



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI

ELC CASE NO. 724 OF 2017

(FORMERLY KISII ELC CASE NO. 538 2017)

PATRICK J. O. OTIENO.....PLAINTIFF/RESPONDENT

VERSUS

LAKE VICTORIA SOUTH WATER

SERVICES BOARD.....DEFENDANT/APPLICANT

RULING

1. The present ruling is in regard to an application by way of a Notice of Motion dated 18th August 2020 lodged in court on the even date pursuant to Order 42 Rule 6 and 7, Order 51d Rule 1 of Civil Procedure Rules, 2010, sections 3 and 3A of the Civil Procedure Act and all enabling provisions of the law. The applicant, Lake Victoria South Water Services Board through M/S Staussi and Asunah Advocates is seeking the orders infra;-

a) Spent

b) Spent

c) THAT there be a stay of execution of the Judgment in this suit pending hearing and determination of the intended Appeal.

d) Spent

e) THAT such orders be made as are just and expedient

f) THAT costs to be in the cause.

2. The application is anchored on grounds (a) to (f) set out on its face as well as the supporting affidavit of 16 paragraphs sworn on even date by Engineer George Odede, the acting Chief Executive Officer of the applicant and a copy of the judgment rendered herein on 28th July 2020 and Notice of Appeal annexed thereto and marked as "GO1" and "GO2" respectively. Briefly, the applicant contends that a notice of appeal has been filed in respect of the judgment and that the applicant would not be able to raise the adjudged sum and restore the respondent's land, Title number Kanyamkago/Kawere II/1224 within the timelines as ordered by this court. That the appeal would be rendered nugatory if the orders sought herein are not granted. That the respondent may be unable to refund the adjudged sum at once should the appeal succeed and that the appeal has high chances of success.

3. The applicant also contends that the instant application has been brought within reasonable time. That the applicant is willing to abide by such reasonable terms as the court is ready to give including depositing a bank guarantee for one third of the adjudged sum in the interest of justice.

4. In his 22-paragraphed replying affidavit sworn on 10th September 2020 and filed in court on even date, the respondent, Patrick J. O Otiemo represented by M/S Okongo, Wandago and Company Advocates, opposed the application, termed it devoid of merits and sought dismissal of the same with costs. He deposed, inter alia, that whereas the applicant has right of appeal and that a notice of appeal has been filed and served, an appeal does not attract an automatic stay of the judgment and the decree appealed against. That the applicant has failed to satisfy all the conditions set out under Order 42 (supra) save that the application has been mounted without delay. That there is no reasonable ground for holding and or evidence led in support of the alleged belief that the respondent will be unable to refund the adjudged sum in case the appeal succeeds.

5. The respondent further deposed that granting the order of stay in the circumstances herein, will be highly prejudicial to him and the wider public since loss and damages will be aggravated. That the applicant had prepared and availed a report admitting to environmental degradation and prepared a budget in the sum of Ksh 199, 000, 000/= towards mitigating the environmental hazard. That no justification has been made to stay the environmental restoration order made by this court in the judgment. The respondent reinforced the replying affidavit by annexed copy of the environmental restoration order and a copy of the applicant's evaluation report marked as "PJ001" and "PJ002" respectively.

6. On 20th August 2020, this court ordered and directed the parties to argue the application by way of written submissions; see **Order 51 Rule 16 of the Civil Procedure Rules, 2010 and Practice Direction number 33 (a) and (b) of this court's Practice Directions, 2014.**

7. Accordingly, on 30th August 2020, learned counsel for the applicant filed and served submissions dated 28th August 2020 making reference to the terms of judgment rendered by this court on 28th July 2020, the orders sought in the application and that the applicant would suffer substantial loss should the stay sought in the application is not granted for reasons, inter alia, that the applicant's property would most likely be attached thereby crippling the applicant's operations and that the appeal would obviously be rendered nugatory. Reliance was made on a persuasive authority of *James Wangalwa and another v Agnes Naliaka Cheseto (2012)eKLR*, and the Court of Appeal decision in *National Industrial Credit Bank Ltd-vs-Aquinas Francis Wasike and another (2006)eKLR*, thereof.

8. Counsel submitted that as regards the issue of security, the applicant has offered to provide a bank guarantee for one third (1/3) of the decretal sum or award, given the amount involved. Thus, counsel urged this court to find the said security offered adequate as envisaged under Order 42 Rule 6(2)(b) (supra) and in the circumstances of this case. To buttress the argument, counsel cited persuasive decisions in *Focin Motorcycle Co. Ltd-vs-Ann Wambui Wangui and another (2018)eKLR*, and *RWW-vs-EKW (2019)eKLR*.

9. The respondent's counsel filed submissions dated 10th September 2020 on even date and argued that this application is not merited hence urged this court to dismiss the same with costs. That the court's jurisdiction to grant an order of stay sought herein under Order 42(supra), is fettered by the three (3) conditions set out thereunder. That availing of a bank guarantee as submitted by the applicant is not sufficient security in the circumstances of the case and that urgent efforts be made for the restoration of the environment for present and future generations.

10. Counsel further submitted that the applicant has not illustrated what substantial loss shall be suffered if the order of stay sought in this application is not granted. That it is in the discretion of the court to grant the orders. That the applicant has not shown sufficient cause upon which the orders can be granted and cited the reasoning of Madan JA (as he then was) in *Butt-vs-Rent Restriction Tribunal (1982) KLR 417 and Kenya Shell Ltd v Kibiru (1986) KLR 410 at 416.*

11. This court has duly examined the entire application, the replying affidavit and the rival submissions including all authorities cited therein. The three (3) conditions for the grant of stay pending appeal are premised under Order 42 Rule 6(2) (supra) which reads:

"No order for stay of execution shall be made under sub-rule (1) unless;-

The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

***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."* (conditions emphasized)**

12. On the issue of delay, in paragraph 13 of the applicant's supporting affidavit to the application, it is deposed that the application has been brought within reasonable time. The respondent affirmed in paragraph 4 of his replying affidavit that apparently the application has been made without unreasonable delay.

13. It is common ground that judgment in this suit was rendered on 28th July 2020 in favour of the respondent. That the instant application was initiated on 18th August 2020. This court is quite conscious of the computation of days under **Order 51 Rule 8 of the Civil Procedure Rules, 2010.** Clearly, the application was mounted on the 21st day (3 weeks) after delivery of the judgment.

14. In the case of *Philip Chemwolo and others-v Augustine Kubende (1982-88) KAR 103*, Apaloo JA (as he then was) observed that four (4) weeks' delay judged against the facts of the case and surrounding circumstances, would be an extreme penalty and would be wrong and unjust. I subscribe to the said decision accordingly. In the foregone circumstances, I find that the present application has been mounted without unreasonable delay.

15. Concerning substantial loss, I note grounds (c) and (e) of the application and paragraphs 4, 6 to 9, 9, 11 and 12 of the supporting affidavit to the application. At paragraph 11 of the affidavit, it is deposed thus:-

" THAT the defendant/applicant will be highly prejudiced and stand to suffer irreparable loss if the orders sought are not granted as her property risks being auctioned since she would be unable to raise the huge amount of money comprised in the Judgment within the earlier period of stay or at all."

16. In the replying affidavit, the respondent deposed that the applicant has not proved the likely substantial loss to be suffered if the application is not allowed. That the form of loss has not been disclosed hence making the allegations in the application bare and speculative in the circumstances. At paragraph 20, he deposed that:-

“I therefore, I verily believe that the applicant has miserably failed to disclose the nature and extent of substantial loss which they stand to suffer or the particulars of such alleged substantial loss.”

17. The respondent further deposed inter alia, that the sum awarded to him as damages in the Judgment is not comparable to the amount the applicant is prepared to use to restore the environment as revealed in the Judgment. Further guidance thereof is found in the principles under section 18 (a) (vi), (b),(c),(d) and (e) of the Environment and Land Court Act, 2015 (2011).

18. In ***Blue Shield Insurance Co. Ltd-vs-(2009) KLR 551 at 560 and 561*** the Court of Appeal held that:

“We are satisfied that if the application for stay of execution of judgment is not allowed, the intended appeal will not only be rendered nugatory, but also that the applicant is likely to suffer great hardship in the nature of financial loss which would be out of proportion to the loss that the respondent is likely to suffer....” (Emphasis supplied)

19. It is settled law that it is not merely sufficient for the applicant to state that he or she is likely to suffer substantial loss if the application for stay of execution is not granted. That in the absence of evidence and bearing in mind the interest of the parties, the orders of stay of execution are sought in a vacuum; see ***Mukoma –vs- Abuoga (1988) KLR 645***.

20. **Article 159 (2)(a) of the Constitution of Kenya** stipulates that justice shall be done to all, irrespective of status. It is well noted that the applicant and the respondent are a statutory body and a state officer respectively. However, status of a party is not one of the prerequisites for the grant of the orders sought in the application.

21. In ***New Stanley Hotel Ltd –vs- Arcade Tobacconist Ltd (1980) KLR 757***, it was held that the applicant ought to demonstrate to the satisfaction of the court that if no stay was granted, the applicant would suffer substantial loss. In the instant case, the applicant has not demonstrated such loss and as envisaged in ***Blue Shield case (supra)***.

22. In respect of security, the applicant has proposed a bank guarantee to the extent of a third ($\frac{1}{3}$) of the adjudged or decretal sum for the performance of a decree. This court is aware of the meaning of the term “**Guarantee**” under **Article 260 of the Constitution (supra)**.

23. In ***Doshi Iron Mongers Ltd -vs- Kenya Revenue Authority and another (2020) eKLR***, the Court of Appeal held that a statutory body is not exempt from providing security for the due performance of a decree. That the provisions of section 94 of the Civil Procedure Act Chapter 21 Laws of Kenya equally apply to such a body. The applicant has not provided security as defined at **page 1558 in the Black’s Law Dictionary 10th Edition and as commanded under Order 42 Rule 6 (2) (supra)**, in the obtaining circumstances.

24. Moreover, this court has the discretion to grant the stay sought depending on the circumstances. Nonetheless, the discretion should not be exercised in a way to prevent the appeal or render it nugatory being guided by ***National Industrial Credit Bank, Butt and Kenya Shell Ltd cases (supra)***, among other relevant authorities. Besides, a party has a vested right to the judgment which ought to be effectual as held in ***Valji Shahmad-vs-Shamji Bros and Popatial Karman and Company Ltd (1957) EA 438 and Mbutia Macharia –v- Anna Mutua Ndwiga and another (2017) eKLR***.

25. It is trite law that the court has authority to issue orders for the preservation, in the interim, of a subject matter of appeal; see the Supreme Court of the Republic of Kenya decision in ***Board of Governors, Moi High School, Kabarak and another-vs- Malcolm Bell (2013) eKLR***.

26. In the case of ***Trust Bank Ltd –vs-Ajay Shah and 3 others (2012) eKLR, at 22***, it was held that:

“The conditions set out in Order 42 Rule 6 (2)(a) are cumulative. All the three must be satisfied before a stay can be granted. The appellants only satisfied one condition and failed to satisfy the others.”

27. In the premises, I find that a part from the condition regarding delay, the applicant has not satisfied the other two (2) conditions for grant of stay as set out in **Order 42 Rule 6 (2) (supra)**. Furthermore, the stay of execution granted on 28th July, 2020, lapsed. To grant another order of stay, would be a direct affront to Article 159 (2) (b) and (e) of the Constitution (**supra**) and amount to an abuse of the process of the court. Therefore, the application is devoid of merits.

28. A fortiori, the application mounted by way of a notice of motion dated 18th August 2020, and duly filed in court on even date, is hereby disallowed. Costs of the application to be borne by the applicant by dint of the proviso to **section 27 (1) of the Civil Procedure Act Chapter 21 Laws of Kenya**.

DATED SIGNED AND DELIVERED in open Court at MIGORI this 9th day of November 2020.

G.M.A. ONGONDO

JUDGE

In presence of :-

Mr. M. Odero learned counsel for the respondent

No appearance for applicant

Tom Maurice – Court Assistant