



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION
CIVIL SUIT NO. 15 OF 2019
CORAM: MUMBI NGUGI J

**ETHICS AND ANTI-CORRUPTION COMMISSION
(FORMERLY KENYA ANTI-CORRUPTION
COMMISSION)PLAINTIFF/RESPONDENT**

VERSUS

PATRICK OCHIENO ABACHI1ST DEFENDANT/APPLICANT
ROSALINE WANJIRA ABACHI2ND DEFENDANT/APPLICANT
BENJAMIN MAKOKHA ABACHI3RD DEFENDANT/APPLICANT
MOSES ODUORI4TH DEFENDANT/APPLICANT
LORIAN JUMA5TH DEFENDANT/APPLICANT
ODEAR NASEWA
HOLDINGS LIMITED6TH DEFENDANT/APPLICANT
RICKAIR TRAVEL
AGENCIES LIMITED7TH DEFENDANT/APPLICANT

RULING

1. In the judgment dated 10th March, 2021, I allowed the plaintiff/respondent's application dated 18th September 2008 seeking declarations that the defendants'/applicants' properties the subject of the application constitute '*unexplained assets*' within the meaning of sections 2 and 55 of the Anti-Corruption and Economic Crimes Act and shall be forfeited to the government. I further granted orders that the funds held in bank accounts the subject of the application and a sum of Kshs 1,990,000/-

recovered from the 1st defendant's premises shall be forfeited to the government. I further directed that the defendants shall bear the costs of the suit.

2. The applicants state that they are dissatisfied with the said judgment and have filed a notice of appeal in the Court of Appeal against the judgment and the orders issued. They have also filed two applications by the 1st -5th respondents and the 6th and 7th respondents respectively seeking stay of the orders issued in the said judgment.
3. The two applications, dated 30th March 2021 and 26th March 2021 respectively have been lodged under the provisions of section 10(4) of the High Court (Organization and Administration) Act) 2015, Rule 16 of the High Court (Organization and Administration) (General) Rules, 2016, section IA (1), 1B, 3A and 63 (e) of the Civil Procedure Act and Order 42 Rule 6 (2) and 7 of the Civil Procedure Rules and any other enabling provisions of the law. The applicants seek stay of execution of the judgment pending hearing of their application before the Court of Appeal. For ease of reference, I shall refer to the 1st -5th defendants as the 1st-5th applicants and the 6th and 7th defendants, the applicants in the second application, as the 6th and 7th applicants.
4. The 1st-5th applicants state that they seek stay of execution of the judgment and orders pending the hearing and determination by the Court of Appeal of their application in Civil Appeal (Application) No. E169 of 2021- Patrick Ochieno Abachi & Ors –vs- Ethics and Anti-Corruption Commission & Ors. The application is lodged under Rule 5 (2) (b) of the Court of Appeal Rules. They also seek the costs of the application.

5. In their application, the 6th and 7th applicants seek stay of the orders of the court in relation to property number L.R. No. MN/ 1/5134, CR. No. 35667 situated within Mombasa Municipality. The grounds on which the application is brought are that the 6th applicant is the proprietor and is in occupation of the property which is registered in its name. The 6th applicant argues that it is a separate and distinct entity from the 1st applicant and the orders of the court issued in relation to unexplained assets acquired by the 1st applicant should not have been issued against its property.
6. The 6th applicant further argues that it faces the imminent risk of being dispossessed of its property L.R. No. MN/ 1/5134, CR. No. 35667. That it did not participate in the proceedings leading to the judgment but is now in danger of being deprived of its constitutional rights to ownership of property under Article 40 (1) of the Constitution in an unprocedural manner and without due process. It intends to appeal against the entire judgment of the court before the Court of Appeal and has lodged an application under Rule 5(2)(b) of the Court of Appeal Rules which is awaiting consideration once a bench of the Court of Appeal is constituted. It is therefore crucial that the subject matter of the application be preserved to protect the integrity of the judicial process and avoid gross miscarriage of justice.
7. In his submissions on behalf of the 1st -5th applicants, Learned Counsel Mr. Ondieki relied on the written submissions dated 11th May 2021. He reiterated that the applicants had filed a notice of appeal and an applicant for stay under Rule 5(2)(b) of the Court of Appeal Rules. The application had been certified urgent and the parties given directions to file their submissions. They had complied and were waiting for a bench to be constituted. Mr. Ondieki submitted

that the applicants were relying on the case of **Butt v Rent Restriction Tribunal 1979 eKLR** on the exercise of discretion to grant stay. He asked the court to consider that the applicants (sic) would suffer substantial loss by losing all the properties he (sic) had acquired since 1996, which included his matrimonial property.

8. The applicants further asked the court to consider the doctrine of proportionality in light of the harm that would be occasioned to the applicants and the fact that if the properties were sold, third parties, innocent purchasers for value, would be introduced.
9. In response to the submissions by the respondent in which it had noted that the applicants had not provided security, it was submitted on behalf of the applicants that all the properties are encumbered and there is therefore no need for security.
10. Regarding the question whether the applicants have an arguable appeal, it was the applicants' submission that that is a question for the Court of Appeal to consider. Since they had filed a Rule 5(2) (b) application before the Court of Appeal, the issue of whether the appeal is arguable, whether it will be rendered nugatory and the issue of fair hearing is a matter for the court of Appeal.
11. The 6th and 7th applicants did not file any submissions nor did their Counsel make oral submissions on their behalf. Their Counsel, Mr. Ndege, informed the court that they would rely on the submissions made by the 1st -5th applicants as they were seeking the same relief.

12. Ms. Ocharo, Learned Counsel for the respondent requested the court to consider the respondent's Replying Affidavit sworn by Pius Maithya on 29th April, 2021 and written submissions dated 19th May 2021.

13. I have read and considered the respective pleadings and submissions of the parties. The applicants seek orders of stay pending appeal, their application being premised primarily on Order 42 Rule 6 of the Civil Procedure Rules which provides as follows;

6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under sub-rule (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. (Emphasis added)*

14. The applicants have referred the court to various decisions in which the principles upon which the court may grant orders of stay pending appeal

have been enunciated. In *Butt v Rent Restriction Tribunal 1979 eKLR*, the court held as follows:

“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in Wilson –vs- Church (No 2) 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p 458:

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”

15. The applicants have also referred the court to various decisions in which courts considered the principles to be applied in determining whether or not to grant orders of stay pending appeal under Order 42 Rule 6. These principles, I believe, do not need belabouring. An applicant must satisfy the court that substantial loss may result unless the order is made, and that the application for such order has been made without unreasonable delay. The applicant must also furnish such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant.

16. In this case, the decision that the applicants seek to appeal against was rendered on 10th March 2021. The two applications the subject of this ruling dated 26th and 30th March 2021, were filed on 30th March and 4th April 2021 respectively. I find that the applications were filed without undue delay, and consequently the second limb of Order 42 Rule 6(a) has been met.

17. In order to exercise its discretion in favour of a party seeking orders of stay pending appeal, the court must also be satisfied that substantial loss will result to the applicant if the orders are not granted. The orders that the applicants seek to stay were made in relation to assets that the court found to be unexplained assets within the meaning of the term in section 55 of the Anti-corruption and Economic Crimes Act. The court made orders for the forfeiture of the assets to the state.

18. In opposing the two applications, the respondent has referred the court to the decision of the Court of Appeal in **Shell Ltd v Kibiru and Another [1986] 1 KLR 410** in which the Court stated:

“The appeal is to be taken against a judgment in which was held that the present respondents were entitled to claim damages due to the negligence of the present applicant.

It is a money decree. An intended appeal does not automatically operate as a stay. The application for the stay made before the High Court failed because the first of the conditions set out in order XLI rule 4 of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the applicant, either in the matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the respondents would be unable to repay the decretal sum plus costs in two courts.

It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see

why the respondents should be kept out of their money.”
(Emphasis added).

19. I have considered the averments and submissions of the applicants, and I find that they have not demonstrated that they will suffer substantial loss if the orders sought are not granted. The orders have been made in favour of the government in respect of unexplained assets. They have been made in a matter that has been pending in the courts for the last 13 years, with the determination thereof held back primarily by a multiplicity of suits and applications filed by the applicants. Other than contending that third parties will be involved should the orders of stay not be granted; the applicants have not demonstrated that they will not be able to recover the assets from the state should their appeal be successful. I am therefore not satisfied that the applicants have met the conditions for grant of stay orders under Order 42 Rule 6.

20. The respondent has submitted that the applicants do not have an arguable appeal. It has made various submissions with respect to the grounds on which the applicants challenge the decision of the court. The respondent disputes the contention by the applicants that the court erred in the manner in which it construed the text and import of section 55 of the Anti-Corruption and Economic Crimes Act. It further notes that the applicants, contrary to their assertion, had been accorded a hearing and had even cross-examined the respondent's witnesses, so there was no basis for alleging violation of their rights under Article 50. However, whether or not the applicants have an arguable appeal is a matter for consideration by the Court of Appeal in the application pending before it. It is not one of the conditions for the court to consider under Order 42 Rule 6.

21. In so far as this application is concerned, I find that the applicants have not satisfied the requirements for grant of stay orders under Order 42 Rule 6. Accordingly, the applications dated 26th March 2021 and 30th March 2021 are hereby dismissed with costs to the respondent.

Dated and Signed at Nairobi this 13th day of July 2021.


MUMBINGUGI

JUDGE

Dated, Signed and Delivered at Nairobi this 14th day of July 2021.


JAMES WAKIAGA
JUDGE

