



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

E.L.C. CIVIL SUIT NO. 47 OF 2015

(FORMERLY NAIROBI HCCC NO. 549 OF 2014 &

MALINDI HCCC NO. 26 OF 2013)

WATER RESOURCES MANAGEMENT AUTHORITY.....PLAINTIFF

VERSUS

KRYSTALLINE SALT LIMITED.....DEFENDANT

RULING

Through the application dated 16/4/2018, the Defendant seeks stay of execution of the judgement delivered by this court on 5/4/2018 pending hearing and determination of the defendant's appeal against that judgement. Being aggrieved by the judgement, the Defendant filed a Notice of Appeal and is apprehensive that the Plaintiff may commence execution of the decree flowing from the judgement.

The Defendant avers that execution of the judgement against it will lead to the closure of its business since the judgement sum is well over Kshs. 2 billion; which is far in excess of the Defendant's existing assets. The Defendant argues that it has an arguable appeal which will be rendered nugatory if the orders of stay are not granted. The Defendant urges that the question for consideration is whether the Defendant can settle the judgement amount without its operations grinding to a complete halt. The Defendant states that it is ready and willing to furnish such security as the court may deem proper in the form of a suitable bank guarantee or otherwise.

The application is supported by the affidavit of Hasmita K. Patel, a director of the Defendant Company who depones to the triable issues she believes the intended appeal raises. She depones that if the Plaintiff executes the judgment to the tune of Kshs. 2,079,590,000/= then the Defendant will be forced to cease operations, shut down and retrench its members of staff who are over 2800. The Defendant argues that the order of stay will not be prejudicial to the Plaintiff.

The Plaintiff opposes the application and relies on the Replying Affidavit of its Chief Executive Officer, Mr. Mohammed M. Shurie. The Plaintiff argues that the application is a scheme by the Defendant to deny it what is lawfully owed to it as determined by the court. The Plaintiff argues that being one of the largest producers of salt from raw water, the Defendant has enjoyed good profits over the years and ought to pay the judgement sum. The Plaintiff points out that the judgment sum which currently stands at Kshs. 3,098,589,098 together with the accrued interest, was accumulated over a period of 10 years. The Plaintiff is apprehensive that since the judgement sum is colossal, the Defendant may wind up its operations without paying the decretal sum if the court grants it a blanket stay of execution.

The Defendant filed a Further Affidavit in which it argues that the Plaintiff will be unable to refund the judgment sum if the Defendant succeeds on appeal since the Plaintiff has disclosed that it urgently needs the judgement sum for its own operations and is likely to utilise the judgement amount immediately it receives it.

The Plaintiff maintains that it is a public body capable of refunding the Defendant all its money should the Court of Appeal allow its appeal. The Plaintiff urges that should the court be inclined to grant the stay of execution sought, then the Defendant ought to deposit the sum of Kshs. 1,500,500,000/= as security for the performance of the judgement. This is half the judgment amount which the Plaintiff proposes to have deposited in a joint interest earning account to be opened in the names of the advocates for both parties pending the determination of the appeal or further orders of the court.

The Defendant is ready and willing to give security in form of a bank guarantee for Kshs. 50 million to Kshs. 100 million. The Defendant believes that the correct scientific fact is that only 36.6m³ of sea water produces 1 tonne of salt and not 530m³ of sea water. Based on this, the true decretal sum according to the Defendant should be Kshs. 17,385,000 and not Kshs. 3,098,589,098/= awarded by this court. The Defendant therefore believes the security it is offering would exceed the true judgement sum by far.

The court has looked at the Defendant's statement of financial position annexed to the Defendant's Further Affidavit showing the Defendant's provisional accounts as at 31/12/2017. The profit reflected in that Statement of Profit or Loss and other Comprehensive Income

for 2017 after taking into account liabilities is Kshs. 2,496,890,535/=. The court notes that that statement included WARMA provision for Kshs. 2,079,455,000.00. This confirms that the Defendant exercised prudence by making provision for the Plaintiff's claim since it knew that judgement may be entered for the Plaintiff in this suit.

The Plaintiff urged the court to disregard the statement since it is not signed by the directors and instead go by the statement the Defendant produced at the trial which shows the Defendant made a gross profit of Kshs. 1,082,271,661.00 in 2012.

The Defendant argued that three conditions are to be met in an application for orders of stay under Order 42 Rule 6 of the Civil Procedure Rules. The conditions are firstly, that the application is made without inordinate delay; secondly, that substantial loss is likely to accrue if the orders are not granted and lastly, the applicant should be willing to furnish security.

The Defendant avers that it made the application timeously within 3 days of receipt of the judgment. It is ready to furnish security in form of a bank guarantee for Kshs. 50 to 100 million or for such sum that the court may deem just. The Defendant urges that its statement of account shows that the value of the Defendant's assets was Kshs. 393 million as at 2012 and Kshs. 700 million as at 2017. He therefore submitted that the decretal sum exceeds the assets owned by the Defendant and the Defendant will have to sell everything it owns and shut down and retrench its staff which is a loss that cannot be compensated by damages.

Further, the Defendant argues that it will suffer substantial loss since it contends that the Plaintiff cannot repay the amount if the appeal succeeds. The Defendant relied on the National Budget which named the Plaintiff as one of the State Corporations with non-performing loans. The Defendant argues that if the Plaintiff cannot repay the loan of Kshs. 362 million and receives a budget of 300 million annually, then it will not be in a position to refund the sum of Kshs. 3 billion if the Defendant succeeds on appeal.

The Plaintiff submitted that in exercising the discretionary jurisdiction to grant stay, the court has to balance the rights of parties and must take into account the circumstances of the case. The Plaintiff submits that the Defendant has failed to demonstrate sufficient cause and based its arguments on the amount being colossal yet it was always aware that it would be liable to pay if judgment was entered against it in this suit. The Plaintiff's advocate referred the court the extract filed by the Defendant which it annexed to the replying affidavit showing that as at December, 2012 the Defendants gross profit was Kshs. 1,082,271,661/=. The Plaintiff urged the court to order the Defendant to secure the judgement sum by providing a bank guarantee for Kshs. 3 billion or Kshs. 1.5 billion to be deposited in an interest earning account to be held by both advocates.

Mr. Agwara relied on the case of **Antoine Ndiaye v. African Virtual University [2015] eKLR** in which the court stated that the security provided must meet the performance of the decree. In that case, the court ordered the Applicant to pay one half of the sum to the Respondent and the other half was to be deposited in an interest earning account. The Plaintiff argues that its budgetary allocation has since gone up and it is capable of refunding the decretal sum if the Court of Appeal allows the Defendant's appeal. The Plaintiff urged the court to consider the Defendant's conduct as it confirmed that the profits it made were shared out among the shareholders yet it knew of this case without making provision for this liability.

The Plaintiff urged the court to preserve the entire judgement amount. He stated that security is required and is to be paid as a condition precedent for a grant of stay. The Defendant's advocate conceded that the court has discretion on the amount of security to be ordered; and that this depends on the circumstances of the case as the court is called upon to do a balancing act.

Mr. Arwa distinguished the decision of *Antoine Ndiaye* relied on by the Plaintiff. He argued that no substantial loss had been demonstrated in that case that is why the court directed that part of the money was to be paid to satisfy the decree and the other part deposited in an account since the court had established that there was no substantial loss. He also urged that the amount involved in that case was small and would not have brought the company to a halt unlike in the instant case.

The Defendant contends that it wishes to have the Court of Appeal order that it ought not to pay any monies at all to the Plaintiff. Further, the Defendant argues that the interest that will accrue will compensate the Plaintiff for any loss suffered if appeal fails. Mr. Arwa concluded his submissions by stating that the court has to balance the interest of the two parties and urged that the balance tilts in favour of the grant of the orders of stay sought in the application.

After considering the application, the affidavits and the submissions of both parties, the court orders that there be a stay of execution of the decree herein on condition that the Defendant furnishes security by way of a bank guarantee from a reputable bank for the sum of Kshs. 1 Billion within 45 days of today. Each party will bear its own costs.

Dated and delivered at Nairobi this 30th day of May 2018.

K. BOR

JUDGE

In the presence of: -

Mr. Arwa for the Defendant

Mr. V. Owuor- Court Assistant

No appearance for the Plaintiff