



**Kenya Power & Lighting Co Ltd v Mwinyikande (Civil Appeal
E049 of 2021) [2022] KEHC 14165 (KLR) (21 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 14165 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E049 OF 2021
MN MWANGI, J
SEPTEMBER 21, 2022**

BETWEEN

KENYA POWER & LIGHTING CO LTD APPELLANT

AND

FARAH JAKA MWINYIKANDE RESPONDENT

RULING

1. The application before this court is dated September 21, 2021 and has been brought under the provisions of section 3A of the Civil Procedure Act, orders 40 and 51 of the Civil Procedure Rules. The appellant/applicant seeks the following orders-
 1. Spent;
 2. Spent;
 3. That pending the hearing and determination of the intended appeal, a temporary injunction do issue restraining the respondent, their agents or assistants from executing the sum of Kshs 3,916,588.00 being the decretal sum in Taveta CMCC No 14 of 2020 against the appellant/applicant; and
 4. That the costs of application be provided for.
2. The application is premised on the grounds on the face of it and the affidavit sworn on September 21, 2021 by Erastus Mbaka, the appellant's director. In response thereto, the respondent on October 4, 2021 filed a replying affidavit sworn on September 29, 2021.
4. It is noteworthy that the instant application was brought under a certificate of urgency, and after the duty court considered the said application, it held the view that the threat of execution had not been demonstrated by the applicant. The application was scheduled for hearing on October 7, 2021 but on the said date the court was not sitting.



5. After various correspondence was exchanged by both parties on the position of the file, the respondent pursuant to an email dated February 15, 2022 fixed the application for hearing on the March 11, 2022. A hearing notice was served upon the applicant pursuant to order 5 rule 22B of the Civil Procedure (Amendment) Rule, 2020 which allows service of documents through email and section 1B(1)(e) of the Civil Procedure Act. An affidavit of service sworn on February 22, 2022 was filed on the same day and the same is available on record.
6. When the instant application came up for hearing March 11, 2022, the applicant was absent. Ms Kithome, learned counsel for respondent was however present and prayed for dismissal of the application dated September 21, 2021 for non-attendance by the applicant. In the alternative, she prayed that in the event that the court did not grant the prayers sought for dismissal, then the applicant should be ordered to deposit security in an interest earning joint account.
7. Order 12 rule 3 of the Civil Procedure Rules provides that-

“3(1) If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court.” (emphasis added).
8. Under section 2 of the Civil Procedure Act, the term “suit” means any proceedings commenced in any manner prescribed. An application therefore falls in the definition of a suit. That being the case, if only the respondent appears on the date fixed for the hearing of an application, an application may be dismissed if no explanation is given for non- attendance. If the suit or application is not dismissed, good reasons must be given for failure to dismiss such a suit or application. It is therefore apparent that the law attaches a lot of importance to the issue of attendance in court of the plaintiff/appellant/ applicant on the hearing date.
9. In Alcon Holding Limited v Kenya Commercial Bank [2012] eKLR, the court stated as follows on the issue of non-attendance in court of the plaintiff/applicant:

“.....if only a respondent appears on the date fixed for a hearing of an application, the application shall be dismissed. The rule is in mandatory terms that if the suit or application is not dismissed, the court must give reasons for failure not to have dismissed such a suit or application. That is how serious the law takes the issue of non-attendance on the date of the hearing. The law therefore presupposes that once a matter has been fixed for hearing unless there is very good reason which must be recorded, if the plaintiff or applicant fails to attend, the suit or application must (due to the use of the term “shall”) be dismissed – unless there is very good which must be recorded. The court’s discretion is taken away by the term “shall”.
10. In view of the applicable law and taking into account the non-attendance of the applicant in court, the application dated September 21, 2021 is hereby dismissed. Costs are awarded to the respondent.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT VOI ON THIS 21ST DAY OF SEPTEMBER, 2022.
RULING DELIVERED VIRTUALLY.**

NJOKI MWANGI

JUDGE

In the presence of:



No appearance for the Applicant

Ms Mutinda for the Respondent

Mr. Otolu – Court Assistant.

