



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: WAKI, NAMBUYE & MURGOR, J.J.A)**

**CIVIL APPLICATION NO. 168 OF 2018 (UR 137/2018)**

**BETWEEN**

**KRYSTALLINE SALT LIMITED.....APPLICANT**

**AND**

**WATER RESOURCE MANAGEMENT AUTHORITY.....RESPONDENT**

***(Being an application for stay of execution the judgment and decree of the Environment &***

***Land Court at Nairobi (Bor, J.) delivered on 5<sup>th</sup> April 2018***

***in***

***NAIROBI ELC PETITION No. 47 of 2013***

***(Formally Malindi ELC Case No 29 OF 2013***

**\*\*\*\*\***

**RULING OF THE COURT**

This Notice of Motion dated 4<sup>th</sup> June 2018 is made under **sections 3, 3A and 3B** of the **Appellate Jurisdictions Act** and **rules 5 (2) (b)** and **42** of the **Court of Appeal Rules**, and has been brought pursuant to a decision of the Environment and Land Court (Bor, J). It seeks orders that:-

1. *(spent)*

2. *(spent)*

3. *That pending the hearing and final determination of the Applicant's intended Appeal, the Court be pleased to stay execution of decree resulting from the judgment in Nairobi ELC Case No. 47 of 2013 dated 5 April 2018 and all orders consequential thereto.*

4. *That the costs of the application be provided for.*

The application was brought on the grounds that the applicant is a Company that produces salt commercially on its private salt works at Gongoni and Marereni along the Kenyan Coast, and the respondent (previously known as the Water Resource Management Authority) was established under the repealed Water Act 2002 and reconstituted under the Water Act 2016), with the mandate of managing inland public water resources; that sometime in 2013, the respondent instituted Nairobi ELC No. 47 of 2013 (formally Malindi ELC No. 29 of 2013) against the applicant demanding Kshs. 2,079,590,000 in respect of alleged unpaid water usage charges for the period between 1<sup>st</sup> October, 2007 and 19<sup>th</sup> April 2017.

On 5 April 2018, the Environment and Land Court at Nairobi (K. Bor, J) delivered a judgment in which it ordered the applicant to pay to the respondent Kshs. 2,079,590,000 as water permit fees from 1st October 2007 to

19th April 2017, together with costs and 2% compound interest on both items from 1st October 2007 until payment in full. The applicant was aggrieved by the judgment and filed a Notice of Appeal to this Court.

In the meantime, it sought an order of stay of execution in the trial court pending appeal to this Court, which was granted on condition that the applicant obtains a bank guarantee of Kshs. 1 billion from a reputable bank as security within 45 days, failing which, the stay of execution ordered would lapse. The applicant contended that it was unable to raise the entire decretal sum from its assets and in view of the time it would take to perfect the securities and obtain the bank guarantee, there was the real risk that the 45 days' period of stay granted would lapse before the guarantee was obtained.

It was further contended that the intended appeal raised triable issues as set out in the attached draft memorandum of appeal.

Furthermore, the applicant feared if stay pending appeal was not granted the respondent would execute the decree to recover the entire sum of Kshs. 2,079,590, 000/- together with interest and costs, and there was the real danger that the applicant's business would be destroyed, staff would be retrenched, operations would shut down and its assets disposed of, to the extent that the success of the intended appeal would be rendered nugatory. The applicant's plea was that the interests of justice should prevail so as to provide the applicant an opportunity to ventilate its case through the appeal process.

The application was supported by the affidavit of **Hasmita Patel** sworn June 2018 which to a large extent repeated the grounds of the application.

By a replying affidavit sworn on 18<sup>th</sup> June 2018 by **Mohammed M. Shurie**, the Chief Executive Officer of the respondent, it was deponed that since 2007, the applicant has deliberately and illegally kept the respondent out of its lawful and statutory dues; that the applicant had significantly profited from its operations, and there was no plausible reason why it should be granted the orders sought; further that the applicant owed such an excessive amount, there was the likelihood that it would wind up its operations without paying the amounts due if a stay of execution was granted. The respondent deponed that the draft memorandum of appeal did not disclose any arguable appeal since, the applicant's claim was merely that, it used sea water in the production of salt, when in actual fact, it used large volumes of sea water drawn from the sea onto its private land, so that the water in controversy was no longer sea water but inland water resource.

It was further averred that the applicant had not demonstrated that the applicant would suffer irredeemable harm or that the appeal would be rendered nugatory, should the application be declined; that the respondent is a public body with the ability to refund any moneys, and so no prejudice would be visited on the applicant. It was further averred that the applicant should provide security for the due performance of the judgment herein in form of a Bank Guarantee for Kshs. 1,500,500,000.00 or deposit such amount in an interest earning account to be held jointly by the parties' advocates.

**Mr. G. Oraro**, learned Senior Counsel for the applicant appearing with **Erastus Rabuy** and **Jotham Arwa** begun by submitting that the appeal was arguable. Counsel explained that the Water Act 2002 defines water resources, and provides that the Minister would be responsible for their regulation. It was further submitted that **section 2** of the **Water Act, 2002** defines water resources, and sea water was not included in that definition. Counsel argued that the learned judge had erroneously applied the United Nations Convention on the Law of the Sea, which specified that the sea was part of the State's jurisdiction, and therefore had the power to levy charges over sea water; that the controversy centered on whether the management of sea water could be brought within the respondent's mandate yet, sea water was not included in the definition of water resources in the Water Act. Counsel submitted that, until the Water Act is amended to include sea water, the respondent had no powers to regulate or manage sea water, or any industrial activity involving sea water extraction.

Counsel faulted the learned judge for shifting the burden of proof of quantification of sea water used in salt extraction to the applicant by adopting an extract from a document posted on the appellant's website. It was argued that it was produced in 2016 and not 2007 as contended by the respondent and could not be used as a basis for computing the water levy charges.

Turning to the issue of whether the appeal would be rendered nugatory if the application was declined and the appeal were to succeed, counsel argued that the levy imposed was well over Kshs. 3 billion which was excessive. Relying on the case of **Alfred N. Mutua vs Ethics & Anti-Corruption Commission (EACC) & 3 Others, Civil Application No. Nai. 31 of 2016, [2016] eKLR**, it was argued that if the respondent was allowed to execute the decree, there would be no applicant left to prosecute the appeal as the sum involved was well in excess of its capacity to pay, since the applicant's assets only amounted to Kshs. 1 billion; that this Court has been known to grant a stay of execution in instances where the decree is excessive, and will jeopardize the applicant's survival. See **Nation Media Group Limited vs Cradle- The Children's Foundation suing through Geoffrey Maganya, Civil Application No. Nai 96 of 2013 [2014] eKLR** and **Sicpa Securities Sol SA vs Okiya Omtata & 2 Others, Civil Application No. 76 of 2018 [2018] eKLR**. On the balance of convenience it was argued that though the applicant has substantial assets, it did not have instant liquid cash; that the demand for the deposit of securities on such a large amount was impossible to obtain, and was intended to defeat the purpose of the stay of execution sought.

Learned counsel for the respondent **Mr. Agwara**, relied on the replying affidavit of Mohammed M. Shurie and, submitted that the application for stay of execution was an abuse of the court process since the applicant had not demonstrated that the appeal was arguable;

that the applicant's case is that sea water usage was not subject to levy, but its claim in the High Court was that it did not use mainland water but used water extracted from the sea. Counsel argued that it was the mainland water that was the subject of a levy, particularly where the source was underground wells.

On the amount of Kshs 3 billion, counsel argued that the amount had arisen over a period of 10 years, and it was on this basis that the sum was levied; that the applicant had made provision of Kshs 2,079,455,000 in its financial accounts for payment of water levy charges in anticipation of the court decision.

It was further argued that since the dispute concerned a money decree, the interests of both parties should be taken into account; that the applicant had no intention of paying the sums owed, and had threatened to wind up its operations which would render the judgment worthless. It was submitted that the applicant either agrees to pay monthly installments in order to settle the sums due or obtains a bank guarantee of Kshs. 1.5 billion. It was further argued that if it was displeased with the conditional order of stay of execution of the High Court, it ought to have sought for a review of that order in the same court; that abandoning those orders in search of similar orders in this Court was an abuse of the court process. In support of this proposition, counsel relied on *Patriotic Guards vs James Kipchirchir Sambu, Civil Application No. 240 of 2016 [2017] eKLR* and *Housing Finance Company of Kenya Limited vs Sharok Kher Mohammed Ali Hirji & Another, Civil Application No 240 of 2015 [2015] eKLR*.

In the case of *Stanley Kang'ethe Kinyanjui vs Tony Keter & 5 Others, Civil Application No. NAI. 31/2012*, this Court stated *inter alia*:

***“That in dealing with Rule 5 (2) (b), the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the judge’s discretion to this Court.” The first issue for our consideration is whether the intended appeal is arguable. This Court has often stated that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous; a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable.*”**

It is therefore well established that, two principles guide the court in the exercise of its mandate under **rules (2) (b), Court of Appeal Rules**. Firstly, an applicant is required to demonstrate that the appeal or intended appeal is arguable, or in other words, that it is not capricious or frivolous.

Secondly, that unless he is granted a stay of execution or injunction as the case may be, the appeal or intended appeal, if successful, will be rendered nugatory.

We would also add that in dealing with applications under **rule 5 (2) (b)**, the court exercises original jurisdiction which exercise does not constitute an appeal to this Court from the trial judge’s discretion. See *Ruben & Others vs Nderitu & Another (1989) KLR 459*.

The applicant has set out various grounds of appeal including whether the water utilized in the salt extraction is sea water or mainland water, and if the former, whether the respondent is capable of subjecting it to a water levy; whether the trial court ought to have taken into account that sea water is *res nullius*, incapable of ownership, and therefore outside the regulatory ambit of the State or a state agency as held by this Court in *Kenya Ports Authority vs East African Power and Lighting Company, Civil Appeal No 41 of 1981* and *Water Resource Management Authority vs Kensalt Limited, Malindi ELC Case No. 28 of 2013*. It was also argued that the trial judge did not appreciate that the Water Act 2002, did not envisage that sea water was a water resource capable of being subjected to a water levy by the respondent.

***Section 2 of the Water Act, 2002 defines a “water resource” as; “...any lake, pond, swamp, marsh, stream, watercourse, estuary, aquifer, artesian basin or other body of standing or flowing water, whether above or below ground;”***

As to whether sea water falls within the remit of water to be regulated by the respondent is indeed a matter that requires to be ascertained by this Court. We do not consider this or the other issues complained of to be frivolous or fictional, but find them to be arguable.

Concerning whether the appeal will be rendered nugatory should we decline to grant the orders sought,

we think so. It is rather disconcerting for a party to plead that in the event that the respondent were allowed to proceed to execute the decree unhindered, there would be no applicant left to prosecute the appeal as the sums involved were colossal, the payment of which would well destabilize its operations. Though it has attempted to demonstrate that it is asset rich, its assets are currently valued at Kshs. 1 billion which amount falls far short of the decretal amount demanded.

The decretal sum of Kshs. 3 billion is indeed substantial, and its immediate payment would be sufficient to seriously affect if not cripple any going concern. The respondent appreciates this, and has proposed that the applicant deposit Kshs. 1.5 billion in an interest bearing account in the names of both parties. This notwithstanding, we do find the proposed amount to be excessively onerous given the circumstances of the case. It would be tantamount to a refusal of an order of stay of execution were we to allow the application on that condition. See ***Bontempi Luigi & another vs Sharrif Mohamed A. Omar [2011] eKLR.***

But as pointed out by the respondent, what is in contention is a money decree, and therefore we are required to exercise our discretion to dispense proportionate justice. The order that commends itself in the circumstances of this case is that the applicant shall provide a reasonable financial security as a condition precedent to the grant of the order sought. In the result, the application is allowed. In all the circumstances we grant an order for stay of execution as sought in prayer (2) of the Notice of Motion dated 4th June 2018 on the following terms;

- (i) The applicant shall provide a Bankers guarantee from a reputable bank for the sum of the Kshs. 100 million.***
- (ii) The guarantee shall be provided within 60 days of this ruling;***
- (iii) In default of compliance with (i) and (ii) above, this application shall stand dismissed with costs without further application.***
- (iv) If there is compliance with (i) and (ii) above, the costs of the application shall be in the intended appeal.***

***It is so ordered.***

***Dated and delivered at Nairobi this 9<sup>th</sup> day of November, 2018.***

**P.N. WAKI**

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**JUDGE OF APPEAL**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**