Mbobu v Kenya Power and Lighting Company Limited (Environment and Land Appeal E038 of 2024) [2025] KEELC 1404 (KLR) (20 March 2025) (Ruling)

Neutral citation: [2025] KEELC 1404 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND APPEAL E038 OF 2024

OA ANGOTE, J

MARCH 20, 2025

BETWEEN

MATHEW KYALO MBOBU ..... APPLICANT

AND

KENYA POWER AND LIGHTING COMPANY LIMITED ..... RESPONDENT

RULING

1. Before this court is a Notice of Motion application filed by the Applicant dated 28th August 2024 pursuant to Article 159(2) of *the Constitution* of Kenya, Sections 13 and 19 of the *Environment and Land Court Act*, and Order 22 Rule 22 of the Civil Procedure Rules. The Applicant has sought for the following orders:

    i. That there be a stay of execution of the determination issued by the Energy and Petroleum Tribunal on 29th February 2024 pending the hearing and determination of the intended appeal filed at the Environment and Land Court.

    ii. That costs of the application be borne by the Respondent.

2. The application is based on the grounds set out in the Supporting Affidavit sworn by the Applicant. He deponed that on 29th February 2024, the Energy and Petroleum Tribunal issued a ruling ordering him to pay the accumulated bill of Kshs. 421,400 and that being dissatisfied with the ruling, he filed a Memorandum of Appeal dated 21st March 2024 in this court.

3. Mr. Mbobu deponed that he also requested for certified copies of proceedings of the Energy and Petroleum Tribunal but to date, the same have not been issued to him and that he was surprised to receive an electricity bill of Kshs. 432,387 from the Respondent on 15th August 2024, to be settled by 29th August 2024, in a bid to execute the impugned ruling.

4. According to the Applicant, he is apprehensive that should the court fail to grant an order of stay of execution, the Respondent will proceed with execution before the Appeal is heard and determined.

5. It is his further contention that the appeal has high chances of success and will be rendered nugatory unless the orders sought herein are granted.

6. The Respondent has opposed the application through Grounds of Opposition dated 30th September 2024. These grounds are that the application is un procedural, premature, made in bad faith and does not disclose all material facts relevant to the case and that the application does not certify the conditions as set out in the case of Giella vs Cassman Brown.

7. It was averred by the Respondent that the Appellant/Applicant has not disclosed any ground to merit granting of the orders sought in the application; that the Appellant has approached this Court with unclean hands and is undeserving of any equitable remedies; and that it is not in the public interest to compel the Respondent to allow the Appellant to continue enjoying power supply without settling his electricity bills.

8. The Respondent further stated that the application and subject orders sought offends the trite principles for issuance of injunctive orders and provisions of Order 42 of the Civil Procedure Rules 2010 and that if this court is inclined to grant the orders sought, then prayers 2 and 3 may be granted to the Appellant on the ground that the Appellant deposits the disputed sum of Kshs. 421,400/- in court pending hearing and determination of the appeal.

9. According the Applicant, the application is misconceived, frivolous, scandalous and vexatious and should be dismissed with costs to the Respondent. Both parties filed submissions and authorities which I have considered.

Analysis and Determination

10. This court has carefully considered the application, the replying affidavit and submissions filed by the parties hereto. The only issue for determination by this court is whether to grant the orders of stay of execution of the determination issued by the Energy and Petroleum Tribunal on 29th February 2024 pending the hearing of this appeal.

11. In its decision, the Tribunal issued the following orders:

    i. That the Appellant is liable to pay the accumulated bill of Kshs. 421,400 in 36 equal instalments of Kshs. 11,706.

    ii. That Kshs 5,000 awarded for the broken pot and Kshs. 100,000 as general damages is hereby upheld.

    iii. That the Respondent shall compensate the Appellant for the 47 cut trees as it was directed by EPRA.

12. It is trite that filing an appeal does not automatically stay the execution of a decision of a court. The relief of stay of execution is a discretionary remedy, which discretion must be exercised judiciously. This was affirmed in the case of Global Tours & Travel Limited Nairobi in Winding up Cause No. 43 of 2000 where the court held as follows:

> " As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from it a matter of judicial discretion to be exercised in the interest of justice. The sole question is whether it is in the interest of justice to order a stay of

proceedings and if it is, on what terms it should be granted. In deciding whether to order stay the court should essentially weigh the pros and cons of granting or not granting the order."

13. The essence of an application for stay of execution is to preserve the subject matter of the appeal. This application has duly been made under Order 42 Rule 6(1) of the Civil Procedure Rules, which stipulates that:-

    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 subrule (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."

14. The court in Antoine Ndiaye vs African Virtual University [2015] KEHC 6783 (KLR) distilled the principles that must be established for a court to grant stay of execution to include:

> " Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under Order 42 Rule 6 of the Civil Procedure Rules, that:
>
> a. The application is brought without undue delay;
>
> b. The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered; and
>
> c. 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."

15. While the Respondent contends that the application is premature for failure on the part of the applicant to first seek orders of stay before the Tribunal appealed from, Order 42 Rule 6 of the Civil Procedure Rules prescribes that once an appeal has been filed before this court, it has the original jurisdiction to hear and determine an appeal for stay of execution, regardless of whether a similar application was preferred before the court appealed from.

16. A party is therefore at liberty to apply directly to the appellate court for the orders of stay of execution.

17. As to the definition of substantial loss, the court in James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] KEHC 1094 (KLR) persuasively held that the fact that execution is likely to be put in motion does not amount to substantial loss. The court stated as follows:

> " No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has

been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein N. Chesoni [2002] 1KLR 867, and also in the case of Mukuma vs Abuoga quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

"...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

18. The High Court in the case of Gianfranco Manenthi & Another vs Africa Merchant Assurance Company Ltd [2019] KEHC 7586 (KLR) considered several authorities on the definition of substantial loss which are reproduced hereunder:

> " In the case of Federal Commission of Taxation v Myer Emporium Ltd 1986 160 CLR 220 the court held:
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> "It well established by authority that the discretion which it confers to order stay of proceedings is only exercised where special circumstances exist which justify departure from the ordinary rule that a successful litigant is entitled to the fruits of his litigation pending the determination of any appeal."
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> Discussing the very point on substantial loss Platt, JA in the case of Kenya Shell Ltd v Benjamin Keruga Kibiru and others 1982-85 1 KAR 1018 observed:
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> "Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented."
>
> In the case Pan African Insurance Co. Ltd vs International Air Transport Association High Court No. 86 of 2006 held as follows on substantial loss:
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> "The deponent should go a step further to lay the basis upon which court can make a finding that the applicant would suffer a substantial loss as alleged. The applicant should go beyond vague and general assertion of substantial loss in the event a stay order is not granted."

19. The Applicant has relied on the cases of Equity Bank Limited vs West Link Mbo Limited Civil Application 78 of 2011, Kiu & Another vs Khaemba & 3 Others (Civil Appeal (Application) E270 of 2021) (2021) KECA 318 (KLR) and Gulf Timber & Hardware Supplies Limited vs Ngaruiya & 5 Others (Civil Appeal E203 of 2021) [2022] KECA 87(KLR). These cases are notably with respect to Rule 5(2)(b) of the Court of Appeal Rules as opposed to Order 42 Rule 6 of the Civil Procedure Rules, which is the provision at issue in this application.

20. The Applicant has submitted that his appeal is arguable and is not frivolous. He also argues that the substratum of the appeal would be destroyed if the Respondent was to proceed with execution before the Appeal is heard and determined. In his Memorandum of Appeal, the Applicant has raised the following grounds:

a. That the Tribunal failed to take cognizance of the maxim of law that a party cannot benefit from its own omission as it was by dint of the Respondent in failing to read the meter for four years that resulted in the accumulated bill of Kshs. 421,400/-

b. The Tribunal's determination failed to acknowledge that at no point in time from 17th October 2018 to 17th September 2022 did the Respondent write or text the appellant to complain about the denial of access to the suit property.

c. The Tribunal's determination failed to appreciate that the good governance provision of Article 10 of *the Constitution* prohibits the Respondent from rendering backdated bills for more than 12 months.

d. The Tribunal failed to appreciate that if the Respondent's charter requires it to make a minimum of 8 meter readings for a period of 4 years, then there arose an implied waiver on the part of the Respondent of the right to pursue the Appellant for the accumulated bill.

e. That while the Tribunal's determination correctly noted that where trespass is proved a party need not prove any specific loss and damage, it failed to refer widely and draw from recent decisions which have made robust awards of general damages under very similar circumstances.

f. The Tribunal's determination failed to appreciate that the conduct of the Respondent in trespassing the suit property without notice as required by law, cutting down tress instead of pruning the branches and cutting off the security infrastructure at the suit property was a breach of the Appellant's constitutional right of sanctity of property.

g. The Tribunal's determination failed to appreciate that the Respondent's acts of trespassing the suit property without notice, cutting down of 47 trees and damaging the security infrastructure was high-handed, oppressive and arbitrary and hence deserving of an award of punitive and/or aggravated damages.

21. The Respondent has argued that the Applicant has not proved substantial loss as there is no impending risk of execution. This is so because it has neither obtained a decree, taxed its costs, obtained warrants nor instructed auctioneers to execute against the Applicant.

22. The Respondent further asserts that there has been undue delay in the filing of this application and that the Applicant has not explained the delay of six months between the determination of the Tribunal and the filing of the application herein.

23. Starting with the issue of delay, this court notes that the Applicant had sought for certified copies of the Judgement and typed proceedings, through a letter dated 21st March 2024. In his Supporting Affidavit, the Applicant has asserted that the same have yet to be issued. The court has also noted that this application is pursuant to an electricity bill he received of Kshs. 432,387/- from the Respondent on 15th August 2024, to be settled by 29th August 2024.

24. The Respondent has not pleaded that it has suffered any prejudice by the Applicant's delay in filing the application. In fact, by its own admission, it has neither obtained a decree nor taxed its costs. In these circumstances, the delay in filing this application has not been unreasonable.

25. The Respondent has asserted that the Applicant has not established that it stands to suffer substantial loss. Indeed, the relief in the Respondent's favor is for the payment of Kshs. 421,400 in 36 equal monthly installments of Kshs. 11,706.

26. Considering that the payable amount will be determined by this court, the Applicant is likely to suffer substantial loss if the court finds that he should have paid a far much less sum of money. In the circumstances, I shall allow the application on condition that the decretal sum is deposited in court.

27. For those reasons, the application dated 28th August 2024 is allowed as follows:

    a. There be a conditional stay of execution of the determination of the Energy and Petroleum Tribunal dated 29th February 2024 pending the hearing and determination of this appeal.

    b. That the stay of execution is granted on condition that the Appellant deposits in court Kshs. 421,400 within 30 days of this Ruling.

    c. That the costs of the application to be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 20TH DAY OF MARCH, 2025.

O. A. ANGOTE

JUDGE

In the presence of;

Ms Linet Chemwa for Applicant

No appearance for Respondent

Court Assistant: Tracy