



Kenya Power & Lighting Company Limited v Nyongesa (Suing as the legal representative of the Estate of Roseline Akinyi Ouma) (Civil Appeal E84 of 2021) [2023] KEHC 3959 (KLR) (26 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3959 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E84 OF 2021
JN KAMAU, J
APRIL 26, 2023**

BETWEEN

KENYA POWER & LIGHTING COMPANY LIMITED APPELLANT

AND

GEORGE OUMA NYONGESA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF ROSELINE AKINYI OUMA) RESPONDENT

(Being an appeal from the Ruling of Hon M. Shimenga (SRM) delivered at Kisumu in Chief Magistrate's Court Case No 120 of 2020 on 3rd June 2021)

RULING

Introduction

1. In its Notice of Motion dated March 31, 2022 and filed on April 1, 2022, the Appellant herein sought an order of stay of execution of the Judgment of the Trial Court that was delivered on February 22, 2021 and the Ruling of June 3, 2021 pending the hearing and determination of this appeal.
2. Hemstone Owino Ouma, an advocate of the High Court of Kenya swore an Affidavit in support of the said application herein on behalf of the Appellant. He swore a Further Affidavit on October 18, 2022 to clarify that in one of the prayers in the application, it had erroneously been indicated "orders of this Honourable Court" instead of "orders of the Learned Trial Court".
3. The Applicant averred that the Trial Court delivered Judgment on February 22, 2021 and awarded the Respondent herein general damages, special damages, costs and interest from the date of the Judgment. It pointed out that it filed an application to set aside the said Judgment, which application was allowed on July 3, 2021 and the Respondent was awarded thrown away costs of Kshs 30,000/=. It added that it was directed to fix its Chamber Summons application seeking to enjoin a third party within thirty (30) days of the Ruling.



4. It asserted that it instructed its advocates to appeal against the said decision on the issue of thrown away costs whereupon in their letter dated June 18, 2021, the said advocates requested for typed proceedings and the Ruling. It added that the Court Registry received the letter on June 21, 2021 and responded to the same on July 5, 2021. It then paid for the certified copy of the typed proceedings and Ruling and that it lodged its Appeal on the same date. It asserted that the Memorandum of Appeal was duly served upon the Respondent.
5. It contended that its advocates did not apply and/or obtain an order for stay of execution as they entered into negotiations with the Respondent to compromise the Appeal. However, the said negotiations did not materialise whereupon the Respondent executed against it for the thrown away costs. It added that it did not fix the third-party Chamber Summons as the file was taken to the typing pool for the typing of the Ruling and proceedings.
6. It pointed out that the Respondent proclaimed against it on the basis of the *ex parte* Judgment which was set aside by the Learned Trial Magistrate and asserted that its appeal had high chances of success and would be rendered nugatory in the absence of stay orders.
7. It added that unless this court intervened, the Respondent would execute against it and subject it to substantial loss. It added that it was ready to furnish security to satisfy the award resulting from the Ruling of the Trial Court as would be directed by the court. It also averred that it filed the said application without delay and that the Respondent would not suffer any prejudice if the orders it had sought were granted.
8. It was its contention that an innocent litigant ought not be condemned for the mistakes of its counsel, if any and urged this court to allow its present application.
9. In opposition to the Appellant's application, Richard Otieno Okungu, the Respondent's advocate, swore a Replying Affidavit on April 26, 2022 on his behalf. The same was filed on April 27, 2022.
10. The Respondent asserted that the Appellant failed to attend court on the day the matter was scheduled for hearing despite the date having been taken by consent. He confirmed that the Judgment that was delivered by the Trial Court was set aside to enable the Appellant be heard.
11. He pointed out that the application to set aside the *ex parte* judgment was allowed on condition that the Appellant set down its said Chamber Summons dated November 12, 2020 for hearing within thirty (30) days failure to which the orders setting aside the Judgment would be automatically vacated. He also stated that the Appellant was to pay him thrown away costs in the sum of Kshs 30,000/=.
12. It was his assertion that the Appellant had not complied with Order 11 of the *Civil Procedure Rules* and/or filed a Record of Appeal and/or fixed the Appeal for directions and/or hearing.
13. He averred that the Appeal herein was not against the Judgment in Civil Case No 120 of 2020 and that since the filing of the Appeal herein, the Appellant had not made any attempt to file orders of stay of execution of the lower court's decree. He was emphatic that the Appellant had lost its right to appeal.
14. The Appellant's Written Submissions were dated and filed on October 18, 2022. The Respondent's Written Submission which were undated were filed on June 9, 2022. This Ruling is based on the said Written Submissions which parties relied upon in their entirety.

Legal Analysis

15. The Appellant relied on several cases amongst them the case of *Loice Khachendi Onyango vs Alex Inyang'u & Another* [2017] eKLR and *Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia &*



- Co Advocates & 2 Others* [2014] eKLR to support its argument that it had satisfied the conditions that had been set out in Order 42 Rule 6 of the *Civil Procedure Rules*, 2010 for the granting of an order of stay of execution pending appeal.
16. It also placed reliance on the cases of *Mandeep Chauhan vs Kenyatta National Hospital & 2 Others* [2013]eKLR and *Republic vs National Land Commission & 2 Others Ex parte Archdiocese of Nairobi Kenya Registered Trustees (St Joseph Mukasa Catholic Church Kabawa West* [2018]eKLR where the common thread was that it was a cardinal rule of natural justice that no one should be condemned unheard. It added that the mistake of its Advocates ought not be visited upon it as was held in the case of *CFC Stanbic Limited vs John Maina Gitthaiga & Another* [2013] eKLR.
 17. On his part, the Respondent argued that the Appeal herein was not against the main suit as the Appellant had lost its right of appeal in the main suit, time having lapsed. He was emphatic that he therefore had the right to execute and averred that the Appellant was not interested in prosecuting its case only but was only interested in delaying justice not knowing that he lost his wife.
 18. Notably, before an order for stay pending appeal under Order 42, Rule 6(2) of the *Civil Procedure Rules*, 2010 could be granted, an applicant had to demonstrate the following:-
 1. That substantial loss may result unless the order is made.
 2. That the application had been made without unreasonable delay.
 3. Such security as the court orders for the due performance of the decree has been given by the applicant.
 19. The three (3) conditions for the grant of an order for stay of execution had to be met simultaneously as they were conjunctive and not disjunctive.
 20. The Appellant annexed a copy of the impugned Ruling that was delivered on June 3, 2021 wherein the Respondent was awarded Kshs 30,000/= as throw away costs. It did not annex a copy of the Judgment that was delivered on February 22, 2021. However, that was not a fatal omission as the question that was presently before this court was whether or not it had satisfied the conditions for being granted an order for stay of execution pending appeal.
 21. The Respondent did not file an Affidavit of Means to demonstrate that he would be able to refund the sum of Kshs 30,000/= being the throw away costs in the event the Appellant was successful in its Appeal. Even so, although the sum was not colossal and the Respondent might have been able to refund the same to the Appellant in the event it was successful in its Appeal, this very court held in *Dr G N Muema t/a Mt View Maternity & Nursing Home vs Miriam Maalim Bisbar & Another* (2018) eKLR that the rigours of recovering sums of money could amount to substantial loss because of the resources that would be put in recovering the same.
 22. It was for that reason that this court found and held that the Appellant had satisfied the first condition of being granted an order for stay of execution pending appeal.
 23. The Ruling the Appellant wished to appeal against was delivered on June 3, 2021. The present application was filed on March 31, 2022. The Respondent did not rebut its assertions that there had been some negotiations to compromise the Appeal but the same collapsed. This court therefore concluded that the period of nine (9) months from the date when the Ruling was delivered and the date the present application was filed, though long, was not inordinate. There having been no inordinate delay in filing the said application, this court found and held that the Appellant had satisfied the second condition for being granted an order of stay of execution pending appeal.



24. In its affidavit evidence and Written Submissions, the Appellant averred that he was ready and willing to abide by any condition of this court. It asserted that it was willing to have the appeal compromised as well as provide security for satisfaction of both the award in the *ex parte* Judgment and the throw away costs so that it secured an opportunity to participate and ventilate its case in the Trial Court. This court thus found and held that the Appellant had satisfied the third condition for being granted an order of stay of execution pending appeal.

Disposition

25. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Notice of Motion application dated March 31, 2022 and filed on April 1, 2022 was merited and the same be and is hereby allowed in the following terms:-

1. That an order for stay of execution of the Ruling of Hon M. Shimenga (SRM) that was delivered at Kisumu in Chief Magistrate's Court Civil Case No 120 of 2020 on June 3, 2021 be and is hereby granted pending the hearing and determination of the appeal on condition that the Appellant shall deposit the throw away costs of Kshs 30,000/= into an interest earning account in the joint names of its advocate and the Respondent's advocates herein within thirty (30) days from the date of this Ruling.
2. For the avoidance of doubt, in the event the Appellant shall default on Paragraph 25(1) hereinabove, the conditional stay of execution shall automatically lapse.
3. To progress this matter further, the Appellant be and is hereby directed to file and serve its Record of Appeal within one hundred and twenty (120) days from date of this Ruling. In the event the proceedings of the lower court and the lower court file will have been placed in the file herein and the Appellant shall have failed to file its Record of Appeal as aforesaid, the Appeal herein will stand as automatically dismissed.
4. Since the Appellant does not have control of the typing of proceedings and placing of the lower court file, the Registrar of High Court Kisumu Courts be and is hereby directed to facilitate the typing of said proceedings and placing of the said lower court file within ninety (90) days from date of this Ruling.
5. This matter will be mentioned on September 27, 2023 to confirm compliance and/or for further orders and/or directions.
6. Costs of the application herein will be in the cause.
7. Either party is at liberty to apply.

24. It is so ordered.

DATED AND SIGNED AT KISUMU THIS 20TH DAY OF APRIL 2023

J. KAMAU

JUDGE

DATED, SIGNED AND DELIVERED AT KISUMU THIS 26TH DAY OF APRIL 2023

M.S. SHARIFF

JUDGE

