



**China Gezhouba Group v Jtg Enterprises Limited & another (Civil Application E145 of 2024) [2024] KECA 610 (KLR) (24 May 2024) (Ruling)**

Neutral citation: [2024] KECA 610 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E145 OF 2024  
DK MUSINGA, K M'INOTI & GWN MACHARIA, JJA  
MAY 24, 2024**

**BETWEEN**

**CHINA GEZHOUBA GROUP ..... APPLICANT**

**AND**

**JTG ENTERPRISES LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**THE HON ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

*(Application for stay of execution pending hearing of the appeal against the Ruling and Order of the High Court of Kenya at Nairobi (A. Mabeya, J.) delivered on 21st March 2024 in Nairobi Commercial Case No. E649 of 2021)*

**RULING**

1. The applicant's notice of motion dated 25<sup>th</sup> March 2024 seeks stay of execution of the orders issued by the High Court (Mabeya, J.), on 21<sup>st</sup> March 2024 and any other consequential orders flowing therefrom in Nairobi HCCOMM No. E649 of 2021 between the parties herein, compelling the applicant to deposit the sum of Kshs.598,708,457 in an interest earning account in the joint names of the advocates for the applicant and the 1<sup>st</sup> respondent within 15 days from the date of the ruling.
2. In the affidavit in support of the application sworn by Tang Yazhou, the General Manager of the applicant, he stated, inter alia, that on 9<sup>th</sup> August 2023, Mabeya, J. delivered judgment in favour of the 1<sup>st</sup> respondent against the applicant in the aforesaid suit in the sum of Kshs. 682,763,004.92 plus costs and interest on account of alleged breach of a sub-contract by the applicant; that on 16<sup>th</sup> August 2023 the applicant filed an application for stay of execution of the said judgment pending appeal; that the said application came up for hearing on 22<sup>nd</sup> August 2023 and the learned judge ordered the applicant to pay the 1<sup>st</sup> respondent forthwith a sum of Kshs.84,054,610.68 that had been admitted by the applicant. The court, however, ordered that there would be an interim stay of execution in respect



of the remainder of the judgment sum pending delivery of the ruling, which the court indicated would be on notice.

3. The applicant further stated that whilst the application for stay of execution was pending determination, the 1<sup>st</sup> respondent filed an application dated 3<sup>rd</sup> January 2024 and sought orders that:
  - “(iii) Pending the delivery of the ruling on the Respondent’s Notice of Motion application dated 16<sup>th</sup> August 2023 and pending the hearing and determination of the Respondents’ appeal, the honourable court be pleased to order the judgment debtor/respondent to deposit Kshs.598,708,457.00 together with interest and costs as security for the due performance of the decree in a joint interest earning account to be held jointly by the decree holder/applicant and judgment debtor/respondent.
  - iv. Pending the delivery of the ruling on the Respondent’s Notice of Motion application dated 16<sup>th</sup> August 2023 and pending the hearing and determination of the Respondent’s appeal, the honourable court be pleased to order the following directors and/or officials of the judgment debtor/respondent to deposit in court their original passport and/or travel documents:
    - a. Li Zhihe (Director/Shareholder)
    - b. Tang Yazhou (General Manager) Passport No. PE 20774577
    - c. Li Shang (Project Manager).”
4. On 21<sup>st</sup> March 2024, the learned judge delivered a ruling in respect of the application dated 3<sup>rd</sup> January 2024 and granted the prayer for the deposit of the aforesaid sum as prayed, but declined to grant the second prayer for deposit of the passports of the 1<sup>st</sup> respondent’s officials. However, up to the date when this Court heard this application, the High Court had not delivered the ruling in respect of the applicant’s application dated 16<sup>th</sup> August 2023 for stay of execution of the judgment pending appeal. The applicant argued that the order to deposit the colossal sum as security for the due performance of the decree could only be made within the context of the application for stay of execution of the judgment.
5. Dissatisfied with the learned judge’s ruling, the applicant filed a notice of appeal dated 22<sup>nd</sup> March 2024 on which he bases this application. The applicant states that its intended appeal is arguable, and faults the learned judge for failing to find that the application dated 3<sup>rd</sup> January 2024 was sub judice in view of the pending application dated 16<sup>th</sup> August 2023. He also faults the learned judge for finding that the applicant had failed to prosecute the application dated 16<sup>th</sup> August 2023; and by failing to exercise his discretion judiciously and reasonably by ordering the applicant to deposit the colossal sum of Kshs. 598,708,457.00 in an interest earning account within 15 days when he was aware that the applicant is the main contractor in the Thwake dam project and depends exclusively on funds received from its employer, the Ministry of Water, Sanitation and Irrigation for any payments to be made in relation to the project.
6. The applicant further argued that if it were to comply with the aforesaid court order, the ongoing construction of the Thwake dam project, which is approximately 90% complete, will grind to a halt because it would have no funds to complete the project. On the other hand, if it failed to comply with the order, it would expose itself to contempt of court proceedings as well as the risk of execution proceedings that may occasion the seizure of its assets; and in either scenario, the interference with or suspension of the project would expose it to the risk of incurring losses running into huge amounts of



- money on account of penalties. For those reasons, the applicant urged this Court to grant the orders sought.
7. The 1<sup>st</sup> respondent opposed the application. Joseph Thuo Gichuhi, a director of the 1<sup>st</sup> respondent, swore an affidavit wherein he deposed, inter alia, that the applicant is a foreign entity with nothing tying it to this country beyond the Thwake dam project, whose contract has since expired and has not been extended; that the applicant is truly indebted to the 1<sup>st</sup> respondent in terms of the decretal amount; and that the deposit of the said sum in accordance with the orders of the court cannot occasion the applicant any prejudice, but is meant to create a level playing field for all parties.
  8. When the application came up for hearing, Mr. Wandati appeared for the applicant, Mr. Atonga for the 1<sup>st</sup> respondent, and Mr. Bett for the 2<sup>nd</sup> respondent.
  9. The applicant's learned counsel urged the Court to find that the intended appeal is arguable, and that unless the Court grants the orders sought, the appeal, if successful, will be rendered nugatory because the deposit of the colossal sum of money as ordered by the High Court would cause the construction of the Thwake dam project to grind to a halt, which would expose it to considerable penalties by the Government of Kenya.
  10. In his submissions, the 1<sup>st</sup> respondent's learned counsel conceded that the intended appeal is arguable. However, he submitted that the appeal, if successful, will not be rendered nugatory if the orders sought are not granted. In his view, (which we do not agree with), deposit of security is a pre-condition for grant of an order of stay of execution by this Court. Counsel further submitted that the applicant had not demonstrated that it will suffer substantial loss if the orders sought are not granted. He relied on this Court's decision in *Kenya Shell Limited v Benjamin Kibiru* [1986] KLR 410.
  11. Lastly, Mr. Atonga urged the Court to dismiss the application, but in the event that it was minded to grant the same, to order that a part of the decretal amount be secured by way of a bank guarantee or deposit in an interest earning account in the joint names of counsel for the applicant and the 1<sup>st</sup> respondent.
  12. Mr. Bett, learned counsel for the 2<sup>nd</sup> respondent, supported the application. In his view, the twin principles for grant of an application for stay of execution had been satisfied.
  13. We have perused the application and considered the written and oral submissions by the parties. The principles that guide this Court in an application under rule 5(2)(b) of this Court's Rules are now well settled. They have been restated in a plethora of this Court's decisions, among them *Stanley Kang'ethe Kinyanjui vs Tony Ketter & 5 Others* [2013] eKLR. An applicant has to satisfy the Court that he has an arguable appeal or intended appeal, and that unless the orders sought are granted, the appeal, if successful, will be rendered nugatory.
  14. The 1<sup>st</sup> respondent's counsel conceded, and rightly so, that the appeal is arguable. We shall not therefore dwell on the first precondition for grant of an order of stay of execution. We shall proceed to determine whether the intended appeal will be rendered nugatory unless we grant the orders sought.
  15. There is no dispute that the applicant is the main contractor of a multi-billion public project, Thwake dam project. It has been contracted by the Government of the Republic of Kenya through the Ministry of Water, Sanitation and Irrigation. The project is 90% complete. If the orders of stay of execution are not granted, the 1<sup>st</sup> respondent will initiate execution proceedings or contempt of court proceedings against the applicant and its principal officers. On the other hand, if the applicant were to deposit the sum of Kshs.598,708,457 as ordered by the trial court, it will not be able to complete the said project as it will be unable to pay its staff and suppliers and meet other operational costs of the project.



Furthermore, the applicant's inability to complete the project would expose it to hefty penalties on account of breach of contract.

16. There is also a public interest element that must be taken into consideration in determination of this application. The Thwake dam project, whose cost of construction is over Kshs.36 billion, is intended to supply water to a large population of this country, and provide water for industrial and agricultural purposes. The government has so far spent billions of shillings on the project. The government and the people of Kenya would be the greatest losers if the project grinds to a halt.
17. On the other hand, the 1<sup>st</sup> respondent, who has a monetary decree as against the applicant, has a crystallised right to enjoy the fruits of its judgment, unless the appeal succeeds. However, the 1<sup>st</sup> respondent is unlikely to suffer any considerable loss if the orders sought are granted because the public project is still ongoing, and there is still substantial amount of money that is yet to be paid to the applicant by the Government of Kenya towards completion of the dam. There is no evidence before us indicating that the applicant may abandon the project and move out of the jurisdiction of this Court before the project is completed, in which event it would be necessary to require the applicant to provide security. Under rule 5(2)(b) of this Court's Rules, this Court may grant a stay of execution, an injunction or a stay of further proceedings 'on such terms as the Court may think just.'
18. But having said that, we are of the considered view that the intended appeal ought to be filed, heard and determined expeditiously, before the said project is completed. It is anticipated that the completion date of the project shall be revised to 31<sup>st</sup> December 2024.
19. We find that the applicant has satisfied the twin principles for grant of an order of stay of execution of the High Court's ruling. Consequently, we grant the orders as sought.
20. In conclusion, we direct that the appeal be heard and determined on priority basis, and in any event, within the next six (6) months from the date hereof. Costs of the application shall abide the outcome of the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF MAY 2024.**

**D. K. MUSINGA (P.)**

.....

**JUDGE OF APPEAL**

**K. M'INOTI**

.....

**JUDGE OF APPEAL**

**G.W. NGENYE-MACHARIA**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR.**

