



**Wekesa v Kenya Power and Lighting Company Ltd & another (Petition
12 of 2021) [2023] KEHC 21996 (KLR) (23 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21996 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
PETITION 12 OF 2021
PJO OTIENO, J
AUGUST 23, 2023**

BETWEEN

PROF. DR. MONI WEKESA PETITIONER

AND

KENYA POWER AND LIGHTING COMPANY LTD 1ST RESPONDENT

ENERGY & PETROLEUM REGULATION AUTHORITY 2ND RESPONDENT

RULING

1. In every application for stay pending appeal, where the appeal lies as of right, as in this case, the primary considerations is the balance of the rights of the Respondent, as a successful decreeholder, to access and derive the benefits in the decree, as weighed against the rights of the Applicant, as Judgmentdebtor, to access justice and do so unhindered or unduly burdened.
2. The order the Court makes must appear to protect the substratum of the litigation in the appeal but without unduly or unjustly keeping the decree holder from his fruits of the litigation. In execution of that mandate, the trial Court whose Judgment is impugned remains reminded that however right or accurate it may consider its decision to be, the appellate Court has the latitude to uphold the decision, tinker with it to any extent or just upset it wholly altogether.
3. In this matter I do remind myself of the powers of the appellate court above me. In doing so, I have in mind the right of the decree holder as a holder of a property in a decree as well as the right of the Judgment debtor to be free to access justice unhindered. An order of stay thus calls for issue every time an appeal stands to be rendered nugatory and substantial loss occasioned to the appellant, if stay is declined.
4. The facts disclosed in the Affidavits sworn and filed by both sides in support and opposition to the application are not very divergent. For the Applicant/Judgmentdebtor, the position taken is that since inception of the suit the Petitioner has never paid any accruing energy bills while he continues to



consume the service from the 1st Respondent and therefore, unless the stay is granted the appeal will be rendered nugatory and the 1st Respondent exposed to suffer substantial loss. In terms of the law under Order 42 Rule 6(2) (b) there is an offer to provide security, for the due performance of the decree, in the event the appeal fails.

5. In the affidavit sworn in support of the application it is disclosed that the Judgment has been partial performed by the 2nd Respondent, to the Petition, hearing and determining the Petitioner's complaint and that the same has been escalated by way of an Appeal to the Energy and Petroleum Tribunal, which Appeal pends determination. It is then reiterated that all the time since institution of the suit, the accruing electricity bills remain unpaid and any demand for payment is met with the sub judice rule as a shield.
6. It is then contended that unless stay be granted, the appeal shall be rendered nugatory but no details are given of such loss. The Applicant has exhibited documents to show that a notice of Appeal has been filed, proceedings applied for, as well as the correspondence between the parties to show that accruing bills remain unpaid.
7. For the Respondent/decreeholder, the Replying Affidavit resisting the application denies almost every allegation by the Applicant but concedes that a Notice of Appeal has been filed, save that no actual appeal (sic) has been filed just as much as no certificate of delay has been exhibited. It is then asserted that none of the prerequisites of grant of stay pending appeal has been met and satisfied by the Applicant hence the same should not be granted. In particular, the decreeholder posits that no prejudice would be occasioned to the Applicant if the 2nd Respondent executes its mandate under the statute and that being Professor in law, he has the ability to effect a refund of the monetary decree in the event the appeal succeeds and that the payment of that sum by the Applicant cannot be said to be capable of crippling its operations. It is therefore the prayer and contention of the decree holder that the stay be declined but in the event the Court be inclined to grant it then the Applicant be ordered to deposit into Court the decretal sum which he calculates at Kshs 1,814,889/=.
8. Parties have equally filed rival Submissions supported with decided cases and the court has benefited from reading same.
9. Before going to the merits there are positions taken by the Respondent as technical objections that needs to be handled before heard. The first of such technical objections regards the contention that no actual appeal exist as no Memorandum of Appeal has been filed nor served and that no certificate of delay has been exhibited. To this Court, an appeal from its decision to the Court of Appeal is deemed filed and pending upon filing a Notice of Appeal. That is the plain and unambiguous meaning and purport of Order 42 Rule 6 (4). It is not for this Court to second guess the pendency of an appeal to the Court of Appeal when it has on its record a Notice of Appeal duly filed. To this Court, that contention and position flies on the face of the law under Order 42 Rule 6 (4) and Rule 85(1) of the *Court of Appeal Rules*.
10. How about, the need for a certificate of delay? It is not within the mandate of this Court, once a Notice of Appeal is filed to consider its propriety or indeed whether the notice has been served in time or at all or even whether the appeal itself has been lodged in terms of the requirements of the Court of Appeal Rules. Once the Notice is filed, the matter sits squarely with the Court of Appeal and all questions are due for determination by that Court.
11. Therefore the concerns of the decree holder on the propriety or indeed pendency of the appeal is not before me in this application. See Rule 85 (2) of the Court of Appeal Rules.



12. On whether a certificate of delay needed to have been exhibited in this application, I consider that to be equally an improper exposition of the law. For an appeal to the Court of Appeal, the provision to Rule 84, of the Rules, permit the Deputy Registrar of this Court to issue a certificate showing that the period between the date the proceedings were requested and the date they were readied was necessary for such preparation and not to blame on the Appellant. In my understanding, therefore, what the Petitioner calls the certificate of delay can only be available once the proceedings are typed and certified so that the Deputy Registrar can determine the date of certification and thus the duration required to avail the proceedings.
13. For this matter I have perused the file as I prepared this Ruling, and noted that the proceedings are ready and certified so. Again that goes to the propriety or deficiency in the appeal which is not for this Court in the application.
14. Now on the merits, it is of note that the Judgment has been partly performed and what remains for performance by the Applicant is the payment of the money awarded to the Petitioner as damages and costs. In a monetary decree, it is a strong thing for the Court to order stay and keep the decree holder from the propriety in the Judgment where it is not demonstrated that the decree holder is a person of the straw who would be unable to effect a refund of the decretal sum if the appeal succeeds. It has therefore remained the law since *Kenya Shell Ltd -vs- Kabiru [1986] KLR 410*, in the words of HANCOX JA, that:-

' Having considered the matter to the full, and with anxious care, there is in my judgement no justification whatsoever for holding that there is a likelihood that the respondents will not repay the decretal sum if the appeal is successful and that the appeal will thereby be rendered nugatory. The first respondent is a man of substance, with a good position and prospects. It is true his house was, in his words, reduced to ashes, but I do not take that against him. Both seem to me to be respectable people and there is no evidence that either will cease to be so, in particular that the first respondent will not remain in his job until pensionable age.'
15. In this matter, the Applicant has simply stated, I think so causally, that it will suffer substantial loss without a succinct depth on the nature and extent of the loss. There has been no attempt to explain what injury would result if the decree is enforced. More significantly, there is no allegation that the Petitioner will be unable to effect a refund and even if the Petitioner asserted ability to effect a refund no rebuttal was filed. It is therefore the finding of the Court that no substantial loss has been demonstrated, as the cornerstone of consideration of grant of stay pending appeal, just as no material has been availed to suggest that the appeal stands to be rendered nugatory unless stay be granted.
16. On the account of the foregoing finding, the Notice of Motion dated May 17, 2023 is determined to have no merits and it is dismissed.
17. Before I conclude, where would this ruling place the Judgment debtor as far as execution is concerned? The Court has perused the file and observed that even though the bill of costs was filed, the same is yet to be taxed and costs certified. Equally the parties appear not to have settled the terms of the decree in terms of the rules applicable. In those circumstances and before the Court is moved to grant leave to execute before taxation, no legal process can ensue. In my view, therefore, as at the date the application for stay was filed, and even today, there is no real threat at lawful execution process issuing. To that extent, even with the command that application for stay be made promptly and without undue delay, I do take the view that the current application was brought and pursued prematurely.
18. Having so said, the application is dismissed with costs to the decree holder being the successful party.



DATED, SIGNED AND DELIVERED IN KAKAMEGA THIS 23RD DAY OF AUGUST 2023.

PATRICK J. O. OTIENO

JUDGE

