

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO 103 OF 2017

TANATHI WATER SERVICES BOARD..... APPELLANT

VERSUS

PASHA ENTERPRISES LIMITED.....RESPONDENT

RULING

1. The Appellant filed an Application dated 28/06/2018 seeking orders *inter alia*: that this court be pleased to extend time for complying with the order dated 17/1/2018; that this court do make such other further orders as it may deem appropriate; that there be stay of execution pending the determination of the application.

2. The Application is supported by an affidavit of Ronald N. Oyagi who is the Legal and Corporate Affairs Manager of the Appellant sworn on even date and is further supported by grounds on the face of the Application. The Applicant's case is that it had already lodged an Appeal against the judgement and decree in **Machakos CMCC No. 96 of 2016** and that this court had already granted an order of stay of execution on condition that the decretal sums were deposited in a joint interest earning account in the names of the parties Advocates or furnish a bank guarantee of an equal amount. It is the Appellant's further case that it could not manage to comply with the order aforesaid due to budgetary constraints. That the Respondent has since obtained warrants of attachment and proclaimed the Appellant's goods which are now liable to be seized and sold by an Auctioneer to the detriment and prejudice of the Appellant. The Applicant further maintains that it has since managed to secure a bank guarantee as earlier directed and is now ready to furnish the same in compliance with the ruling dated 17/1/2018. Finally it was the Appellant's request that this court do extend time for complying with the order of 17/1/2018 as the Respondent is not likely to be prejudiced in any way.

3. The Application was opposed by the Respondent whose learned Counsel Francis N. Sila swore an affidavit dated 4/7/2018 in which he deposed *inter alia*: that the Appellant failed to comply with the ruling of this court dated 17/1/2018; that the Respondent had no option but to apply for warrants of attachment in execution of the decree; that the Appellant ought to have sought extension of time before the period elapsed if indeed it had any financial problems; that there has been inordinate delay on the part of the Appellant who is not entitled to the discretionary remedy; that the Application has been with the sole aim of frustrating the Respondent from realizing the fruits of the judgement; that if the court is inclined to allow the Application, then the Appellant should meet the Auctioneer's costs of Kshs.1,978,563/= plus punitive costs of Kshs.100,000/=.

4. Parties opted not to present any submissions but opted to rely on the rival affidavits.

Determination

5. I have considered the Application and the rival affidavits. It is not in dispute that this court had granted the Appellant an order of stay of execution of the lower court's judgement and decree on condition that the entire decretal sums were deposited into an interest earning account in the joint names of the parties advocates or to furnish a bank guarantee of an equal amount from a reputable bank. This was pursuant to the ruling dated 17/1/2018. It is also not in dispute that the Appellant did not comply with the said order forcing the Respondent to proceed to take out warrants of attachment in execution of the decree and that at the moment the Appellant's properties have been proclaimed by an Auctioneer. The issue for determination is whether the Appellant has furnished sufficient reasons to merit the orders being sought.

6. The Appellant through its Legal and Corporate Affairs Manager has explained the predicament of the Appellant namely that it had been facing some budgetary constraints and hence the delay to comply with the order of 17/1/2018. However the Appellant has not explained why it did not see it fit to seek for an extension of time to comply with the order and has waited until the Respondent came knocking while armed with warrants of attachment. Under those circumstances the Respondent cannot be blamed for taking out warrants of attachment. The Appellant appears to have now secured a bank guarantee of the whole decretal sums and requests this court to extend a little bit of time to enable it to deposit. Indeed the Respondent has had the Appellants goods proclaimed but is yet to seize them for auction. As the Appellant is ready with the security, I find it would be unfair to deny it a chance to deposit the same. I note the Respondent is agreeable to the Appellants request subject to the payment of Auctioneers charges. It is noted that the Appellant is a public body and thus budgetary constraints are not unusual since all its finances have to be budgeted for and which takes time. The amounts involved is a tidy sum by all standards. The Appeal herein still remains for determination and might be rendered nugatory if the Application is not allowed. The issue of the Auctioneers charges will be addressed by the parties either through a consent or assessment if need be as the appeal is being canvassed. The Respondent on the other hand can be adequately compensated by an award of costs.

7. In the result, I find the Appellant's Application dated 28/06/2018 merited. The same is allowed in the following terms:-

(a) The Appellant is granted 14 days within which to deposit the decretal sums or furnish a bank guarantee of an equal amount from a reputable bank as directed on the 17/1/2018.

(b) The Auctioneers charges if already incurred shall be agreed upon by consent or assessed by the parties.

(c) The cost of the Application shall be to the Respondent.

Orders accordingly.

Dated and delivered at Machakos this 6th day of November, 2018.

D.K. KEMEI

JUDGE