds or in any other way dealing with bank account Number SV1520400816 TD 1526700443 Fina Bank Nkrumah Road branch and Bank Account Number 0310411008 domiciled at Prime Bank Mombasa branch be vacated on condition that he 1st Respondent deposits with the court all the title documents of that property known as Kilifi/Viriko "A"/22 measuring approximately 536.08 hectares or such other terms as the court may deem just to impose in the circumstances.

(viii) That costs of this application be provided for.

2. The main prayer, however, appears to me to be the one seeking a stay of execution of the Judgment of this court delivered on 18th day of September, 2017 pending the hearing and determination of the intended appeal. The Notice of Appeal was lodged herein on 9th October, 2017, out of time and one of the prayers sought is for leave to have the same deemed duly filed.

3. In the Judgment dated 18th September, 2017, this court made orders against the 1st Defendant as follows:

(a) That the following assets are declared as unexplained assets:-

- Kshs., 63,688,794/=
- Parcel of land No. MN/I/13483
- Parcel of land No. MN/I/15351

(b) That the 1st Defendant do pay the Government of Kenya Kshs. 63,683,794/= being the cumulative bank deposits made by the Defendant between 31st August, 2008 and 20th May, 2010 and Kshs. 11,000,000/= being the value of immovable properties both of which constitute immovable property.

(c) Costs of this suit to the Plaintiff.

4. It is the execution of these orders that the current application seeks to stay as the Applicant appeals the said decision.

5. The Applicant's case is that he was dissatisfied with the Judgment of the Court and that he has the right of appeal and in the meantime the suit subject matter should be stayed. The Applicant's case is that he has a meritorious appeal.

6. Further, the Applicant has offered an alternative security for the suit being his parcel of land known as Kilifi/Viriko "A"/22 measuring 536.08 Hectares and valued at Kshs. 200,812,200.

The Response

7. The Respondent in opposition to the motion filed Grounds of Opposition, stating that the 1st Defendant/Applicant's application dated 3rd October, 2017 is incompetent for failing to cite any of the grounds recognized under Order 42(6) of the Civil Procedure Rules on stay of execution in the event that an appeal is preferred; that the 1st Defendant/Applicant has not demonstrated that execution may result in substantial loss to the Applicant unless the order for stay is made in terms of Order 42 Rule 6(2) (a) of the Civil Procedure Rules; that the 1st Defendant/Applicant has not established any other factors that will irreparably affect the 1st Defendant/Applicant as the potentially successful Appellant; that the 1st Defendant/Applicant has erroneously asserted, in this application, the arguability of his appeal which is not a ground for granting an order of stay of execution under Order 42 of the Civil Procedure Rules; that the 1st Defendant/Applicant consistently asserted the legitimacy of the source(s) of his unexplained wealth which remain unhindered by the Plaintiff/Respondent meaning that satisfaction of the decretal award herein would cause no substantial loss; that the security proffered by the 1st Defendant/Applicant merely reinforces the Plaintiff/Respondent's belief that satisfaction of the decree herein through execution will not materially alter his status as an Appellant so as to render such execution unjust; that no material have been placed before this Court to suggest that the Plaintiff/Respondent would be unable to restore the 1st Defendant/Applicant to his position prior to execution of the Decree herein if he were, ultimately, successful in his appeal; and that 1st Defendant/Applicant has shown no merit in his application to stay a decree where the subject matter is unexplained assets acquired illicitly by a public officer.

8. Parties filed submissions and authorities which I have carefully considered.

The Determination

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

10. 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.

11. In the matter at hand, the proceedings leading to the Judgment to be appealed against arose out of Section 55 of the Anti-Corruption and Economic Crimes Act No. 3 of 2003 by way of Originating Summons. That Section of the law allows the Respondent herein to trigger legal proceedings in situations where it suspects that a public officer has acquired unexplained assets through corrupt practices. The public officer is then given statutory notice to explain how the wealth was acquired. Under the said regime of laws, the public officer would be left free if satisfactory explanation is provided by the officer. On the contrary, like in the instant case, where no satisfactory explanation is given by the public officer, the Respondent would commence proceedings leading to the forfeiture of the said suspected wealth. Those proceedings begin by firstly the Respondent applying to court for the freezing orders on the suspect accounts and orders freezing any sale and/or transfer of immovable properties. That is what happened in this case.

12. In the matter at hand freezing orders were issued on 13th April, 2011 against the above mentioned properties and accounts of the Applicant. The assets or accounts are frozen simultaneously as proceedings begin for their recovery. This is done so that in the event of a successful recovery, the suit property is still intact so that the final victory is not a pyrrhic victory. The preservative orders were issued on 13th April, 2011,

(a) Restraining the 1st Respondent by himself, his agents, servants and/or employees from alienating, selling, clearing, leasing, transferring, wasting or in any other way dealing with all the under listed parcels of land namely

- Parcel of land No. MN/I/13483
- Parcel of land No. MN/I/15351
- Parcel of land No. MN/I/15275, and

(b) Restraining the 1st Respondent by himself, servants, agents, and/or employees from withdrawing funds or in any other way dealing with bank account Number SV1520400816 TD 1526700443 Fina Bank Nkrumah Road branch and Bank Account Number 0310411008 domiciled at Prime Bank Mombasa branch.

13. 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.

14. 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. In the application the Applicant has sought to provide a security of an immovable property said to be valued at over Kshs. 200 million. The property is Kilifi/Viriko "A"/22 approximate area 536.08 Ha. The property is in the name of the Applicant and is valued at Kshs. 200,812,200 by **M/S Next Level Valuers & Property Consultants** on 25th September, 2017.

16. The Applicant prays that the execution of the Judgment herein be stopped altogether, and all the properties of the Applicant which were frozen be released to the Applicant. In the alternative the Applicant offers the said property valued at one Khs. 200 million as security.

17. The issue for consideration by this court is whether the security offered is suitable alternative to the properties which the Respondent had frozen. What is notable, however, is that the said security offered by the Applicant is not among those frozen assets to be recovered. So it is a freely available property.

18. The other question to answer is whether in the nature of this case it is suitable or indeed proper to exchange free property for property which is frozen and secured under the Anti-Corruption and Economic Crimes Act. I will attempt to answer these questions at two levels. The first level is that the accounts which have been frozen herein are suspected to contain cash of over Kshs. 63,000,000. The immovable assets whose sale on transfer is stopped are also urban houses or properties whose value is clearly ascertainable, and which properties can also be disposed off in sale fairly quickly. In my view, a property like the one offered for security, although alleged to be over Kshs. 200million, it is not in urban setting and cannot be deemed to be suitable replacement for the secured property and accounts.

19. 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.

20. 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.

21. From the foregoing, and save that the time for filing of the Notice of Appeal is extended and the Notice of Appeal filed herein is deemed duly filed, the motion dated 3rd October, 2017 is dismissed with costs to the Respondent.

Dated, Signed and Delivered in Mombasa this 14th day of November, 2018.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Makori for Respondent

No Appearance for Applicant

Mr. Kaunda Court Assistant