



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL APPEAL NO. 103 OF 2017

TANA ATHI WATER SERVICES BOARD.....APPELLANT/APPLICANT

VERSUS

PASHA ENTERPRISES LTD.....RESPONDENT

RULING OF THE COURT

1. The Appellant has filed a Notice of Motion dated 25/07/2017 seeking for an order of stay of execution of decree and judgment in **Machakos CMCC No.96 of 2016** pending the hearing and determination of the Appeal. It also seeks for costs to be in the cause. The Application is brought pursuant to the provisions of Order 42 Rule 6 and Order 51 of the Civil Procedure Rules as well as Section 1A, 1B and 3A of the Civil Procedure Act.

2. The Application has grounds on the face of the Notice of Motion. It is also supported by the affidavit of Ronald N. Oyagi who is the legal and Corporate Affairs Manager of the Applicant sworn on 24/07/2017. Among the grounds is that the Applicant has an arguable appeal which is not frivolous as well as that if stay is not granted the Appellant stands to suffer irreparable loss. The Applicant further avers that it is ready and willing to provide suitable security and that the Application has not been brought late.

3. The Application is opposed. A Replying Affidavit sworn on 7/08/2017 by Samuel Kimondo Theuri the director of the Respondent was filed. It was deponed *inter alia* that the Application does not satisfy the conditions laid down in Order 42 Rule 6(2) of the Civil Procedure Rules and that the Application was meant to deny the Respondent from enjoying the fruits of the judgement.

4. Learned Counsels for the parties filed written submissions. It was submitted for the Applicant that if stay is not granted it will suffer irreparable loss that touches on the general public since the Appellant is a public body. It was also submitted for the Applicant that its appeal is arguable and has high chances of success. It was further submitted that the Applicant is ready to furnish security and that the Application has been filed timeously. It was finally submitted that the Respondent has failed to prove that it shall be in a position to refund the monies in the event of success of the appeal since the bank details furnished belong to third parties not related to the Respondent.

It was submitted for the Respondent that the Applicant has not proved that it will suffer substantial loss and that in any case the Respondent has the means or wherewithal to refund in the event the Appeal succeeds. It was finally submitted that should the court be inclined to allow the Application then it should order the Appellant to pay the Respondent Kshs.10 million and the balance of Kshs. 5 million be deposited in court within a period of 14 days.

5. I have considered the Appellant's Application and the rival affidavits. I have also considered the submissions by the learned counsels. The relevant provisions of the law governing the grant of stay of execution pending Appeal is Order 42 Rule 6 of the Civil Procedure Rules. The same provides thus:-

“6(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 the Application has been made without unreasonable delay.

(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.”

6. There is no argument advanced alleging that the present Application was filed late. The judgement appealed against was delivered on the 13/07/2017 and the present Application was filed on 26/07/2017 and hence I find the same was filed timeously and even before the period for appeal lapsed.

7. As regards the issue of substantial loss, the Applicant has stated that it is a public body and will suffer irreparable loss if its assets are seized and auctioned which would severally affect the greater public. On the other hand a Director of the Respondent has indicated that he has the means to refund the monies in the event the Appeal succeeds. However the said Director has not availed evidence that he is indeed a Director of the Respondent since the bank statements showing a balance of Kshs.15 million is not in the names of the Respondent. There was no Memorandum and Articles of Association incorporating the Respondent availed so as to leave no doubt that the said Samuel Kimondo Theuri is indeed a Director of the Respondent and hence in the absence of such evidence he shall be treated as a third party. Again there are no valuation reports for the four vehicles belonging to the Respondent which would indicate the sums to be paid in the event the Appeal succeeds. Moreover the assets being motor vehicles, their values shall depreciate significantly. All these are sufficient reasons to justify the Applicant's fears that the Respondent may not be able to reimburse the monies should the Appeal succeed. The Appeal filed herein is not frivolous and as such the Applicant ought to be allowed to prosecute the same and at the same time the Respondent who is the successful litigant in the court below should not be unduly kept away from the fruits of the judgement. This then calls for a balance to be struck and which has been provided by the Applicant who has agreed to furnish security for the due performance of the decree that may ultimately be binding upon it. The security once deposited will assuage any fears or concerns of both the Applicant and Respondent as they canvass the Appeal.

8. In the result the Applicants' Application dated 25/07/2017 is allowed in the following terms:-

(a) The Applicant to deposit the decretal sums into an interest earning account in the joint names of both Advocates or in the alternative furnish a bank guarantee of an equal amount from a reputable bank within the next forty five (45) days from the date hereof failing which the order of stay shall lapse.

(b) The costs hereof shall abide in the Appeal.

It is so ordered.

Dated and delivered at Machakos this 17th day of **January, 2018.**

D. K.KEMEI

JUDGE

In the presence of:-

Mrs Mutua for Mulekyo - for the Appellant

N/A/ for Sila - for the Respondent

Kituva - Court Assistant