

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO. 73 OF 2019

(An appeal arising from the ruling and order of Hon. Eric Malesi,

Senior Resident Magistrate, of 2nd July 2019,

in Kakamega CMCCC No. 319 of 2018)

THE KENYA POWER AND LIGHTING CO. LTD.....APPELLANT

VERSUS

MWILWA DASE INVESTMENT CO. LTD.....RESPONDENT

RULING

1. The application for determination is the Motion dated 4th July 2019. It principally seeks stay of execution of the judgment that was allegedly delivered 19th March 2019 and of the decree issued on 9th April 2019, in Kakamega CMCCC No. 319 of 2018, pending an appeal that the appellant has lodged herein through the memorandum of appeal, dated 5th July 2019.

2. Although the application before me is pegged on a judgement that was alleged to have been delivered on 19th March 2019, and a decree ostensibly extracted from that judgment on 9th April 2019, copies of those court processes have not been attached to the application before me. The only documents attached are the warrants of attachment, the proclamation by the court broker and the court broker's fee note. The original record of the trial court has also not been made available.

3. It is the two processes, that is to say the judgment and the decree, that ostensibly prompted the filing of the appeal herein, and the instant Motion. It should be demonstrated that such a judgment and decree existed before the court can take any further step. The documents attached are not the foundation of the appeal nor of the Motion. They are, themselves, founded on the documents that the appellant ought to have exhibited. A court of law always acts on the basis of certainty, not presumption or speculation. A copy of the judgement or the decree would provide the certainty that there was indeed a judgement and decree. The documents attached only leave room for the court to speculate that there was such a judgment or decree in existence, and are, in fact, an invitation to the court to proceed on the presumption that the judgment and decree exist.

4. In the absence of a copy of either the judgment or, especially, the decree, I am unable to consider the application on its merits, for the application is not properly founded. Consequently, I shall, and do hereby, dismiss the application dated 4th July 2019, with costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 30TH DAY OF APRIL, 2020

W. MUSYOKA

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic, and in light of the directions issued by His Lordship, the Chief Justice, on 15th March 2020, this ruling/judgment has been delivered to the parties online with their consent. They have waived compliance with Order 21 rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159 (2) (d) of the Constitution which requires the court to eschew technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 18 of the Civil Procedure Act, Cap 21, Laws of Kenya, which impose on this court the duty to use, inter alia, suitable technology to enhance the overriding objective, which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

W. MUSYOKA

JUDGE