



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MAKUENI**

**ELC CASE NO.83 OF 2017**

**EQUATOR INN LIMITED t/a TSAVO INN HOTEL.....PLAINTIFF/RESPONDENT**

**VERSUS**

**NATIONAL OIL CORPORATION OF KENYA LIMITED.....DEFENDANT/APPLICANT**

**RULING**

1) What is before this court for ruling is the Defendant's/Applicant's Notice of Motion application dated 26<sup>th</sup> February, 2019 and filed in court on 27<sup>th</sup> February, 2019 for orders: -

**1. Spent.**

**2. Spent.**

**3. Pending the hearing and determination of the intended Appeal, this Honourable Court be pleased to order a stay of execution of the Judgment in Makueni ELC No.83 of 2017 by Hon. Mr. Charles Mbogo delivered on 26<sup>th</sup> November, 2018.**

**4. This Honourable Court be pleased to give further orders and directions as it may deem fit and just.**

**5. That the costs of this Application be provided for.**

The application is predicated on the grounds on its face and is supported by the affidavit of Pauline Kimotho, its Company Secretary and Head of Corporate Affairs, sworn at Nairobi on 26<sup>th</sup> February, 2019.

2) The Plaintiff/Respondent has opposed the application vide the replying affidavit of Nilaben Desai, its Director, sworn at Nairobi on 10<sup>th</sup> May, 2019 and filed in court on the 13<sup>th</sup> May, 2019.

3) Directions to dispose off the application by way of written submissions were issued on the 13<sup>th</sup> May, 2019. The matter was fixed for mention on 11<sup>th</sup> July, 2019 to confirm filing of submissions by the parties herein. The matter was further fixed for mention on 24<sup>th</sup> September, 2019 to enable the parties file their submissions which they had not been able to file by the 11<sup>th</sup> September, 2019.

4) Amongst the grounds that the application is predicated on are that there is real and imminent risk that unless the application is heard without delay, the Defendant/Applicant shall suffer loss and damage, that the application has been brought without delay, that the Plaintiff/Respondent will not suffer any prejudice if the application is allowed and that the Defendant/Applicant is willing to comply with the orders that this court may issue in respect to security for costs. These grounds have been repeated in paragraphs 10, 13, 15, 16 and 17 of Pauline Kimotho's affidavit.

5) On the other hand, Nilaben Desai has deposed in paragraph 4 (a), (b) & (d) of her replying affidavit that no decree has been signed and as such no execution can be undertaken, that the Plaintiff/Respondent has not yet commenced execution of the judgement and therefore the application is premature and that the Defendant/Applicant has not shown the court what loss or damage it shall suffer to necessitate stay of execution.

6) The Applicant's Counsel cited **Order 42 Rule 6(2) of the Civil Procedure Rules 2010** which provides as follows: -

*“(2) 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.”*

The Counsel submitted that the application ought to meet three broad conditions, namely, (a) substantial loss may result to the Defendant/Applicant if the order is not made; (b) the application has been made without undue delay; (c) the Defendant/Applicant is willing to abide by the court's order as to security for the due performance of the decree.

7) The Counsel submitted that the Defendant/Applicant has satisfied all the three tests for the award of an order of stay of execution pending appeal. Regarding the first test, the Counsel submitted that the Defendant/Applicant spent considerable efforts and finances in undertaking business and construction of the projects on the suit property the disruption of which will cost a huge financial loss to the Defendant/Applicant and the taxpayer since the Defendant/Applicant is a government owned entity. The Counsel relied on the cases of **Dr. John Gachanja Mundia vs. Francis Muriira alias Francis Muthika & Another [2016] eKLR and Kiplagat Kotut vs. Rose Jebor Kipngok [2015] eKLR.**

8) Regarding the second test, the Counsel pointed out that the judgement in this matter was delivered on 26<sup>th</sup> November, 2018 and on the same day, the Defendant/Applicant made an oral application for 30 days stay of execution which was allowed and stay orders granted. The Counsel went on to submit that on 03<sup>rd</sup> December, 2018 the Defendant/Applicant filed a notice of appeal. That unfortunately, the firm of Mulondo Oundo Muriuki & Co. Advocates which was on record during the trial was dissolved on 10<sup>th</sup> December, 2018 whereupon the Defendant/Applicant instructed the firm of Mulondo & Co. Advocates to act on its behalf and that is when this application was filed on 27<sup>th</sup> February, 2019. That the application was filed within an aggregate of 108 days from the date of the judgement and in the Counsel's opinion, the application was filed without delay and that no prejudice will be occasioned upon the Plaintiff/Respondent. That the slight delay in filing the application was due to procuring typed copies of the proceedings and judgement, which were only issued by the Hon. Deputy Registrar on 20<sup>th</sup> March, 2019. The Counsel cited the case of **Utalii Transport Company vs. NIC Bank Ltd. & Another [2014] eKLR.**

9) As for the third test, the Defendant/Applicant's Counsel submitted that the decree in the suit is not a monetary decree and therefore there is no risk of non-payment of money to the Respondent. The Counsel went on to submit that should the court be inclined to order for payment of security for costs, the Defendant/Applicant is willing to abide by any condition that the court may attach to the grant of stay of execution.

10) On whether the application was brought without undue delay, the Plaintiff's/Respondent's Counsel submitted that the Defendant/Applicant took over three months to file the application and that there is no proper application before this court that would satisfactorily explain the reason for the delay.

11) The Counsel for the Plaintiff/Respondent went on to submit that it is the Plaintiff/Respondent who will suffer substantial loss if it is not allowed to continue accessing its right of way from the main Mombasa/Nairobi highway. The Counsel went on to submit that to stay the judgement would be to return the Plaintiff/Respondent to the status quo.

12) The Counsel for the Plaintiff/Respondent termed the averments by the Defendant/Applicant as misleading and asserted that it is the Plaintiff/Respondent who will suffer substantial loss owing to the construction and blocking of its right of way. The Counsel added that it is trite law that negative orders are incapable of execution hence cannot be stayed. To support his submissions, the Counsel cited the case of **Kanwal Sarjit Singh Dhiman vs. Keshavji Jivraj Shah [2008] eKLR** where the Court of Appeal while

dealing with stay of a negative order, held as follows: -

*“The 2<sup>nd</sup> prayer in the application is for stay (of execution) of the order of the superior court made on 18<sup>th</sup> December, 2006. The order of 18<sup>th</sup> December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only.*

13) As for provision for security for costs, the Counsel submitted that in paragraph 27 of their written submissions, the Defendant/Applicant had indicated that the decree herein is not monetary and it therefore follows that the risk of non-payment of any monies to the Plaintiff/Respondent does not arise. The Counsel pointed out that in light of the foregoing, the court would require to consider the interest of both parties herein in that the Plaintiff/Respondent is being stayed from executing and having her statutory right of way she has been enjoying ever since she purchased her portion of land. The Counsel was of the view that the application is not only unmeritorious but has also not met the threshold of the grant of the stay of execution orders and should therefore be dismissed with costs.

14) On the issue of security for costs, the Plaintiff's/Respondent's Counsel asked the court to consider the interest of both parties and submitted that the stay sought is prejudicial to the Plaintiff/Respondent.

15) The Counsel concluded by urging the court to find that the Defendant/Applicant has not met the threshold for grant of the orders sought.

16) Having read the application and the replying affidavit as well as the submissions filed by the Counsel on record for the parties, I do note that it is common ground that the principles for the grant of stay of execution pending appeal are as provided for in Order 42 Rule 6 of the Civil Procedure Rules. The Applicant herein must give sufficient cause in addition to satisfying the court that substantial loss may result to him unless the order is made. The Applicant must also show that the application has been made without unreasonable delay and must also provide security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

17) There is no doubt that the Applicant has invested heavily in land parcel number 11794/2. The Applicant is likely to suffer substantial loss especially if prayer (d) of the judgement delivered on 26<sup>th</sup> November, 2018 is executed as it will interfere with the business that it runs in the said land parcel number 11794/2. Even though this application was filed on 27<sup>th</sup> February, 2019, I am satisfied that from the reasons proffered, it is safe to hold that the application was filed without unreasonable delay. I have also noted that the Defendant/Applicant has conceded that the decree in this suit is not monetary but is willing to abide by any conditions that the court may grant. I will therefore balance the competing interests of the parties herein.

18) Whereas I agree with the Plaintiff/Respondent's Counsel that the application seeks to stay orders which do not command the Defendant/ Applicant to do anything, it is clear prayer (d) of the judgement delivered on 26<sup>th</sup> November, 2018 if executed, is likely to cause substantial loss. In the circumstances, my finding is that the application herein partially succeeds. I will, therefore, issue an order of stay of execution of prayer (d) of the judgement delivered on 26<sup>th</sup> November, 2018 pending the hearing and determination of the intended appeal. The Defendant/Applicant shall also have costs of application.

Signed, dated and delivered at Makeni this **06<sup>th</sup>** day of **December, 2019**.

**MBOGO C. G.,**

**JUDGE.**

**In the presence of: -**

Ms. Odinga for the Defendant/Applicant

No appearance for the Plaintiff/Respondent

Ms. C. Nzioka – Court Assistant

**MBOGO C. G. (JUDGE),**

**06/12/2019.**



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