Kenya Power & Lighting Company v Chonge (Environment and Land Appeal 2 of 2023) [2023] KEELC 17950 (KLR) (12 June 2023) (Ruling)

Neutral citation: [2023] KEELC 17950 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT AND LAND APPEAL 2 OF 2023

FO NYAGAKA, J

JUNE 12, 2023

BETWEEN

KENYA POWER & LIGHTING COMPANY ..... APPELLANT

AND

JUSTUS CHONGE MUKANDA ALIAS JUSTUS CHONGE KORAH ..... DEFENDANT

RULING

The Application

1. The Appellant was aggrieved by the judgment and decree of Hon CM Kesse (Principal Magistrate) delivered on January 19, 2023 in Kitale CMC ELC No 38 of 2021; *Justus Chonge Mukanda alias Justus Chonge Korah vs Kenya Power & Lighting Company Limited*. Consequently, it filed its Memorandum of Appeal dated February 2, 2023 on February 6, 2023. The Memorandum of Appeal raised several grounds impugning the decision of the trial court.

2. The Appellant later filed an Application under Certificate of Urgency dated March 17, 2023 on that day invoking Section 1A and 3A of the *Civil Procedure Act*, Order 42, Rule 6 and Order 51, Rule 1 of the *Civil Procedure Rules* as well as Article 50 and 169 of the *Constitution* seeking the following reliefs:

    1. ...spent.

    2. ...spent.

    3. That this Honorable Court be pleased to order for stay of execution of the judgment and/or decree made on January 19, 2023 in Kitale CMC ELC No 38 of 2021; *Justus Chonge Mukanda Alias Justus Chonge Korah Vs Kenya Power & Lighting Company* And All Consequential Orders Therein Pending The Hearing And Determination Of The Appellant's Appeal In

Kitale Elc Appeal No 2 Of 2023; *Kenya Power & Lighting Company Vs Justus Chonge Mukanda Alias Justus Chonge Korah*.

4. That the costs of this application be provided for.

3. The Application was supported by the grounds on the face of it and by the Affidavit of Irene Walala, the Appellant's employee duly authorized to swear the Affidavit. The gravamen of the Application is that the Respondent filed suit in Kitale CMC ELC No 38 of 2021; *Justus Chonge Makanda alias Justus Chonge Korah vs Kenya Power & Lighting Company* by lodging a Plaint dated April 22, 2021 against the Appellant. The Respondent succeeded in the claim since the outcome, delivered on January 19, 2023, was entered in his favor. The Appellant annexed to the Supporting Affidavit a copy of the judgment and marked it as IW1. Further, the Appellant annexed and marked as IW2, a copy of its Memorandum of Appeal.

4. It was the Appellant's contention that the Appeal was merited and had high chances of success such that if stay was not granted, the appeal would be rendered nugatory. It contended that Respondents had filed a Bill of Costs which was assessed on March 7, 2023. It annexed to the Supporting Affidavit the ruling thereto and marked it as IW3. It expressed apprehension that the Respondent was likely to execute the decree at any time.

5. Further grounds supporting the Application were that the Application had been filed without undue delay, the Respondent was not likely to suffer real prejudice if the Application was allowed and the Appellant was ready and willing to furnish such security for due performance. It was also advanced that the Application served the interest of justice and the Appeal would be rendered an academic exercise causing irreparable harm to the Appellant if stay was not granted. For those reasons, the Appellant urged this Court to grant the reliefs sought.

6. This court directed parties to address it on the competency of the Application in view of Order 42, Rule 6(1) of the *Civil Procedure Rules* necessitating a party to file the Application at the first instance in the trial court as a preliminary issue. It is apparent that for this reason, by the time of preparing this Ruling the Respondent had not filed his response to the Application.

Submissions

7. At the hearing that took place virtually on March 27, 2023, the only issue poised for determination was on the point of law the Court directed submissions on.

8. Learned Counsel for the Appellant Mr Ododa urged this court to grant the Application, noting that the same was not opposed. He contended that since judgment had been delivered in the lower court and the Bill of Costs therein already taxed (sic), the applicant was legally entitled to move this Court for stay of execution pending appeal. He did not think, in his view, that learned counsel for the Respondent would be opposed to the Application since in any event the Appellant would be willing to deposit security for due performance of the decree.

9. Learned Counsel for the Respondent Mr Onyancha submitted that the Appellant herein was duty bound to file the present Application first at the court that issued the impugned decision and seek stay of execution thereat. He observed that the Appellant herein did file a similar Application as the present one in the trial court with directions that the same be heard on May 2, 2023.

10. Learned Counsel continued that the Application in the lower Court had neither been served him nor the directions of the court pursuant to the filing of the Application. He opined that the Appellant was guilty of concealing material facts, had moved this Court to obtain orders by deceit and was thus not deserving of the orders sought. He urged this Court to dismiss the Application as it was inchoate.

11. In brief rejoinder, Learned Counsel Mr Odada acknowledged that directions as to its Application at the trial court were issued and duly served upon his counterpart. It was his comprehension that Order 42, Rule 6 (1) of the *Civil Procedure Rules* did not confer a mandatory obligation to explore an audience at the trial court first. He further defended that the said provision did not confer a duty upon an Applicant to inform the court that an Application had been filed at the trial court.

12. Conceding that if the trial court refuses to grant stay thereby paving way for seeking the orders at the Appellant court, the Appellant's Counsel submitted that the Respondent stood to suffer no prejudice if the orders sought were granted. He maintained that the Application was competently proper praying that the same be allowed.

Analysis and Disposition

13. Before looking at the merits or demerits of the Application, this court formed the opinion that a preliminary issue was necessary to determine the competency of the Application because it was apparent from the perusal of the grounds and Affidavit in Support thereof that the lower court had neither refused nor granted an application for stay of execution of its decree. The question was whether or not the Application was properly before the Court as provided for under Order 42, Rule 6 (1) of the *Civil Procedure Rules*. If it was, then this Court would unwaveringly proceed to determine its merits otherwise it would have to be struck out for incompetence and being in violation of the rules of procedure.

14. Order 42, Rule 6 (1) of the *Civil Procedure Rules* provides as follows and I will reproduce the same verbatim:

> 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.

15. In terms of the provision quoted above, a party seeking stay of execution is invited to apply first for the orders at the trial court where the impugned decision emanates from. It is only when a party is aggrieved by the outcome of such an application that he/she/it can invoke the jurisdiction of the Appellate court herein. Thus, a party must first explore the avenue of the trial court at the first instance before lodging the Application at the Appellate court. And, the wisdom of the Rules Committee in formulating the Rule in such a way as to require the parties to first move the trial Court for such orders is pretty obvious: not all decisions of the trial Court that go on appeal call for stay of execution of the decision. Similarly, it is possible that even for monetary or indeed other decrees, the Appellant may as well decide to comply with them but still pursue the appeal if substantial loss does not result from making such a step or the Appeal is rendered nugatory in the circumstances.

16. It is therefore extremely important for substantive and procedural justice that a party aggrieved by a decision of a trial Court to first of all apply for stay of execution of the decree or order of the Court before moving the Appellate Court for similar orders. Needless to say, that for a party to skip such an important step, it is an indirect and uncalled for indictment of the impartiality and lack of bias of the trial Court: it is akin to implying that the Court was not just or is not likely to deliver justice. It is also

an indirect was of a party mocking the trial Court in its position as a proper forum for adjudication of the matter.

17. In the present case, the Appellant who is the Applicant filed the instant Application before exhausting the available mechanisms as provided in statute. Suffice to add that the Applicant admitted that a similar Application was filed in the trial court where directions have been issued, and it was pending for hearing on May 2, 2023. Flowing from that, as at the time of delivering this Ruling this Court was not aware whether or not the Application in the lower Court was heard, determined or not.

18. It is worth emphasizing that Rules of procedure are not made in vain. In *Nuh Nassir Abdi v Ali Wario & 2 Others* [2013] eKLR, the learned judge, GV Odunga J, as he then was stated:

> "Whereas the rules of procedure are not made in vain and are not to be ignored, often times the Courts will encounter inadvertent transgressions or unintentional or ill-advised omissions through defective, disorderly and incompetent use of procedure but which if strictly observed may give rise to substantial injustice and in such circumstances, the exercise of the discretion of the Court comes into play to salvage the situation for the ends of justice. Though the rules of procedure constitute the handmaiden of the Court they must not be indulged in so as to convert them into a relentless mistress.
>
> The above principles existed even before the advent of the current Constitution. Under the current Constitutional dispensation Article 159(2)(d) enjoins the Courts and the Tribunals to be guided by the principle that justice shall be administered without undue regard to procedural technicalities. The Courts are therefore nolonger expected to concentrate their attention on checking whether the all the i's are dotted and the t's crossed but ought to rise to the higher calling of investigating the truth."

19. I agree with my learned brother Judge and other judges who have pronounced themselves ably, deeply and succinctly on this issue that Rules of procedure are not to be seen as relentless mistresses and they can, in some instances, for the sake of courts doing substantive justice, be overlooked. This is particularly in the wake of the 2010 *Constitution* whose Article 159(2)(d) is clear on the unction of Courts to go beyond mere technicalities and do substantive justice.

20. The good practice in constitutional democracies is that the Rule of Law governs in it as a value of life in such a society. This is the import and spirit of the *Constitution* of Kenya, right from the preamble where it stipulates that we as the people of Kenya recognize that we are to be governed by a government based on essential values such as human rights, freedom and the rule of law, among others. At Article 10 (2) thereof it then lists the Rule of Law as one of the national values and principles of governance.

21. What the rule of law is does not require a lot of explanation save to summarize it to mean that the law is applied and obeyed in the day to day lives and operations of both government and its citizens. It eliminates arbitrariness which is not only uncertain but unfair and against reason. The English jurist and great constitutional theorist AV Dicey (1835-1922) in the *Introduction To The Study of the Law of the Constitution* (1885) defines rule of law to mean;

> ".. in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness."

22. Bearing the importance of the Rule of Law as a national value in Kenya, it is my view that the rule of law should not be selectively applied. What I mean is that parties to a matter, such as the instant one, should not be given leeway to choose which rule to obey or follow and which one not to. It would portend a breakdown of the rule of law and spell the doom of a constitutional democracy. It therefore follows

that once a law, whether substantive or procedural in nature is promulgated, it ought to be followed. While one does not expect perfection in all things or actions, it should not be a basis for deliberate or conscious failure to obey it. This must be the antidote for the reliance by parties on Article 159(2)(d) of the *Constitution* to go around the requirements of the law. To insist that parties follow the law does not make the law an unreasonably unrelenting mistress.

23. As was stated by the Court of Appeal in the *Kakuta Maimai Hamisi V Peris Pesi Tobiko & 2 Others* [2013] EKLR,

> "The question of a right to appeal goes to jurisdiction and is so fundamental we are unprepared to hold that absence of statutory donation or conferment is a mere procedural technicality to be ignored by parties or a court by pitching tent at Article 159 (2) (d) of the *Constitution*. We do not consider Article 159 (2) (d) to be a panacea, nay, a general whitewash, that cures and mends all ills, misdeeds and defaults of litigation."

24. Also, in *Mumo Matemu Vs Trusted Society Of Human Rights Alliance & 5 Others* Civil Appeal No 290 of 2012 as follows:

> "In our view it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of the *Constitution* and the overriding objective principle under Section 1A and 1B of the *Civil Procedure Act* (Cap 21) and Section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a handmaiden of just determination of cases."

25. In essence, this Court is of the view that for a party to be required to follow a rule of procedure is not to base a determination on failure to follow the required step a mere technicality which should be wished away by waving Article 159(2)(2) of the *Constitution* as a remedy for such an infraction. This is particularly so when parties would use the failure to adhere to that Rule as a way of forum shopping. Just like the law should not be used as an instrument of fraud so it should not be used to circumvent the proper forum to adjudicate a matter in. To require a party to go to the right forum is not a mere technicality but an issue of substantive justice that emanates from a proper procedure.

26. It is apparent that the Applicant is forum shopping so as to obtain orders through the back door. This will not tire to remind parties that a court shall not be used as a panacea for violating rules of procedure. The spirit and rule of law must be held and that will not stop in this case. Imagine a situation as the instant one where as it stands, this Court is unaware as to whether or not the Applicant herein is litigating over a similar application (having filed one before the trial Court and let it lie to await the outcome herein) before another Court, and immediately this Court does not grant the orders sought, he revives the application before the trial Court. Then, peradventure he is not granted the orders in that Court. Shall he turn again to this Court for another order? This is an absurd practice and must stop. Since there were directions by the trial Court on a similar Application as the instant one, the parties should follow the right steps.

27. The upshot is that the present Application dated and filed on March 17, 2023 was filed inchoately. For these reasons, I hereby strike it out with costs to the Respondent. And in order to avoid abuse of the process of the Court as was herein, the costs of the instant Application should be agreed upon or taxed and paid to the Respondent before the trial Court is moved for any similar orders as the once which were sought herein.

28. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 12TH DAY OF JUNE, 2023.

HON DR. IUR FRED NYAGAKA

JUDGE, ELC KITALE.