



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 190 OF 2018**

**AHMED MBARAK.....APPELLANT/RESPONDENT**

**VERSUS**

**KENYA POWER & LIGHTING CO. LTD.....APPLICANT/RESPONDENT**

**RULING**

1. The application for consideration before this court is the Appellant's **Notice of Motion** dated **9<sup>th</sup> April, 2021** and filed on the **14<sup>th</sup> April, 2021**. The same is expressed to be brought under **Sections 1A, 1B & 3B of the Civil Procedure Act, Order 22 Rule 22(1), Order 42 Rule 6(2), Order 51 Rule 1 of the Civil Procedure Rules, 2010** and all other enabling provisions of the Law. By the Application, the Appellant/Applicants seek the following orders: -

**1. Spent;**

**2. Spent;**

**3. THAT pending the hearing of the Mombasa Court of Appeal Civil Appeal between Kenya Power & Lighting Company limited (Appellant) and Ahmed Mbarak (Respondent), there be a stay of execution of the judgment/decree herein granted on 16<sup>th</sup> March, 2021;**

**4. THAT the costs of and incidental to this application abide with the result of the said Appeal.**

2. The **Motion** is supported by the grounds presented on its body and the **Affidavit** of **Peter Omwenga**, the Respondent/Applicant's Counsel. He has averred that his firm **M/S Mogaka Omwenga & Mabeya Advocates** was instructed by **CIC General Insurance Company Limited** to represent the Respondent/Applicant and that the matter herein is a second Appeal from the Judgment of Honorable J. Kassam (SRM) delivered on the **7<sup>th</sup> September, 2018** in **Mombasa SRMCC No.1670 of 2013 - Ahmed Mbarak -vs- Kenya Power & Lighting Company Limited**.

3. It has been deponed that this Court delivered a Judgment on the **16<sup>th</sup> March, 2021** and agreed with the Appellant/Respondent that his yard had **400 tyres worth Kshs.5,000/= each and proceeded to award the Appellant the sum of Kshs.2,000,000/=** for the loss and damages that was occasioned to him by the Respondent/Applicant's negligence.

4. Being dissatisfied with the said Judgment the Respondent/Applicant filed a Notice of Appeal on the **23<sup>rd</sup> March, 2021** and has through a letter dated **22<sup>nd</sup> March, 2021** requested for typed and certified copies of proceedings from the High Court of Kenya.

5. **Mr. Omwenga**, counsel for Applicant/Respondent has deponed that unless an order of stay of execution is granted, the Respondent/Appellant shall execute the Judgment delivered on **16<sup>th</sup> March, 2021** and once execution is done, the second Appeal to the Court of Appeal shall be rendered nugatory.

6. It is stated that a **Mr. Erastus Mbaka**, the **Legal Officer** of **CIC General Insurance Company Limited** from whom **Mr. Omwenga** obtained instructions to represent the Respondent/Applicant and has indicated that they are ready and willing to pay security on behalf of the Respondent/ Applicant by depositing the same in a joint interest earning account in the name of the respective counsels in the matter herein.

7. The Respondent/Applicant has averred that the orders sought herein will not occasion any prejudice to the Appellant/Respondent since the Application herein has been brought without any delay and is not a subversion of Justice. The Respondent/Applicant prays that this Court allows its application dated **9<sup>th</sup> April, 2021** in the interests of Justice.

8. In response, the Respondent filed a Replying Affidavit sworn by **Mohamed Faki Khatib** on the **20<sup>th</sup> April, 2021** wherein he has stated that the mere fact that a successful party is about to execute is not a ground for grant of stay of execution. The Applicant must demonstrate that they have complied with the requirements of **Order 42 Rule 6** of the **Civil Procedure Rules, 2010**.

9. He has deponed that he will be able to pay back the Respondent/Applicant the decretal amount in the event their Appeal to the Court of Appeal succeeds. He has added that his Company is a reputable Company that will have no difficulty to pay back the money decree.

10. The Appellant/Respondent has also averred that he will be prejudiced if the application herein is allowed because the incident occurred in 2013 and has been out of business for eight (8) years.

11. The Appellant/Respondent has stated that in the event the court is inclined to

grant the prayers sought in the application herein, the Respondent/ Applicant be ordered to deposit the decretal amount in a joint interest earning account.

#### **Directions of the Court**

12. Directions were taken that the application be canvassed by way of written submissions. The Respondent/Applicant's submissions were filed on **24<sup>th</sup> May 2021** while those of the Appellant/Respondent are dated **10<sup>th</sup> May, 2021** and filed on an even date. Counsel for the parties indicated to court that they would rely on their written submissions as presented.

#### **The Respondent/Applicant's Submissions**

13. On substantial loss, the Respondent/Applicant has submitted that Appellant/Respondent can proceed with execution at any time should this application be disallowed and orders sought denied.

14. The Respondent/Applicant has stated that the intended Appeal has a high chance of success and has urged the court to exercise discretion in its favour and grant the orders of stay of execution. The Respondent/Applicant is apprehensive that if stay of execution is not granted it will be forced to pay the Appellant/Respondent the decretal amount which will be prejudicial to them if the intended Appeal to the Court of Appeal succeeds as the Appellant/Respondent has not demonstrated that he will be able to refund the money, having indicated in his Affidavit that he has been out of business for the last eight (8) years. The Respondent/Applicant submits that if stay is not granted, its Appeal will be rendered nugatory.

15. It has been submitted that the Application herein has been brought without undue delay as judgment was delivered on the **16<sup>th</sup> March, 2021** and the application herein was filed on **14<sup>th</sup> April, 2021**.

16. The Respondent/Applicant has submitted that the law permits furnishing of security for costs in order for a party to be granted with an order of stay of execution pending appeal. It was stated that the Respondent/Applicant is ready and willing to furnish such security as may be directed by court by depositing the decretal sum in an interesting earning joint account or in court. Reliance has been placed on the case of **Magnate Ventures –vs- Simon Mutua Muatha & Another [2018]eKLR**.

17. According to the Respondent/Applicant it has demonstrated sufficient cause to warrant the grant of stay of execution orders pending Appeal to preserve the subject matter in dispute as the parties ventilate in Appeal. Failure to grant stay of execution will lead to their Appeal being rendered nugatory in the event they succeed in Appeal, the Appellant/Respondent will not be in a position to refund the decretal sum and thus occasion an injustice and render the entire Appeal a mere academic exercise.

#### **The Appellant/Respondent's Submissions**

18. The Appellant/Respondent has submitted that in a money decree, deposit of

security would only occur if the recovery of the decretal sum paid would be impossible or such payment of the decretal sum would occasion the intended Appellant unnecessary difficulty in prosecuting his Appeal. It has been stated that the Respondent/Applicant has not raised any such fears of the Appellant/ Respondent's ability to refund the money if the Appeal succeeds. The Appellant/Respondent has maintained that his company is a reputable one with enough resources to pay back the decretal sum as it still is a profitable business as it was before the incident occurred.

19. It has been stated that the Appellant/Respondent's business of selling tyres, place food on the table and since the incident happened in **2013**, he should be allowed to enjoy the fruits of his Judgment to enable him restart his business. The Appellant/Respondent has urged the court to dismiss the Respondent/ Applicant's application for lack of proof for substantial loss as required under the law.

20. The Appellant/Respondent has submitted that it would be just and fair as he has been out of business for more than eight (8) years due to the Respondent/Applicant's negligence, the Respondent/Applicant be directed to pay half of the decretal sum to the Appellant and the other half be deposited in a joint interest earning account in the names of the respective Advocates.

21. The Court has been urged not to grant the orders sought as the Appellant/Respondent believes that the Respondent/Applicant has not established the loss he would suffer to render his Appeal nugatory. The filing of an Appeal does not guarantee orders of stay of execution as provided under **Order 42 Rule 6 of the Civil Procedure Rules, 2010**.

## **Analysis and Determination**

22. After perusing all the pleadings filed in this case and the written submissions by the parties herein, I find that the main issue for determination is *whether this court can issue stay of execution of the Judgment delivered and Decree issued on 16<sup>th</sup> March, 2021 pending the hearing and determination of the Appeal to the Court of Appeal.*

23. Stay of Execution pending appeal is provided for under **Order 42 Rule 6(1) and (2)** of the **Civil Procedure Rules, 2010** which states that:-

***“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.***

24. The above rule thus provides that before a court can grant an order of stay of execution pending hearing and determination of the Appeal, it must be satisfied that there is proof of substantial loss to be suffered by the Applicant; the application was made without unreasonable delay and that the Applicant

is ready to provide such security as the court may impose.

25. On substantial loss, it is the Respondent/Applicant's contention that if stay of execution is not granted, the Appellant/Respondent may execute which amount, it is not sure the Appellant/Respondent will be able to refund in case their Appeal succeeds. The Respondent/Applicant stated that the Appellant/ Respondent has submitted that he has been out of business for the past eight (8) years and thus it is clear he will not be able to refund the said decretal amount.

26. In the case of **Ujagar Singh –vs- Runda Coffee Estates Limited [1966] EA 263** it was held that:-

***“It is not normal for a court to grant stay of execution in monetary decrees but where there are special features such as the issue or the regularity of the judgment, the fact that the amount payable under the decree being substantial and the fact that the plaintiff has no known assets within the jurisdiction from which the applicant can recoup in the event the appeal is successful.”***

27. The Respondent/Applicant has raised the concern of the Appellant/ Respondent being unable to pay the decretal amount in case they succeed on Appeal. As held in the case of **Ujagar Singh (Supra)**, the burden to prove whether they can refund the said money is now on the Appellant/Respondent to show his capability to refund the amount in the decree in case the Appeal is successful.

28. The Appellant/Respondent is blowing hot and cold in response as to whether he can refund the decretal amount. In his response, he can be seen to state that his business is up and running and he is able to refund the decretal amount while in the same breath he still states that he has been out of business for over eight (8) years. It is not clear then if the Appellant/Respondent can refund the monetary decree if the Appeal succeeds. The Appellant/ Respondent has not brought any proof to court to show that he will be able to refund the decree in case the Appeal succeeds.

29. This Court thus finds that the Respondent/Applicant has proved that it will suffer substantial loss if the Appellant/Respondent is paid the decretal amount as he has not shown how he intends to refund the same.

30. On whether the Application was filed without undue delay, the Judgment of this Court was delivered on the **16<sup>th</sup> March, 2021** and the Application herein was filed on the **14<sup>th</sup> April, 2021**. In this case the Respondent/Applicant had 30 days stay and this application has been brought before lapsed of the said stay, thus making this application proper before this court.

31. The final requirement for a stay of execution to issue is the willingness of the Applicant to provide security for costs as may be directed by court. The Respondent/Applicant in its Affidavit has indicated at paragraph 9 its willingness to pay the security by depositing the same in a joint interest earning account in the name of both Advocates or abide by any reasonable condition that will be set by this court.

32. In view of the above, it is evident that the Appellants have fulfilled all of the requirements for stay of execution being that they will suffer substantial loss, application has been brought without undue delay and its willingness to provide security for costs for the settlement of the

Judgment as delivered by this court, hence the interest of the Respondents in being assured of its right to enjoy fruits of its Judgment being secure.

33. The upshot is, the application dated **9<sup>th</sup> April, 2021 in the interest of justice for the Respondent/Applicant to enjoy its right to Appeal be and is hereby allowed. I therefore grant Stay of Execution on the condition that:-**

*a) The Respondent/Applicant do pay the Appellant/ Respondent half of the decretal sum being Kshs.1,000,000/=.*

*b) The other half being Kshs.1,000,000/= be deposited in a joint interest-earning account in the names of both Advocates of the parties herein.*

*c) Orders (a) and (b) above be complied with within forty (45) days of the date of the Ruling hereof.*

*d) If the Appellants do not comply with (a) and (b) above their application dated 9<sup>th</sup> April, 2021 shall stand dismissed with costs to the Appellant/Respondents.*

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 23<sup>RD</sup> DAY OF SEPTEMBER, 2021.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

Mr. Mayuke counsel holding brief for Mr. Mogaka counsel for Respondent/Applicant

Mr. Khatib counsel for Respondent/Appellant

Court Assistant - Winnie