



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 291 OF 2013**

**NATIONAL WATER CONSERVATION & PIPELINE CORPORATION.....  
....APPLICANT**

**-VS-**

**NGATUNYI ENTERPRISES LIMITED.....RESPONDENT**

**RULING**

[1] The Notice of Motion dated 24<sup>th</sup> September 2013 is essentially one for stay of execution pending appeal under Order 42 Rule 6 of the Civil Procedure Rules. The said application is premised on the following grounds:

1. *That the Applicant has appealed against the whole judgment delivered on 16<sup>th</sup> August 2013 against them.*
2. *The Applicant is likely to suffer irreparable loss if stay of execution is not granted.*
3. *The Applicant is ready to comply with any orders as may be directed by the Honourable court.*
4. *The Applicant's appeal has high chances of success.*
5. *The Applicant may apply for execution any time.*

[2] The application was opposed through Grounds of Opposition filed in court on 16<sup>th</sup> October 2013. In those grounds of opposition, it was contended that the Applicant has not met the threshold for stay of execution pending appeal, and that the Respondent should not be deprived of the fruits of his judgment without good reason. The Respondent, however, urged as an alternative path that, if stay is granted then he should be paid at least half the decretal amount and balance be invested in interest earning account. The basis for that submission is that the Applicant had during trial agreed owing the Respondent a sum of Kshs 180,000.

[3] The parties also filed submissions in support of their respective positions outlined above. The Applicant submitted that it is a state parastatal and it is allocated money through budgetary allocation for specific budgeted activities within the financial year and therefore, if the Respondent executes the decree herein against it two things will happen; (1) the Applicant will be forced to stop budgeted activities to pay the decretal sum as the same had not been previously budgeted for in the financial; and (2) it will be unable to perform financial obligations to the tax payers. In addition, they argued that, in the event their appeal is successful, they will not be able to recover the decretal sum from the Respondent who has confirmed that the company has collapsed, is highly indebted and will therefore not be in a position to refund the amount herein once it is

paid over to them. The Applicant saw substantial loss occurring if the above incidents were to happen.

[4] It was further submitted for the Applicant that he was ready to conform to the terms that this honourable court may deem fit to set for the grant of stay orders subject to Order 48 Rule 8 in respect of security from the government.

[5] The Applicant also submitted that this application was filed without unreasonable delay for it was filed on 24<sup>th</sup> September 2013 whereas the judgment whose execution the Applicant seeks to stay was delivered on 16<sup>th</sup> August 2013. The memorandum of appeal was filed on 13<sup>th</sup> September 2013.

[5] On the other hand, the Respondent submitted that this application for stay was an attempt to misuse the process of court and is made for ulterior motive. The ill will is in the fact that the Applicant is not interested in prosecuting the appeal and their intention is to continue enjoying court orders. It was further submitted that under Order 22 sub rule 3 of the Civil Procedure Rules, before making an order to stay execution or for the restitution of the property or the discharge of the judgment debtor the court may require such security from or impose such conditions upon the judgment debtor as it thinks fit. It was further submitted that the argument by the Applicant that they will suffer irreparable loss if the stay order is granted was baseless as it was the Respondent who was going to suffer irreparable loss if the stay of execution was granted.

## **DETERMINATION**

[7] I have carefully considered this application and the rival submissions by the parties. As I have already stated, this is an application for stay of execution pending appeal, The jurisdiction of the court to grant such stay is governed by Order 42 Rule 6(2) of the Civil Procedure Act. Under that law, the Applicant must show sufficient cause that a stay is merited. And in reaching that decision, the court will be guided by some traditional considerations, namely:

***1) Whether the application has been brought without unreasonable delay;***

***(2) Whether the Court is satisfied that substantial loss would occur unless stay is granted; and***

***(3) On being convinced that stay is deserved, the kind of security the Applicant should furnish which shall be sufficient to satisfy any decree that might ultimately be binding on the Applicant.***

### **Timeous application**

[8] I will start with the first requirement which is relatively straight forward. This application was filed on 24<sup>th</sup> September 2013. The judgment in question was delivered on 16<sup>th</sup> August 2013. Approximately period of 38 days lapsed between these two events which in my view does not amount unreasonable delay. Therefore, I hold and find that the Applicant has satisfied the first condition precedent for granting of an order of stay. I move on to the next hurdle which is more substantial.

### **Substantial loss occurring**

[9]It is not lost to me that the purpose of a stay pending appeal is to preserve the subject matter of appeal. On this see the case of **JETHWA vs. SHAH T/A SUPREME STYLES (1989) KLR 198** where the Court of Appeal held that:-

***“The purpose of an application for stay is to preserve the subject matter in dispute so that the rights of an appellant who is exercising his undoubted right of appeal are***

***safeguarded and the appeal if successful is not rendered nugatory.”***

It also not lost to me that the Respondent also has right to immediate realization of its judgment. These two competing rights must be balanced to almost legal symmetrical bound. It therefore, becomes imperative that the court should examine the facts before it to see whether substantial loss would be visited upon the Applicant if he is asked to pay over the decretal sum to the Respondent- this is the cornerstone of this jurisdiction. In money decrees, substantial loss lies in the Respondent’s inability to refund the decretal in the event the appeal succeeds. Is that possibility of substantial loss occurring present in this case?

[10] The Applicant has submitted that the Respondent has confirmed that the company has collapsed, is highly indebted and will therefore not be in a position to refund the amount herein once it is paid over to them. I note with curiosity the following submission was made by the Respondent:-

***“The refusal to pay by the Applicants/appellants has forced the Respondent to close shop.***

That submission shows some form of financial limitation on the part of the Respondent which is an important consideration in applications such as this. But I note with a lot of trepidation that the embarrassing financial status of the Respondent may have a connection with the facts of this case. That notwithstanding, I should state that besides the above submission, there is nothing to show the submission reflects the real status of the company. In these circumstances, the whisper from the Constitution and the overriding objective is that, as I interpret the prescriptions of the law, I should have a broader sense of justice. Accordingly, despite the submission on the diminished fortunes of the Respondent two things are necessary to fathom; (1) that the Respondent has a judgment in its favour; and (2) that the Applicant had proposed to pay Kshs. 180,000 during the trial and evidence thereto is on record. When I take all these matters into consideration, I am persuaded that a stay is merited but on what conditions? Accordingly, I order a stay of execution pending the determination of the appeal herein on condition that the Applicant:-

- 1. Shall pay a sum of Kshs. 180,000 to the Respondent within 60 days;***
- 2. Shall, within 120 days pay the balance of the decretal sum into a joint interest earning account in the names of counsels for the parties herein; and***
- 3. Costs of the application shall be in the cause.***

As it was submitted for the Applicant that they were ready to conform to the terms that this honourable court will deem fit to grant, I hope they will do so. I have set the above timelines to enable the Applicant source for funds without undue anxiety. Similarly, the above orders preserve the subject matter of the appeal and also guarantee the rights of the Respondent. Therefore, in the event of default on any of the orders, the stay of execution granted will automatically lapse and the Respondent will be at liberty to execute. It is so ordered.

**Dated, signed and delivered in open court at Meru this 13<sup>th</sup> day of July 2016**

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**F. GIKONYO**

**JUDGE**

**In the presence of:**

Mr. Kaumbi advocate for Mr. Kioni advocate for appellant.

M/s. Kiome advocate for respondent.

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**F. GIKONYO**

**JUDGE**