



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KARANJA & OKWENGU, J.J.A)

CIVIL APPLICATION NO. 38 OF 2019

BETWEEN

KENYA RAILWAYS CORPORATION.....APPLICANT

AND

TELKOM KENYA LIMITED.....RESPONDENT

(Being an application for stay of execution pending hearing and determination of an appeal from the Judgment and decree of the High Court of Kenya at Nairobi (J.L. Onguto, J.) dated 2nd February 2018 *in HCCC No.621 of 2016*)

RULING OF THE COURT

[1] On 2nd February, 2017, the High Court gave judgement in favour of **Telkom Kenya Limited (respondent)** against **Kenya Railways Corporation (applicant)** for the sum of Kshs. 217,100,360.90 together with interest and costs of the suit.

[2] By a notice of motion dated 5th February, 2019, the applicant has moved to this Court for orders of stay of execution of the judgment of the High Court pending the hearing and determination of an appeal to this Court against the judgment.

The applicant has already lodged **Civil Appeal No. 423 of 2018**.

[3] The applicant contends that it has an arguable appeal with high chances of success. A memorandum of appeal has been availed in which 10 grounds are raised including: the issue of locus of the respondent; the validity and probative value of the bills issued by the respondent in its name; the issue of limitation; and whether the applicant acknowledged liability.

[4] The applicant is apprehensive that the respondent may execute the decree which is for a colossal amount, and contends that it is not in public interest that the applicant, which is a public corporation, pay up the amount when it has a merited appeal with high chances of success.

[5] The applicant is willing to provide security for the decretal amount and contends that it is a public institution with immense properties capable of settling any decree of this honourable court in the event that the appeal is unsuccessful.

[6] Pursuant to the Covid-19 practice directions, hearing of the motion was scheduled to proceed by way of written submissions without the presence of the parties or their advocates. The applicant did not file any submissions but the respondent filed submissions opposing the applicant's motion.

[7] In its submissions, the respondent argued that the applicant's motion is not merited as the intended appeal does not raise any arguable issue, the judgment of the High Court having been founded on an unequivocal admission by the applicant of the amount due to the respondent. In regard to the issue of locus, the court took judicial notice of Kenya Gazette Supplement No. 59A and 59B of 24th February, 2014 wherein the Minister for Finance transferred the assets and liabilities of Kenya Posts and Telecommunications to the respondent, and this by extension included the applicant's unsettled bills.

[8] On the nugatory aspect, the respondent argued that the decree is a monetary decree. Citing **Kenya Properties Hotel Limited vs. Willisdan Properties Limited, Civil Application Nai No. 322 of 2006 (UR 178/06)**, it was argued that the appeal cannot be rendered nugatory as the respondent is a reputable institution capable of refunding the money, should that become necessary. The respondent urged that having succeeded in its case, it should not be denied the fruits of its victory, but that if the Court is inclined to grant an order of stay, it should consider granting a conditional order.

[9] This being an application for an order of stay of execution under Rule 5(2)(b) of this Court's Rules, the applicant must satisfy the Court that the appeal is arguable and not frivolous, and secondly, that, if the stay order is not granted, the appeal would be rendered nugatory if it eventually succeeds. (**Reliance Bank Limited (In liquidation) vs. Norlake Investment Limited, Civil application No. Nai 93 of 2002**).

[10] As already observed, the applicant has provided a memorandum of appeal indicating ten (10) grounds upon which it intends to rely. We do not find it appropriate to go into the merits of those grounds save to state that they appear to be arguable grounds. (**Kenya Tea Growers association & Anor vs Kenya Planters and Agricultural Workers Union, Civil Application Nai No. 72 of 2001**).

[11] In regard to the nugatory aspect, we do note that the decree is a monetary decree. However, the judgment amount together with costs and interest is well over Kshs 217,100,360.90. Execution if allowed to proceed may include attachment and sale of the applicant's property which may lead to loss that may not be recoverable. On the other hand it has not been shown that the respondent is likely to suffer serious prejudice from the delay that may be caused in awaiting the finalization of the appeal.

[12] The respondent in its submissions indicated to us that they were willing to concede to an order for stay of execution being granted subject to a security being deposited. As the applicant has expressed a willingness to give security, we think that the interest of both parties will be sufficiently taken care of by a conditional order for stay of execution.

[13] For the above reasons, we allow the applicant's motion and order that:

(i) There shall be an order for stay of execution of the judgment of the High Court dated 2nd February, 2018, pending the hearing of the applicant's appeal on condition that the applicant shall deposit a sum of Kenya Shillings Sixty Million (Kshs. 60,000,000) in an interest earning account in the joint names of the two parties' advocates within 30 days from the date of this order.

(ii) Costs of the motion shall be in the appeal.

(iii) The applicant having already filed the appeal, the Registrar of the Court is directed to ensure that the same is listed for case management and subsequent hearing without undue delay.

It is so ordered.

Dated and delivered at Nairobi this 23rd day of April, 2021

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR