



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL SUIT NO.375 OF 2011**

**CHAPTER PROPERTY CONSULTANT LIMITED.....PLAINTIFF**

**VERSUS**

**TANATHI WATER SERVICES BOARD.....DEFENDANT**

**R U L I N G**

1. The Defendant herein, Tanathi Water Services Board, moved the Court vide the application dated 24<sup>th</sup> March 2016 for orders that the Court be pleased to order a stay of execution of the Decree herein together with all consequential orders arising therefrom pending the hearing and determination of the appeal lodged by it from the Judgment of the Court dated 15<sup>th</sup> January 2016. The application is expressed to have been filed under Section 3A of the Civil Procedure Act and Order 42 Rule 6(1), and Order 51 Rule 1 of the Civil Procedure Rules. It is supported by the affidavit annexed thereto sworn by **FIDELLIS MUEKE NGULLI** on 24<sup>th</sup> March 2016.

2. The grounds relied on by the Defendant are set out in the notice of Motion thus:

- (a) That Judgment herein was delivered on the 15<sup>th</sup> January 2016 in favour of the Plaintiff/Respondent.
- (b) That the Defendant/Applicant is aggrieved by the said Judgment and has preferred an appeal therefrom.
- (c) That there is a high and probable likelihood that execution may issue at any time in the absence of stay orders.
- (d) That the Defendant/Applicant has an arguable appeal that raises serious triable issues, and any execution herein will render the appeal nugatory.
- (e) That the Defendant/Applicant stands to suffer irreparable loss and/or harm if the orders sought are not granted.
- (f) That no prejudice whatsoever will be visited upon the Plaintiff/Respondent if the Orders sought herein are granted; and

(g) That it is in the interests of justice that the orders sought be granted.

3. The grounds aforesaid have been amplified in the Supporting Affidavit to which the Plaintiff/Applicant annexed here following documents:

(a) **A copy of the Judgment delivered on 15<sup>th</sup> January 2016.**

(b) **A copy of the Application to the Court of Appeal seeking leave to appeal out of time.**

(c) **A copy of the letter dated whereby the Plaintiff/Respondent forwarded a draft decree to the Defendant for approval.**

(d) **Draft Decree itself.**

The Defendant/Applicant thus urged the Court to grant stay of execution pending the hearing and determination of the Appeal, which it believes raises serious triable issues.

4. The Plaintiff/Respondent opposed the application, and to that end relied on the affidavit sworn on 12<sup>th</sup> April 2016 by **BERNARD WOIE KAVIVYA**, in which it was averred that the decretal sum was based on a written contract that was signed by both parties, and that after the entry of judgment, the Advocates for the Defendant wrote to the Plaintiff's advocate seeking accommodation. Thereafter negotiations on Party and Party costs also commenced in the belief that the defendant was keen on settling the Decree. The Plaintiff/Respondent thus contends that the turn around by the Defendant/Applicant and its decision to appeal the Judgment should be taken as indicative of a lack of integrity as it borders on trickery and dishonesty.

5. It was further averred on behalf of the Plaintiff/Respondent that:

(a) Mr Ngulli is not competent to swear the Supporting affidavit as he deponed to matters that were not within his personal knowledge.

(b) The application seeks an order of stay pending appeal and yet no Appeal or Notice of Appeal had been filed.

(c) That in the Court of Appeal application annexed to the application herein the applicant sought for an order of stay of Execution; and therefore that it is an abuse of the Court process for the Applicant to seek similar orders herein.

6. In addition to the Supporting Affidavit the Plaintiff/Respondent filed a notice of Preliminary Objection based on ground (c) above. The Notice is dated **22<sup>nd</sup> April 2016**, and although this point was not taken up specifically before the application was argued, the Court is obliged to deal with it upfront, being satisfied as I am, that it falls within the parameters set out in **Mukisa Biscuits Manufacturing** case, namely that:

**“... A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit.” (Emphasis added)**

7. A perusal of the record herein does confirm that the Defendant lodged a Notice of Appeal, pursuant to Rule 75 of the Court of Appeal Rules, on the 17<sup>th</sup> May 2016 and therefore although no appeal has so far been filed, for purposes of Order 42 Rule 6 of the Civil procedure Rules, the notice suffices, for Rule 6(4) provides that:

**“ For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.”(Emphasis added)**

8. It is noteworthy however that on the **25<sup>th</sup> February 2016**, the Defendant filed an application before the Court of Appeal under **Rules 4, 5(2)(b), 41,42 and 47 of the Court of Appeal Rules** seeking extension of time within which to appeal the Judgment herein, and one of the prayers therein is for stay of proceedings and/or execution of the judgment delivered on 15<sup>th</sup> January 2016 “ pending the hearing and determination of the Intended appeal by the applicant.”

9. It is evident therefore that the instant application which seeks a similar order was filed about one month thereafter, and is therefore a manifest contravention of **Section 6 of the Civil Procedure Act, Chapter 21 of the Laws of Kenya** which provides that:

**“No court shall proceed with the trial of any suit or proceeding in which the subject matter is in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed.”**

10. It is now trite that it amounts to abuse of the process of the Court for a party to file similar applications seeking same relief in respect of the same subject matter before different courts. Besides, it offends the provisions of **section 1B of the Civil Procedure Act** that favours efficient use of the available Judicial and administrative resources, including time.

11. In the premises I would uphold the preliminary objection and find that the Notice of Motion dated 24<sup>th</sup> March 2016 is indeed an abuse of the Process of the Court. The same is hereby struck out with costs.

**Dated, signed and delivered at Nairobi this 8<sup>th</sup> day of July 2016.**

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**OLGA SEWE**

**JUDGE**