



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**MIS APP NO. 32 OF 2018**

**SEA STAR MALINDI LIMITED.....PLAINTIFF/RESPONDENT**

**VERSUS**

**KENYA WILDLIFE SERVICES.....DEFENDANT/APPLICANT**

**RULING**

1. By this Notice of Motion application dated 27<sup>th</sup> December 2018, Kenya Wildlife Services (the Defendant/Applicant) prays for orders: -
  1. ....
  2. ....
  3. *That this Honourable Court be pleased to grant a stay of execution of the Judgment dated 31<sup>st</sup> July 2018 in respect to Sea Star Malindi Ltd –vs- Kenya Wildlife Services ELC No. 56 of 2016 pending the hearing and determination of the intended Appeal.*
  4. *That this Honourable Court be pleased to extend the timelines and grant the Defendant/Respondent leave to file an appeal, out of time against the said Judgment delivered by the Court in ELC No. 56 of 2016.*
  5. *That consequently the Notice of Appeal duly filed on 28<sup>th</sup> December 2018 be deemed as duly and properly filed and admitted into Court record.*
  6. *That the costs of this application be in the cause.*
2. The application is supported by an Affidavit sworn by Lily K. Musinga Advocate and is anchored on the grounds inter alia: -
  - i. *That the Defendant wishes to appeal against the Judgment delivered on 31<sup>st</sup> July 2018 in favour of the Plaintiff/Respondent in Malindi ELC No. 56 of 2016; Sea Star Malindi –vs- Kenya Wildlife Services;*
  - ii. *That the stipulated timeline for filing the said appeal lapsed;*
  - iii. *That despite the prospects of the intended appeal there is inherent risk that the Plaintiff will institute execution whereof the Applicant will suffer irreparable financial harm; and*
  - iv. *That the Applicant is willing to abide by such terms and conditions that the Court may impose.*
3. In response to the application, the Plaintiff filed Grounds of Opposition dated 24<sup>th</sup> January 2019 in which they state that: -
  1. *The application is misconceived, does not lie and is an abuse of the process of Court;*
  2. *The mandatory requirements for stay to be granted in the circumstances presented in this case have neither been met nor an attempt made to meet them and in the absence of compliance there is no provision in law or procedure of the Court or even its inherent powers that contemplate a stay or arrest of execution of Judgment as prayed for in the application;*
  3. *The Defendant is seeking an equitable remedy from this Court and yet they have failed to apply the principles of equity in*

*dealing with the Plaintiff during the pendency of the suit;*

**4. The Plaintiff has painstakingly gone through the hearing of ELC No. 56 of 2016, which commenced over 20 years ago and now that they have the fruits of a positive Judgment the same cannot be withheld any longer in the manner proposed by the Defendant/Judgment-Debtor;**

**5. The Defendant has had ample opportunity to mitigate their exposure over the course of hearing this matter but they have remained obstinate in engaging the Plaintiff and cannot plead risk of financial harm at this juncture especially because they are a government body;**

**6. The Applicant has not demonstrated why they delayed in filing their appeal and the legal and factual basis thereof; and**

**7. The application is devoid of any merit and there will be material prejudice if the Plaintiff is estopped from pursuing and obtaining the fruits of a victorious, long, hard fought Court Process.**

4. I have considered the application and the Grounds of Opposition thereto. I have equally considered the oral submissions of the Learned Advocates for the respective parties as canvassed before me.

5. As it were, the Applicant craves an extension of time to file an Appeal from the Judgment of this Court in respect of **Malindi ELC No. 56 of 2016** as well as a stay of execution of the said Judgment delivered on 31<sup>st</sup> July 2018 pending the resolution of the appeal to be filed.

6. The power to grant leave extending the period of filing an appeal out of the statutory period is discretionary and must be granted on a case by case basis. That discretion as any other must be exercised judiciously and only after a party seeking the exercise of the same places before the Court sufficient material to persuade the Court that the discretion should be exercised on its behalf and in their favour.

7. Some of the factors to be considered as were stated by the Court of Appeal in **Mwangi –vs- Kenya Airways Ltd (2003) KLR** include the following: -

**a) The period of delay;**

**b) The reason for the delay;**

**c) The degree of prejudice which could be suffered by the Respondent if the extension is granted;**

**d) The importance of compliance with time limits to the particular issue or litigation; and**

**e) The effect if any on the administration of justice or public interest if any is involved.**

8. In the matter before me, the Applicant does not offer much by way of the Supporting Affidavit in explanation of the delay that occurred herein in lodging the Appeal. At paragraphs 3,4 and 5 of the Supporting Affidavit of Lily K. Musinga, the deponent simply avers as follows: -

**“3. That the defendant wishes to appeal against the Judgment delivered on 31<sup>st</sup> July 2018 in respect to Sea Star Malindi –vs- Kenya Wildlife Service ELC Number 56 of 2016 in its entirety.**

**4. That nonetheless the stipulated timeline for filing the said appeal has since lapsed.**

**5. That consequently the applicant seeks leave of this Honourable Court to file the appeal out of time.**

9. It was accordingly not easy for this Court to discern when the Applicant learnt of the said Judgment from the pleadings filed herein. In his oral submissions before this Court however, Mr. Okoko, Learned Counsel for the Applicant informed the Court that they were not aware of the date of delivery of the Judgment and only learnt of the same when they received a letter from the Respondents attaching a draft decree.

10. While the oral submissions of Counsel did not count much for evidence, a perusal of the record reveals that the impugned Judgment was delivered on notice having failed to be delivered in the date it was scheduled. On the date of its delivery, the Applicants were not represented in Court and it is possible they only learnt of the same when they received the Respondent’s letter dated 30<sup>th</sup> October 2018 attaching the decree and seeking their approval thereof.

11. A perusal of the letter attached to the Applicant’s Supporting Affidavit and marked DM-03 reveals that it was received at Musinga & Company Advocates on 27<sup>th</sup> November 2018. Given that the present application was filed about a month later on 28<sup>th</sup> December 2018, I am prepared to accept, given the consultations that are said to have been required, that the application before me was made within a reasonable time.

12. As it were, I am unable to see any substantial adverse effects granting the extension of time will have on the Plaintiff/Respondent other than permitting the Applicants to exercise the preciously cherished right of appeal.

13. In regard to the application for stay, Order 42 Rule 6(2) of the Civil Procedure Rules provides as follows: -

***“No order for stay of execution shall be made under subrule (1) unless-***

***a) 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***

***b) 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.”***

14. Arising from the said provisions, I think it was incumbent upon a party seeking a stay of execution pursuant to the said provisions, as is the case herein, to as it were, demonstrate and/or satisfy the Court that it stands to suffer substantial loss unless the Order is made.

15. In the application before me, the Applicant does not allude to any possibility of such a loss. Indeed the nearest it comes to making any reference to the need for stay is at paragraph 6 of the Supporting Affidavit where the Applicant asserts as follows:

***“6. That despite the prospects of the intended appeal there is inherent risk the Plaintiff will institute execution whereof the applicant will suffer irreparable financial harm.”***

16. While it is true that the decretal sum is substantial, nothing was placed before me to suggest that the payment of the said sum would lead to irreparable financial harm to the Applicant. Indeed, I did not hear the Applicant contend that the Respondent is, as they say, a man of straw incapable of refunding the decretal sum where the intended appeal were successful.

17. As Mr. Anami, Learned Counsel for the Respondent submitted, the Applicant is a Government agency and there is in place a very elaborate and robust procedure laid out under the Government Proceedings Act that a successful litigant has to go laboriously through before any execution can issue against such an agency. Given that this matter has been in Court since 1997, I did not find any sufficient reason to hinder the Plaintiff from enjoying the fruits of its long sought Judgment.

18. Accordingly, the application dated 27<sup>th</sup> December 2018 only succeeds partially in terms of Prayer 4 and 5 thereof. The application is disallowed in terms of Prayer No. 3.

19. The Defendant/Applicant shall pay the costs of this Application.

**Dated, signed and delivered at Malindi this 8<sup>th</sup> day of October, 2019.**

**J.O. OLOLA**

**JUDGE**