



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kenya Electricity Transmission Co. Ltd v Onsongo & another (Environment and Land Appeal 28 of 2022) [2023] KEELC 18627 (KLR) (13 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18627 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT AND LAND APPEAL 28 OF 2022**

**M SILA, J**

**JULY 13, 2023**

**BETWEEN**

**KENYA ELECTRICITY TRANSMISSION CO. LTD ..... APPELLANT**

**AND**

**ESTHER MORAA ONSONGO ..... 1<sup>ST</sup> RESPONDENT**

**ESTHER GESARE ONSONGO ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

(Application for stay of execution pending appeal; money decree in favour of the respondents made; Order 42 Rule 6 (2); whether mandatory that money be deposited as security for due performance of the decree; court of opinion that it has discretion on the security to be offered; in circumstances of the case court of opinion that an undertaking is sufficient).

1. The application before me is that dated 17 February 2023 filed by the appellant. It is an application seeking stay of execution of the judgment in Kisii MCCC No. 504 of 2018, pending the hearing of an appeal that has been preferred to this court. The application is opposed.
2. From the material presented before me, it appears that the issue relates to compensation to the respondents for allowing the applicant to have a wayleave through the land parcel Bassi/Bogetaorio II/984B in order to construct a transmission line. The registered proprietor of the said land is one Nyakundi Maiko (deceased). In the supporting affidavit, sworn by Davies Owiti Obare, the applicant's legal officer, compensation was agreed at Kshs. 462,571.20/- which it is said, was to be divided equally between the respondents. The appellant contends that the 1<sup>st</sup> respondent authorized the 2<sup>nd</sup> respondent to receive the said funds on her behalf since she did not have a bank account and the applicant deposited the monies into the account of the 2<sup>nd</sup> respondent. It is claimed that the 1<sup>st</sup> respondent acknowledged receipt of the funds and executed a discharge and indemnity form. However, she later filed the suit Kisii MCCC No. 504 of 2018 seeking payment of Kshs. 231, 285.60/- being half of the compensation



- money. Judgment was delivered in her favour on 7 November 2022 and it is this judgment that the applicant has appealed against and now seeks stay of execution pending appeal.
3. The application is opposed by the replying affidavit of Esther Moraa Onsongo, the 1<sup>st</sup> respondent. She inter alia avers that the applicant has not demonstrated how she stands to suffer substantial loss in the event that execution issues.
  4. I invited both counsel for the applicant and respondent to file submissions which I have taken note of.
  5. . This is an application for stay pending appeal and I stand guided by the principles laid down in Order 42 Rule 6 (2) which provides as follows :-
    - (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.
  6. . From the foregoing, it will be discerned that the court ought to consider three issues when addressing an application for stay of execution pending appeal. These are :-
    - i. That the application has been made without unreasonable delay;
    - ii. That the applicant satisfies the court that she stands to suffer substantial loss if the order for stay is not made;
    - iii. That there is provision of security as the court orders for the due performance of the decree.
  7. I stand guided by the above.
  8. . In our instance, it is said that judgment was delivered on 7 November 2022 and this application was filed on 5 December 2022. I hold the view that there was no delay in the filing of this application.
  9. The second issue is substantial loss. I have not seen a copy of the judgment and it is difficult for me to comprehend what exactly transpired in court. It would have helped immensely to annex a copy of it so that this court is fully aware of the orders that were made and which are appealed from. I hope that the applicant takes this advice seriously for it can impact on whether or not an order of stay ought to be granted. However, it does appear, at least from the deposition of the applicant, that the order that was made was payment of money to the 1<sup>st</sup> respondent, of the sum of Kshs. 231, 285.60/-. I do not know whether a duration of time was given for payment of this money, for as I have said, I do not have the benefit of the judgment. The replying affidavit does not contain any deposition to the effect that the respondents are persons of means and able to refund the applicant without any problem in the event that the applicant succeeds on appeal. I am thus persuaded that the applicant has demonstrated that she stands to suffer substantial loss in the event that she satisfies the decree and succeeds on appeal.
  10. . The only issue left is security and it appears as if this is the point of departure for the parties. In her submissions, counsel for the applicant urged that the applicant is a public institution and it would be contrary to public policy and in breach of the rule of law to allow for execution of the decree. She argued that it is the applicant's case that it already paid the monies ordered by the lower court and



to repay again will lead to double payment and unjust enrichment. Counsel referred me to Rule 8 of Order 42 which provides as follows :-

“No such security as is mentioned in rules 6 and 7 shall be required from the Government or where the Government has undertaken the defence of the suit or from any public officer sued in respect of an act alleged to be done by him in his official capacity.”

11. She also referred me to the case of *Mombasa County Government v Pauline Wanjiku Kageni* (2017) eKLR to support her argument. She submitted that the applicant is controlled by the Government and its budget is appropriated by Parliament following Section 216 of the *Energy Act* thus limiting the scope of its financial activities. On the other hand, counsel for the respondents submitted that Order 42 Rule 6(2) does not exempt the applicant. He also urged that if stay is granted, then half the decretal sum be paid to the 1<sup>st</sup> respondent and the remaining half be deposited in an interest earning account.
12. I have taken the above into consideration. As I earlier said, I do not have the benefit of the judgment, and really have no idea what sort of evidence was led. I cannot therefore comment on whether or not the applicant duly paid the respondents what was owed to them and that will have to await determination on appeal. The only issue is whether I should direct the applicant to deposit security for the due performance of the decree.
13. Although counsel for the applicant referred me to Order 42 Rule 8, I am not persuaded that it applies to the applicant herein. The applicant is not ‘Government’ but is a parastatal. It cannot therefore benefit from Rule 8. The case referred to me by counsel for the applicant is also clearly distinguishable as the entity therein was the County Government of Mombasa, which is part of devolved Government. It is therefore Order 42 Rule 6 (2) which applies without modifications.
14. Having said that, I hold the view that the court has discretion on the nature of security to be made by the applicant. That is why Order 42 Rule 6 (2) (b) provides for security ‘as the court orders.’ In my view it means that the court is at liberty to assess all surrounding circumstances and make the order that it deems appropriate in the circumstances regarding performance of the decree. That, in my opinion, will need the taking into account of the type of the dispute, the nature of orders made in the judgment, and the character or characteristics of the parties before court. From the above, the nature of the dispute is purely monetary and that is the order that was made by court. It is nothing more than a money decree at hand. In money decrees, what is important is to see to it that if the appeal fails, then the respondent is promptly paid. I am not of the opinion that it is mandatory in all instances that deposit of the money at stake must be made. So long as it is shown, or the surrounding circumstances, including the taking of judicial notice, demonstrate that the applicant will make good payment, and promptly so, in the event of losing the appeal, I don’t think that the court must demand that the money at stake be deposited.
15. . In the case at hand, the applicant is a parastatal that has huge assets, and is largely owned by the Government. It is unlikely that she will not have capacity to make good the sum of Kshs. 231, 285.60/=, and promptly so, in the event that she loses the appeal. For the circumstances herein, I am of the view that it is sufficient that the Managing Director or the Chief Executive Officer of the applicant makes a written undertaking that in the event of losing the appeal, he/she undertakes that the decretal sum will be paid within 30 days of the judgment. This undertaking be filed within 30 days from the date hereof. However, if no such undertaking is filed, as ordered above, time being of essence, the decree may be executed.
16. On costs, the costs of this application to abide the outcome of the appeal.
17. Orders accordingly.



**DATED AND DELIVERED AT KISII THIS 13 DAY OF JULY 2023**  
**JUSTICE MUNYAO SILA**  
**JUDGE, ENVIRONMENT AND LAND COURT**  
**AT KISII**

