



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 288 OF 2016**

**KENYA NATIONAL HIGHWAYS AUTHORITY.....APPELLANT**

**- V E R S U S -**

**ZENITH STEEL FABRICATORS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**SBI INTERNATIONAL HOLDINGS AG (KENYA) LTD.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. Kenya National Highway Authority, the appellant/applicant herein, took out the motion dated 4<sup>th</sup> august 2016 in which it sought for *inter alia* an order for stay of execution pending appeal of the ruling/order delivered on 17.5.2016 by Hon. A. M. Obura, learned Principal Magistrate vide Nairobi C.M.C.C no. 7044 of 2014. The motion is supported by the affidavit of Jessica Karimi Mbae. When served with the motion, Zenith Steel Fabricators Ltd, the 1<sup>st</sup> respondent, filed grounds of opposition and the replying affidavit of Bakirali Noordin to oppose the application. SBI International Holdings A.G (K) Ltd, the 2<sup>nd</sup> respondent informed this court that it was not opposing the motion since the orders sought does not affect it. When the motion came up for interpartes hearing this court gave directions to have the motion disposed of by written submissions.

2. I have considered the grounds stated on the face of the motion plus the facts deponed in the affidavits filed in support and against the motion. I have also taken into account the grounds of opposition and the rival written submissions. It is the submission of the appellant that it has appealed against the trial court's ruling delivered on 17.5.2016 and the appeal is yet to be heard. The appellant argued that the 1<sup>st</sup> respondent has now moved to court seeking to execute the order by proclaiming the appellant's motor vehicles and machinery. It is the submission of the appellant that unless an order for stay is given this appeal will be rendered nugatory. The appellant pointed out that the 1<sup>st</sup> respondent's assets are unknown and there is an imminent risk that the appellant will not easily recover the decretal sum of ksh.7,833,059/= from the 1<sup>st</sup> respondent if the appeal turns successful thus making the appellant suffer substantial loss. It is also pointed out that the proclaimed property are tools of trade of the appellant which is a public body and agent of the Government hence any distraint or auction will cause irreparable loss to the appellant.

3. The 1<sup>st</sup> respondent on the other hand vehemently opposed the appellant/applicant's application. It is the 1<sup>st</sup> respondent's submission that the appellant/applicant has not demonstrated the substantial loss it would suffer if the order for stay is denied. It is also argued that there was an inordinate delay of 79 days in filing the application for stay. The 1<sup>st</sup> respondent further argued that the appellant has not made any offer as to what form of security it was offering to give for the due performance of the decree. The 1<sup>st</sup> respondent stated that it has already secured a bank guarantee as an additional security hence its bankers

can readily refund the decretal sum of ksh.7,833,059 when required.

4. The principles to be considered in an application for stay of execution pending appeal are clearly outlined in Order 42 rule 6(2) of the Civil Procedure Rules, 2010.

**First, an applicant must show the substantial loss it would suffer if the order is declined.**

**Secondly, the application for stay has to be filed without unreasonable delay.**

**Thirdly, the provision for security for the due performance of the decree should be considered.**

5. Before applying the above principles to this case, let me first set out the history behind this case. Zenith Steel Fabricators Ltd, the 1<sup>st</sup> respondent herein filed a suit before the Chief Magistrate's Court, Milimani Commercial Courts, Nairobi by way of a plaint, whereof it sought for payment from the appellant and the 2<sup>nd</sup> respondent a sum of kshs.4,241,829/05 being a balance of the amount due from the design and construction of a pedestrian foot bridge within Mlolongo Area along the Nairobi-Mombasa Highway. The appellant filed a defence denying the 1<sup>st</sup> respondent's claim. The 1<sup>st</sup> respondent successfully applied for the appellant's defence to be struck out and for entry of summary judgement on admission for ksh.4,241,829/05 vide the motion 30.10.2015. The outcome of the aforesaid motion was expressed in the ruling of Hon. Obura learned Principal Magistrate delivered on 17.5.2016. Being aggrieved by the aforesaid ruling, the appellant filed this appeal to challenge the order. The appellant is now before this court seeking for among other orders, an order for stay of execution pending appeal.

6. Having given in brief the history behind this motion, let me now consider the merits or otherwise of the motion. I have already outlined the arguments presented by both sides plus the applicable principles. On the first principle that to say whether the applicant has shown the substantial loss it would sufferer if the order is denied. The appellant/applicant has expressly stated that unless the order for stay is granted it would lose its tools of trade through a public auction. It also stated that the 1<sup>st</sup> respondent is not in a position to refund the decretal sum if it is paid. There is no doubt that the appellant is a statutory body established under Section 3 of the Kenya Roads Act, no. 2 of 2007 with its function stated under Section 4 as management, development, rehabilitation and maintenance of national Roads. I have looked at the notice of proclamation of attached goods and it is apparent that the appellant's eight (8) motor vehicles have been attached. With respect, I agree with the submissions of the appellant that the aforesaid motor vehicles are key components and tools of trade used by the appellant to perform its statutory functions. If the attachment is allowed to proceed, the activities of the appellant will be paralysed. On this account, I find that the appellant has shown the substantial loss it would suffer if the order for stay is denied. It would appear from the reading of section 68 of the Kenya Roads Act, Act no. 2 of 2007, that decree holders are expressly barred from executing or attaching the appellant's property pursuant to a lawful judgment or order. The law requires such parties to initiate a process to have the Director General of the authority compelled to settle judgements/ orders. Consequently if the order for stay is refused the appellant will obviously suffer substantial loss in that its properties will have been attached against statutory protection.

7. The second principle to be considered is whether the application for stay was filed without unreasonable delay. The order sought to be impugned was delivered on 17.5.2016. This application was filed on 1<sup>st</sup> August 2016. The appellant is of the view that the application was filed without unreasonable delay. The appellant admits that there was a bit of delay caused by the appellant's acts of changing its advocates. It is also stated that there was delay in obtaining certified copies typed proceedings and ruling. The 1<sup>st</sup> respondent pointed out that the delay was inordinate and unreasonable. This court notes that there was a considerable delay in filing the application for stay. However there is a plausible explanation for the delay given by the appellant. I find the delay not inordinate. The cause for the delay is explained hence excusable.

8. The final consideration in such an application is the provision for security for the due performance of

the decree. The 1<sup>st</sup> respondent is of the view that the appellant should deposit the decretal sum as security for the due performance of the decree. The appellant is of the contrary view that since it is a statutory body it should not be ordered to deposit the decretal sum since its funding comes directly from the exchequer which has to be budgeted for and approved every financial cycle by the National Assembly. The decision as to whether or not to order a party to provide security is a discretionary one. Whether or not a party makes an offer to provide security does not matter. I do not agree with the arguments of the appellant that it should not be ordered to provide security because it is statutory body. To ask the appellant to provide security cannot be said to tantamount to asking the government to provide security. The 1<sup>st</sup> respondent has correctly captured in its submissions the correct legal position that is to say that the appellant is a creature of statute. Under Section 3 of the Kenya Roads Act (cap 4 of Laws of Kenya) confers upon the appellant powers in its corporate name to *inter alia* take, purchase, acquire, hold and dispose movable or immovable property. It can also be sued or sue in its corporate name. However, what I know is that it will take time for the appellant to access funds to deposit as security due to government bureaucracies for requesting, budgeting for and approval of the same. The purpose of providing security is to ensure that at the end of the dispute, the decretal sum is easily accessible to the winning party. In this case, I am convinced that under any circumstances, the decretal sum can easily be obtained from the appellant being a body corporate which is directly funded by the National Government. I therefore find no compelling reason to order the appellant to provide security. I will instead direct that the appeal be heard on priority basis.

9. In the end, I allow the motion dated 4<sup>th</sup> August 2016 in terms of prayer 4 with costs abiding the outcome of the appeal.

Dated, Signed and Delivered in open court this 10<sup>th</sup> day of February, 2017.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent