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REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Koome: CJ & P, Mwilu; DCJ & VP, Ibrahim, Wanjala & Njoki SCJJ)

PETITION (APPLICATION) NO. E011 OF 2023

-BETWEEN-

KENYA AIRPORTS AUTHORITY APPLICANT

-AND-

OTIENO, RAGOT & COMPANY ADVOCATES RESPONDENT

Being an application for stay of proceedings

Representation:

Mr. Munyu & Ms. Weru for the Appellant/Applicant
(Iseme, Kamau & Maema Advocates)

Mr. Otieno for the Respondent
(Owiti, Otieno Ragot & Company Advocates)

RULING OF THE COURT

[1] UPON perusing the Notice of Motion by the applicant dated 19th April, 2023 and filed on 25th April, 2023 pursuant to sections 3, 3A, 21(1 & 2), 23 (A) of the Supreme Court Act and rule 32 of the Supreme Court Rules, 2020 seeking *a stay of execution of the decree/order resulting from the judgment delivered by the Court of Appeal on 19 May 2023 in **Civil Appeal No. 39 of 2017** and as a consequence to stay the hearing of the enforcement proceedings pending*

before the High Court in **Kisumu HCCC Misc. Civil Cause 95 of 2011** and any other consequential orders arising therefrom pending the hearing and determination of the Petition of Appeal.

[2] UPON perusing the grounds on the face of the application; the supporting affidavit sworn on 19th April, 2023 by Margaret Munene; further affidavit sworn on 27th April, 2023 by Martin Munyu and written submissions dated 19th April, 2023 and filed on 25th April, 2023 wherein the applicant contends that it had retained the services of the respondent to represent it in a suit filed by various plaintiffs in **Kisumu HCCC No. 156 of 2009, Donde Opogo & 56 others v Kenya Airports Authority** in which the plaintiffs claimed compensation in the sum of Kshs.13,932,000,000/- for alleged compulsory acquisition of land; that vide a ruling delivered on 24th June 2010 the court proceeded to strike out the suit with costs; that the respondent demanded to be paid advocate-client costs based on the certificate of costs derived from party to party costs for the sum of Kshs. 151, 650, 000/-.

[3] Since the applicant and respondent could not agree on fees, the respondent filed their bill of costs which was taxed at Kshs.8,759,022.74. This finding was upheld upon a reference before the High Court at Kisumu **HCCC Misc. Civil Cause No. 95 of 2011**. On appeal in **Civil Appeal No. 39 of 2017** (“the impugned decision”) the court increased the fees by one half guided by provisions of Schedule VI Part A and B of the Advocates Remuneration Order 2014 in the sum of Kshs.196,044,750.50; and

[4] UPON considering the applicant’s further argument that its petition having been certified as raising questions which require a multi-faceted approach to the interpretation of the applicable principles on taxation of advocate - client bill of costs *vis a vis* the constitutional right of access to justice; that the appeal has met the threshold set out by this Court in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others** [2014] eKLR as it is arguable, not frivolous, raises weighty and *bona fide* issues for determination; and that it will be rendered nugatory considering that the respondent has taken

steps towards enforcement of the decree arising from the impugned decision with a mention scheduled on 15th May 2023 in **HCCC Misc. Civil Cause No. 95 of 2011** for directions; and it is a public interest consideration since the colossal sum claimed by the respondent is to be paid from public coffers by dint of the fact that the applicant is a public entity; and

[5] UPON perusing the respondent's replying affidavit sworn on 27th April 2023 by David Otieno and written submissions dated 27th April, 2023 and filed online on even date opposing the application on the grounds that the impugned decision resulted in a fresh certificate of costs leaving the actual recovery process to the High Court; that the sum of Kshs.191,044,750.50 is colossal though the applicant was faced with a claim of Kshs.13 Billion; that the applicant has the capacity to pay the sum but it only chooses who to pay.

[6] FURTHER CONSIDERING the ground advanced by the respondent that it is financially hamstrung is not supported by any evidence; that the stay will irreparably harm the respondent given that while the respondent is being kept away from the fruits of litigation, the value of money continues to diminish; that the allegation that the respondent has now just applied for enforcement of the decree at the High Court is incorrect as the applicant has been aware of the same since 2021; that at the moment the application pending before the High Court is one in which the respondent seeks the adoption of the certificate of costs as a judgment of the court of which, there is no judgment capable of execution given that the court only issued a declaration as to quantum of fees payable to the respondent and left the actual recovery process to the High Court; that it is in public interest that litigation must come to an end hence they have filed **Civil Application No. E015 of 2023** before this Court seeking review of certification made by the Court of Appeal as the matters the applicant intends to pursue are not for this Court; and

[7] NOTING the Court's order issued on 26th April, 2023 granting the applicant an order of stay of execution pending the *inter partes* hearing and determination of this application.

[8] **HAVING** considered the totality of the application, responses and submissions put forth, **WE OPINE** as follows:

- (a) This Court has, under section 23A of the Supreme Court Act, jurisdiction to issue an order for stay of execution, an injunction, a stay of further proceedings or any other conservatory or interim orders, on such terms as the Court may deem fit. It is well established following our decision in the case of ***Gatirau Peter Munya vs. Dickson Mwenda & 2 others***, SC Application No. 5 of 2014, [2017] eKLR that an applicant must satisfy the Court that the appeal is arguable and is not frivolous; that unless the orders of stay are granted, the appeal will be rendered nugatory; and thirdly, it is in the public interest that the order of stay be granted.
- (b) The gist of the appeal, as certified by the Court of Appeal as one of general public importance, involves a determination of the proper interpretation of the provisions of Schedule VI, Part A and B of the Advocates Remuneration Order and the extent to which such interpretation limits the exercise of the taxing officer's judicial discretion in taxation of Advocate – Client bill of costs especially where the value of the subject matter of the dispute is not substantiated. In our view, and in light of the pending application in ***Application No. E015 of 2023*** to review the certification, the appeal is arguable and not frivolous.
- (c) The impending and imminent execution of the decree arising from the impugned decision in the proceedings pending before the High Court and the amounts involved risks rendering the appeal nugatory should the same be concluded pending the hearing and determination of the appeal.
- (d) Given that the sum in question is colossal, the appeal, pending our review, having been certified as raising an issue of general public importance and the dispute involving a statutory body funded by the

public coffers, we are of the view that it is in the public interest that the order of stay is granted pending the determination of the appeal.

- (e) On costs, award of the same is discretionary and follows the principle set out by this Court in ***Jasbir Singh Rai & 3 other v Tarlochan Singh Rai & 4 others*** SC Petition No. 4 of 2012; [2014] eKLR that costs follow the event. On this account, it is only prudent that we defer the costs to await the ultimate outcome of the appeal.

[9] ACCORDINGLY, we make the following orders:

- a) *The Notice of Motion dated 19th April, 2023 and filed on 25th April, 2023 by the applicant be and is hereby allowed.*
- b) *THAT pending the hearing and determination of the Petition of Appeal against the judgment delivered on 19 May 2021, this Honourable Court be pleased to order a stay of execution of the decree/order resulting from the judgment delivered by the Court of Appeal on 19 May 2023 in **Civil Appeal No. 39 of 2017** and as a consequence to stay the hearing of the enforcement proceedings pending before the High Court in **Kisumu HCCC Misc. Civil Cause 95 of 2011** and any other consequential orders arising therefrom.*
- c) *The costs of this application to abide the outcome of the appeal.*

It is so ordered.

DATED and DELIVERED at NAIROBI this 16th day of June, 2023.

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M. K. KOOME
CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

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P. M. MWILU
DEPUTY CHIEF JUSTICE & VICE
PRESIDENT OF THE SUPREME COURT

.....
M. K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....
S.C. WANJALA
JUSTICE OF THE SUPREME COURT

.....
NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

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

REGISTRAR
SUPREME COURT OF KENYA

