



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

CONSTITUTIONAL PETITION NO. 9 OF 2016

IN THE MATTER OF: ARTICLE 22(1)

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF ARTICLES 2, 3(1), 20, 22(1), (2), ©, 23(1), (3), 6(2), 40(1), (4), 47(1) & (2), 64, 186(3), 187(1) & (2) AND 189(1) & (2) OF THE CONSTITUTION

AND

IN THE MATTER OF: CONTRAVENTION OF SECTION 4, 23, 25, 26, 27 AND 28 OF THE INTERGOVERNMENTAL RELATIONS ACT, CAP 5G

AND

IN THE MATTER OF: FERRIES ACT, CAP 410

AND

IN THE MATTER OF: KENYA FERRY SERVICES LIMITED

BETWEEN

KENYA FERRY SERVICES LIMITED.....PETITIONER

AND

MOMBASA COUNTY GOVERNMENT.....RESPONDENT

AND

- 1. ATTORNEY GENERAL for and on behalf of the
INTERGOVERNMENTAL RELATIONS TECHNICAL COMMITTEE**
- 2. MY SPACE PROPERTIES LTD.....INTERESTED PARTIES**

RULING

The Application

1. By a Notice of Motion herein dated 15th December, 2016 the Applicant seeks as the main prayer an order of stay of execution of Judgment of the Honourable Mr. Justice M. J. Anyara Emukule delivered on 28th of November, 2016 pending the hearing and determination of the appeal against that Judgment. The Application is brought pursuant to **Order 42 Rule 6(1) (2)(a) 3 and Rule 8 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act.**

2. The Application is premised on the grounds stated therein among them that the Notice of appeal has been filed and served and that the application for stay of execution has been made within reasonable time. Further grounds are that the intended appeal has high chance of success.

The Response

3. M/S Lutta for the Attorney-General submitted that they do not wish to participate in the application, while on their part the Petitioner/Respondent filed grounds of opposition to the application on 6th February, 2017. The Petitioner/Respondent also filed a replying affidavit on 9th February, 2017 in opposition to the application. The replying affidavit is sworn by **Elijah Kitur**, who depones that he is the Company Secretary and Head of Legal Service of the Petitioner and has the authority to depone to the affidavit. The Respondent's case is that the application is fatally defective, is misconceived, bad in law and an abuse of the court process and that in any event the application has failed to annex a copy of the decree to the Petition.

Submissions

4. Counsel for the Applicant **Mr. Abed** submitted that the application is merited and ought to be granted, and that there are high chances of appeal succeeding. Further, Counsel submitted that the Applicant is a Government under the Constitution of Kenya and so there is no need to give security since there is no possibility that it will default in settlement of the decretal sum and that as their finances are public finances the services to the people of Mombasa will be affected by the shuffling of funds between accounts without budgetary provisions and that it is in the interest of justice that the stay of execution be granted. Counsel submitted that if the stay is not granted the intended appeal will be rendered nugatory.

5. On their part **Mr. Akanga** for the Respondent submitted that the Applicant has not placed before this court any specific details or particulars or material that show or demonstrate loss that may be suffered by the Applicant if the orders sought are not granted. Counsel argued that the Applicant has not demonstrated that execution will create a state of affairs that will irreparably affect or negate the position of the Applicant should the intended appeal succeed. Mr. Akanga submitted that the Applicant has not offered or demonstrated willingness to offer any security for the due performance of the decree being appealed from hence the application does not satisfy the legal conditions for the grant of stay pending appeal. Counsel submitted that an order for stay of execution will cause grave injustice and hardship to the Petitioner herein by denying the Petitioner the fruits of justice as well as prolonging hardship of the Petitioner due to constraint in financing its activities. Mr. Akanga submitted that if the court were to grant the orders prayed for then one half of the decretal amount be paid to the Petitioner within 45 days and the other half deposited in an interest earning account in the joint names of the advocates.

The Determination

6. I have carefully considered the submissions of the parties in this matter. The issues I raise for determination are as follows:

- (i) Whether conditions for the grounds of stay have been met.

(ii) Whether the intended appeal would be rendered nugatory if the stay of execution is not granted.

7. To begin with this court observes that the Applicant in its supporting affidavit merely repeated its argument in the trial court and also merely urged the grounds of their intended appeal. The Respondent also followed suit in the replying affidavit to respond to those issues. I must point out that those issues are the ones to be argued in the Court of Appeal. It is not for this court to consider the merits of the intended appeal. However, the court can only peep into merits briefly, to see if there is an arguable appeal. It is the finding of this court that the supporting and replying affidavits herein are not very useful in helping the court to determine the issues.

8. A stay of execution should not be granted whimsically. When a party has a Judgment or a decree in its favour, the Judgment creditor is entitled to enjoy the fruits of the Judgment. However, because the Judgment debtor has a right of appeal, it is the duty of the court to which an application for stay of execution is brought to exercise its discretion according to the law to ensure that if the intended appeal were to be rendered nugatory, a stay is issued on terms approved by the law. Under **Order 42 Rule 6 of the Civil Procedure Rules**, there are three grounds upon which a court can issue stay of execution:

(a) that the application is brought without undue delay;

(b) the court is satisfied that substantial loss may result to the applicant unless stay of execution is ordered; and

(c) 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.

9. Now, considering all the three factors above, it is clear and all parties accept that the application has been brought in good time and so the Application on this ground is merited. On the issue of substantial loss occurring if the stay is not granted, it is firstly to be noted that the decree here is a monetary decree. There is already a Judgment creditor who should be enjoying the fruits of the said Judgment. The question then to raise is the capacity of either of the parties herein either to pay the decretal sum, or to refund the same should the intended appeal succeed. It has been alleged that the sums due under the decree is over Kshs. 80,000,000/= . That is a lot of money. The issue is whether or not any of the parties would find it difficult to pay that sum of money, either now or after the appeal proceedings. As I have already noted the parties before the court are both government entities. The Respondent is a Central Government funded corporation, while the Applicant is a County Government. Both of them are in business and both of them make good money. The decree herein being a money decree, both parties would not have a problem either paying the decretal sum now, or refunding the same after the intended appeal. It is not the duty of the court to assist a party to avoid paying legitimate debt. The decree herein is legitimate. The intended appeal cannot be rendered nugatory if the decree is paid now since the Respondent is capable of refunding the said sum should the appeal succeed. It is the finding of this court that this is a clear case of the Applicant suffering no substantial loss if the stay is not granted. It is also the finding of this court that this is a clear case of allowing the Judgment creditor to enjoy the fruits of its Judgment.

10. Pursuant to the foregoing, there is no need to explore the third condition, that is, provision of security.

11. In conclusion, it is the duty of this court to affirm the right of the decree holder to enjoy the fruits of such a decree unless there are valid reasons to stay such enjoyment pending appeal.

12. In the upshot the Application for stay of execution dated 15th December, 2016 is herewith dismissed. Costs shall be for the Respondent.

Orders accordingly.

Dated, Signed and Delivered in Mombasa this 7th day of

March, 2017.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Cheruiyot holding brief Akanga for Petitioner/Respondent

Mr. Mogaka holding brief Mr. Mohamed for Applicant/Respondent

Mr. Kaunda Court Assistant