



Kenya Power & Lighting Company v Tesot & 3 others; Dawning Agencies Auctioneers (Interested Party) (Miscellaneous Civil Application E021 of 2023) [2023] KEHC 21448 (KLR) (31 July 2023) (Ruling)

Neutral citation: [2023] KEHC 21448 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
MISCELLANEOUS CIVIL APPLICATION E021 OF 2023**

**JK SERGON, J
JULY 31, 2023**

BETWEEN

KENYA POWER & LIGHTING COMPANY APPLICANT

AND

JOEL KIPKOECH TESOT 1ST RESPONDENT

GEOFFREY K CHEPKWONY 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

THE COMMISSIONER OF POLICE 4TH RESPONDENT

AND

DAWNING AGENCIES AUCTIONEERS INTERESTED PARTY

RULING

1. The instant application is a notice of motion dated May 15, 2023 seeking the following orders;
 - i. Spent
 - ii. That this honourable court be pleased to order a stay of execution of the judgments delivered in Kericho Chief Magistrate's Court civil suit No 48 of 2012 and Kericho Chief Magistrate's Court civil suit No 49 of 2012 on August 4, 2015 and subsequent decrees and proclamation, as well as the intended sale slated for May 19, 2023 pending hearing and determination of this application.
 - iii. That this honourable court be pleased to order a stay of execution of the judgments delivered in Kericho Chief Magistrate's Court civil suit No 48 of 2012 and Kericho Chief Magistrate's Court civil suit No 49 of 2012 on August 4, 2015 and subsequent decree and proclamation,



as well as the intended sale slated for May 19, 2023 pending hearing and determination of the intended appeal.

- iv. That the honourable court be pleased to grant the applicant/appellant leave to lodge its appeal and record of appeal out of time
 - v. That the costs of this application be provided for.
2. The application is supported by grounds on the face of it and the supporting affidavit of Justus Ododa the legal officer of the applicant herein.
 3. The applicant avers that on August 4, 2015 the Chief Magistrate's Court at Kericho entered judgment in Kericho Chief Magistrate's civil suit No 49 of 2012 and the same judgment was thereafter duplicated in Kericho Chief Magistrate's Court civil suit No 48 of 2012. The net effect of the two judgments was that the respondents were each awarded the sum of Kshs 1,500,000/= that was to be borne by Kenya Power and Lighting Company (KPLC) jointly and severally with the 2nd and 3rd respondents herein. Soon thereafter a decree was extracted and warrants of attachment issued on February 3, 2023 in favour of the interested party over several of the applicant's vehicles.
 4. The applicant avers that it has been more than 7 years since judgment was entered and no decree and execution proceedings had ever been served on the applicant and that they only became aware of the execution of the judgment against KPLC when they were served with warrants of attachment and proclamations dated February 3, 2023 in spite of which there was a notice of sale by auction of the applicant's vehicles in service of the above mentioned warrants to be effected.
 5. The applicant avers that the subject motor vehicles were in risk of disposal albeit irregularly despite the applicant being an essential service provider for electricity supply and distribution within the South Rift Region, the irregular disposal of the subject motor vehicles would jeopardize the livelihood and property of many residents.
 6. The applicant avers that unless orders sought in the application are granted the applicant's vehicles risks being auctioned based on irregular, defective and illegal warrant of attachment and/or proclamation.
 7. That the applicant argues that they have an arguable appeal with a high probability of success, which appeal would be rendered moot or a mere academic exercise if the execution decree is allowed to proceed.
 8. The matter was fixed for inter parties hearing on June 13, 2023, however, before the inter parties hearing, the 1st and 2nd respondents through their duly appointed advocates filed a notice of preliminary objection dated June 9, 2023 that application dated May 15, 2023 was frivolous, vexatious and out to delay the respondent's from enjoying the fruits of judgment that was rendered eight (8) years ago.
 9. Further, that the instant application was an abuse of court process, no appeal had been preferred against the judgment delivered on August 4, 2015 and the court ruling on April 11, 2023 therefore, the instant application was fatal, incurably defective and had been overtaken by events, the applicant was guilty of laches and had squandered the opportunity to appeal 8 years ago.
 10. The 1st and 2nd respondents through their duly appointed advocates filed a statement of grounds of opposition dated June 9, 2023 and stated that the applicant was granted a thirty (30) day stay on August 4, 2015 to appeal against Kericho CMCC No 48 of 2012 but failed to appeal and further that on April 11, 2023 in an application dated February 15, 2023 filed by the applicant in Kericho CMCC No 48 of 2012 which was dismissed, the court on its own motion granted the applicant thirty (30) days stay and right of appeal, the applicants herein did not lodge an appeal.



11. The applicants filed a replying affidavit dated June 13, 2023 sworn by Justus Ododa in response to the respondents preliminary objection dated June 9, 2023 and stated that they had not been served with a notice to show cause as stipulated by section 38 of the Civil Procedure Act, the notice to show cause was an indispensable prerequisite to the court issuing orders of execution and further that the passage of 8 years was indicative of their own laxity in executing their judgment, they have not explained why it took more than 1 year to execute the judgment.
12. The applicants stated that they had lodged an application to file the appeal out of time alongside a draft notice of appeal which was evidence that they were desirous of appealing the judgment.
13. The applicants contended that they took issue with the judgment's ambiguity on apportioning liability, as they were found severally and jointly liable for malicious prosecution amongst the other defendants and the court did not apportion the extent of the defendant's liability and that the plaintiff (the respondents herein) had not justified the partisan execution against KPLC and not the other named defendants in the suit, KPLC was not responsible for the investigations, arrest and subsequent prosecution, they merely reported the theft in their offices and the police pursued the complaint.
14. The applicants stated that if execution were to be allowed then it would constitute an infringement of KPLC's right to property as enshrined in section 40 (1) of the Constitution and the net effect of the execution would be to transfer nebulous liabilities solely to KPLC when it should be apportioned severally to the other defendants as well.
15. The interested party filed a replying affidavit in opposition to the instant application dated June 12, 2023, the affidavit was sworn by Moses K. Korir a licensed class "B" auctioneer trading under the name and style of M/S Dawning Agencies Auctioneers.
16. The interested party avers that the instant application has been overtaken by events that the court *vide* ruling in Kericho CMCC No 48 of 2012 dated April 11, 2023, lifted interim stay orders and gave orders for execution to continue.
17. The interested party further avers that the court in Kericho CMCC No 48 of 2012 had earlier issued him with warrants of attachment and he had proceeded to proclaim the judgment debtors property and further that in Kericho CMCC No 49 of 2012 execution had been done.
18. The interested party avers that on or about May 17, 2023 he had received a call from the applicants, legal officer requesting him to furnish them with bank details so that he can advise the judgment debtor to make payment and was therefore surprised to be served with the instant application.
19. The interested party faulted the applicant's legal officer for concealing the fact that the judgment debtor's property had long been seized in execution of the courts decree.
20. The interested party therefore urged the court to dismiss the instant application with costs to the decree holders and himself.
21. I have considered the instant application, supporting affidavit and replying affidavit filed in opposing the instant application, the notice of preliminary objection, statement of grounds of opposition dated June 9, 2023 responses thereto and the parties oral submissions in court during the inter parties hearing on June 19, 2023 and I find that the sole issue for this court's determination is whether this court can entertain the application for stay of execution and leave to file an appeal out time in the circumstances. I find that the applicants herein have acted in indolence whereas the law is there to aid the vigilant, they failed to lodge an appeal in Kericho CMCC No 48 of 2012 and Kericho CMCC No 49 of 2012 over a period of 8 years and were catapulted into action when the decree holder moved to court for



execution of judgment and/decreed in the said matters. Furthermore, the applicants have not explained the inordinate delay and/or given a plausible explanation for the delay in filing the appeal on their part.

22. Accordingly, I find that the application dated May 15, 2023 lacks in merit and I dismiss it with costs to respondents (the decree holders herein) and the interested party.

DATED, SIGNED AND DELIVERED THIS 31ST DAY OF JULY, 2023

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J.K. SERGON

JUDGE

In the presence of:

C/Assistant - Rutoh

Miss Sang holding brief for Biko for Applicant

Sigira for the Respondent

