REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 28 OF 2013

WATER RESOURCES

MANAGEMENT AUTHORITY.....PLAINTIFF/RESPONDENT

VERSUS

KENSALT LIMITED.....DEFENDANT/APPLICANT

RULING

1. On or about 21st November 2013, the Plaintiff, Water Resources Management Authority instituted this Suit in the High Court at Malindi claiming a sum of Kshs 270,295,759.90/= being water use charges allegedly due from the Defendant-Messrs Kensalt Ltd, for the use of sea water in its manufacturing process.

2. On or about 20th January 2014, the Defendant filed its defence wherein it did admit that it manufactures salt from sea water and the fact that the Plaintiff has the statutory mandate to levy "water use charges" in respect of water resources. The Defendant however denied that the Plaintiff has any locus standi and jurisdiction to institute this suit and/or to require the Defendant to submit a self assessment form in respect of its use of sea water in respect of the Defendant's salt manufacturing process.

3. Contemporaneous with the Defence, the Defendant filed a Notice of Motion Application dated 17th January 2014 seeking to have the suit struck out on grounds that:-

i. The Plaintiff did not have the requisite locus standi to bring these proceedings;

ii. The Plaintiff had no mandate either under the Constitution, the Water Act or any other law, and therefore no jurisdiction to levy charges for the use of sea water;

iii. In turn, by reason of the Plaintiff's lack of locus standi, the Court had no jurisdiction to levy charges for the use of sea water;

iv. Sea water is 'res nullius' and incapable of ownership in law or in equity; and

v. The Plaintiff was, in any event, constitutionally barred from levying a tax in the absence of an express provision permitting it to do so either under the Water Act or the Water Rules.

4. By a Ruling delivered on 17th October 2014, Hon. Justice Angote then seized of the matter allowed the application thereby striking out these proceedings on all the grounds submitted except on the ground that 'sea water was "res nullius".

5. Aggrieved by the said Ruling, the Plaintiff lodged an appeal to the Court of Appeal. On its part, the Defendant opposed the Appeal and also filed a Notice of Cross-Appeal challenging the said Ruling in so far as it held that sea water was not "res nullius".

6. By a Judgment delivered on 22nd April 2016, the Court of Appeal allowed both the Appeal and the Cross-Appeal, set aside the Orders of the Environment and Land Court and ordered that his matter be tried by any other Judge other than the Honourable Mr. Justice Angote.

7. Feeling aggrieved by the Court of Appeal decision, the Defendant has since lodged an appeal to the Supreme Court, being Supreme Court Petition No. 9 of 2016.

8. Subsequently, by the Notice of Motion presently before me and dated 16th February 2017, the Defendant now prays for an Order:-

> ***(c) That all proceedings in this suit be stayed pending the hearing and determination of the Supreme Court Petition, being Petition No. 8 of 2016(Kensalt Limited and Water Resources Management Authority) filed by the Respondent against the whole of the Judgment of the Court of Appeal in Malindi Civil Appeal Number 9 of 2015(Water Resources Management Authority and Kensalt) delivered on 22nd April, 2016.***

9. The Defendant's Application is premised on the grounds inter alia:

> ***a) That the case before the Supreme Court has far reaching implications that may impact not only on the present parties but other parties involved in the salt manufacturing industry such as Krystalline Salt which has since applied to be enjoined in the Supreme Court Petition;***
>
> ***b) That it is important that this application is heard and disposed of first before this Court can give directions and proceed to fix this matter for hearing as ordered by the Court of Appeal;***
>
> ***c) That proceeding with this suit would render the entire purpose of the Supreme Court Petition otiose by reason of the fact that the Supreme Court Petition is based on the twin issues that the Plaintiff herein has no locus standi to bring this suit as well as the fact that this Court also has therefore no jurisdiction to entertain this suit; and***
>
> ***d) That it is in the interest of justice that a stay of all proceedings in this suit be granted pending the hearing and determination of the Supreme Court Petition.***

10. By a Replying Affidavit sworn and filed herein on 19th April 2017 by its Chief Executive Officer Mohamed Moulid Shurie, the Plaintiff is opposed to the orders sought by the Defendant herein. It is the Plaintiff's case that the Court of Appeal has found that the questions of whether or not the Plaintiff/Appellant had the power to control or regulate the use of sea water or levy charges for its use, whether sea water is res nullius and who between the Plaintiff and the National Land Commission has the power to regulate the use of water resources, were all questions which could only be determined on merit at the trial at which, perhaps expert evidence would be called to resolve technical aspects of the dispute.

11. It was further the Plaintiff's case that the orders of the Court of Appeal have not been stayed and this being a Court subordinate to the Court of Appeal, it does not have the jurisdiction to stay the ruling of the Court of Appeal.

12. The Plaintiffs further aver that there is no Judgment capable of enforcement to merit an application under Order 42 Rule 6 of the Civil Procedure Rules as sought by the Defendants and that, in any event, it is only the Supreme Court which has the jurisdiction to determine whether or not there exists prima facie merits of the intended appeal to merit stay of these proceedings.

13. The Plaintiffs are accordingly of the view that this application if allowed will create a bad precedent and abuse the finality of Court decisions where parties who are aggrieved by the decision of the Court of Appeal would ingeniously seek to have the High Court stay the same as is the case herein.

14. I have considered the said application and the response thereto. I have equally considered the substantive submissions and authorities placed before me by the Learned Advocates for the respective parties herein.

15. The application before me is premised on Order 42 Rule 6 of the Civil Procedure Rules which specifies the circumstances under which either the trial Court or an appellate Court may order stay of execution of a decree or order pending an appeal. Rule 6(2) lays down the conditions which an applicant must satisfy in order to deserve orders of stay of execution pending appeal.

16. I must hasten to add here that the conditions set out in Rule 6(2) only serve as guidelines which the Court can use as beacons in exercising its unfettered discretion in deciding whether or not to grant stay of execution pending appeal depending on the circumstances of each case. The applicant must ordinarily satisfy the Court that he stands to suffer substantial loss if stay is not granted and that the application had been filed without unreasonable delay. The applicant must also show that he was willing to offer such security as may be ordered by the Court.

17. Having carefully considered the provisions of Order 42 Rule 6 of the Civil Procedure Rules, it is clear to me that the said provisions only apply to applications for stay of execution of a decree or order issued by this Court pending the hearing of an appeal to the Court of Appeal but not to an application for stay of proceedings such as the one now before me.

18. The Plaintiff/Respondent has emphasized the fact that the Defendant/Applicant ought to have moved the Court of Appeal to file an application for stay of proceedings. A perusal of Rule 5(2) (b) of the Court of Appeal Rules which appears to me to be the only avenue through which one can move the Appellate Court would however appear to suggest that Rule 5(2) (b) only comes into play when there is an appeal pending before that Court.

19. I am fortified in the conclusion by the finding in ***Dickson Muricho Muriuki –vs- Timothy Kagondu Muriuki & Others (Nyeri Civil Application No. 21 of 2013(UR 5/2013)*** where the Court of Appeal emphatically rejected the notion that it had any power, incidental or otherwise, to grant a stay of execution of its own Judgment pending appeal to the Supreme Court. In that matter, the Learned Judges of Appeal delivered themselves thus (pages 87 – 88):-

> ***"From the foregoing, it is quite clear as pointed out in this Court's decision in Equity Bank Ltd –vs- West Link MBO Ltd-Civil Application No. 78 of 2011 that the true nature of an application under Rule 5(2) (b) is a procedural innovation designed to empower this Court to entertain interlocutory applications for preservation of the subject matter of the pending appeal in order to ensure the just and effective determination of the appeal. It is also clear that this Court's jurisdiction under Rule 5(2) (b) can only be invoked once a Notice of Appeal is lodged in this Court. See the Interim Independent Electoral Commission & Another –vs- Paul Waweru Mwangi- Civil Application No. Nai 130 of 2011. We find that the Notice of Appeal that grants this Court jurisdiction under Rule 5(2)(b) is the one filed against the decision of the High Court or any other tribunal prescribed by statute whose appeal lies in this Court and not the Notice of Appeal filed against the decision of this Court which is the subject of an intended appeal to the Supreme Court. Therefore, in this case the Notice of Appeal dated 3rd July, 2013 filed by the Applicant against the decision of this Court does not grant us jurisdiction and power to exercise our discretion under Rule 5(2) (b) having pronounced the final Judgment on the appeal that was before us from the decision of the High Court."***

20. While the **Dickson case** above properly advises on the need when challenging a decision of the Court of Appeal for one to apply to the Supreme Court, the circumstances therein are slightly different as the Court did not address itself to a situation where there are pending proceedings in the Superior Court as is the case here.

21. In my view and considering the circumstances of this case, the Court must be guided by other considerations in making its decision whether or not to grant stay of proceedings as sought herein. When confronted by a near similar situation in ***Global tours & Travels Ltd; Nairobi H.C Winding Up Cause No. 43 of 2000***, Ringera J(as he then was) observed as follows:-

> ***"As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice….. the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.***

22. Guided by the above principles I think the fact that it is open to the Applicant to proceed to apply to the Supreme Court for a stay does not in the peculiar circumstances of this case preclude its right to make such an application before this Court. Quite apart from the fact that it is this Court that is presently seized of these proceedings, the provisions of Order 42 Rule 6 of the Civil Procedure Rules expressly confer a right to apply for a stay in either this Court, or notwithstanding, any refusal by this Court, to apply to the Court to which such appeal is preferred. As it were, the Court to which the Appeal is preferred is the Supreme Court.

23. Evidently the discretion to stay proceedings is in my view incidental to the power inherent in every Court to control the disposition of cases before it with maximum economy of time and effort for itself, for counsel and for litigants. The Applicant herein has an unfettered right to appeal to the Supreme Court. In balancing the right to appeal by the Defendant and the right to have this matter disposed off expeditiously in the Plaintiff's interest, this Court needs to take into consideration the fact that the outcome of the Supreme Court proceedings which are soon to commence may well have a final outcome on this matter.

24. In the prevailing circumstances, I think a stay pending the result of the Supreme Court's decisions is the most appropriate path of conserving the Court's resources and adjudicating these cases in the most efficient manner possible. Most significant to the Court in making this determination is the substantial overlap between the legal issues present here and those that the Supreme Court may itself soon decide.

25. The long and short of it is that I find merit in the Application dated 16th February 2017. The same is allowed in terms of Prayer No. 1(c) thereof.

26. Each Party shall bear their own costs.

Dated, signed and delivered at Malindi this 22nd day of February, 2018.

J.O. OLOLA

JUDGE