



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

MISC CIVIL APPLICATION NO. 29 OF 2020

KENYA POWER & LIGHTING COMPANY LTD.....APPLICANT

=VERSUS=

ROSE ANYANGO.....1ST RESPONDENT

HIGHRISE ENTERPRISES.....2ND RESPONDENT

(Application for leave to file an appeal out of time from the judgment and decree of Hon S.W. Mathenge, Resident Magistrate in Bondo Principal Magistrate's Court Civil Suit No 45 of 2017 delivered on 19th February 2020 and stay of execution of the said decree/judgment)

RULING

1. This Ruling determines the applicant's application by way of Notice of Motion dated 25th March, 2020 seeking the following prayers:

1. Spent

2. Spent

3. Spent

4. That this Honorable court be pleased to allow the applicant to appeal the judgment in Bondo PMCC No. 45 of 2017 on the 19th February 2020 out of time

5. That this Honorable Court be pleased to order a stay of execution of the judgment delivered on 19th February, 2020 pending the hearing and determination of the intended appeal

6. That costs of this application be in the cause.

2. The application is premised on the grounds that judgment in the matter sought to be appealed from was delivered on 19th February 2020 in favour of the 1st Respondent against the applicant and that the applicant being aggrieved by the said judgment intends to prefer an appeal. Further, that there is high and probable likelihood of execution of the said judgment in the absence of stay orders by this court chances of success; that the applicant has an arguable appeal that raises serious triable issues thus the need to allow the determination of the appeal on merit and that any execution herein will render the appellant's appeal nugatory; that the applicant stands to suffer irreparable loss and or harm if the orders sought are not granted; that the applicant is ready and willing to deposit security as required by law; that no prejudice will be occasioned upon the Respondent if the orders sought herein are granted save that the correct position of the law and proper dispensation of justice shall be done once and for all; and that it is in the wider interest of justice that the orders sought herein are granted.

3. The application is further based on the supporting affidavit sworn by Dennis Cheruiyot Advocate wherein counsel reiterated the grounds in support of the application, annexing copy of draft intended memorandum of appeal.

4. In the said affidavit, counsel further deposes that their law firm received instructions to file appeal, after judgment was delivered in the lower court on 19th February 2020, during the scale down of judicial services following the outbreak of the Covid19 pandemic. Further, that the 1st Respondent is not a person of means and may not be in a position to refund the decretal should the intended appeal succeed.

5. The application is opposed by the 1st Respondent **Rose Anyango** who filed a Replying affidavit sworn on 5th Day of May 2020 by her counsel Mr. Denis Odero Okoyo deposing in contention that the application is fatally defective and lacks merit hence it should be dismissed

with costs. The 1st Respondent's counsel deposes that the judgment sought to be appealed against having been delivered on 19th February 2020, over 40 days to the date of filing of the application, there is no explanation for the delay hence the application is guilty of laches.

6. Further, that the alleged instructions to appeal out of time are not annexed to the affidavit sworn by the advocate and that neither has the applicant annexed copy of judgment o, decree or certificate of costs hence the court should find that the application herein lacks merit, is an abuse of the court process and an afterthought which is only meant to deny the plaintiff Respondents the enjoyment of the fruits of her judgment.

7. The application was canvassed by way of written submissions.

8. In the applicant's counsel's written submissions dated 18th May 2020, it was submitted reiterating the prayers and grounds in support of the application and stating that the applicant was only late in filing of the appeal by 10 days hence the delay is not inordinate.

9. On the prayer for stay of execution, reliance was placed on Order 42 Rule 6(2) of the Civil Procedure Rules on the conditions that must be met for stay of execution pending appeal orders to issue. Further reliance was placed on several authorities that speak to the conditions for grant of stay and leave to appeal out of time. These are: **Carter & Sons Ltd v Deposit Protection Fund Board & 2 others CA No. 291 of 19197; Butt v Rent Restriction Tribunal Nrb Civil Appl No.6 of 1979; Silverstein v Chesoni (2002) e KLR 867.**

10. On whether the intended appeal is arguable reliance was placed on **Nrb CA No. 74 of 2015-HFCK v Sharok Kher Mohamed Ali Hirji citing Reliance Bank Ltd (in Liquidation) v Norlake Investments Ltd CA No. NAI. 93 of 2002.**

11. On whether granting of leave to appeal out of time will be in the interest of justice, reliance was placed on section 3A of the Civil Procedure Act and **Patrick Maina Mwangi v Waweru Peter [2015] e KLR and United Arab Emirates v Abdel Ghafar & Others [1995]IR LR 243 citing with approval Nicholas Kiptoo Arap Korir Salat v IEBC &7 others [2014] e KLR.**

12. The applicant submitted maintaining that the 1st Respondent will in no way be prejudiced if the orders sought are granted and that it is ready and willing to deposit the decretal sum in joint interest earning account. Counsel attributed the late filing of the appeal to the Covid 19 pandemic in the country which led to the scaling down of the activities. It was submitted that the application was brought in good faith and in the interest of justice.

13. Opposing the application, the 1st Respondent's counsel submitted that it took the Applicant 40 days before filing the Memorandum of Appeal and that the applicant has not explained the cause of the delay in the application. Section 79G of the Civil Procedure Act on the timelines for filing appeals in civil matters was cited. The 1st Respondent's counsel further relied on **JMM v PM [2018] e KLR** in opposing the prayer for stay of execution of decree pending appeal and a submission made that although the Applicant's Supporting Affidavit claims that they have instructions to lodge an appeal out of time, the said instructions have not been brought to the attention of this honorable court by way of annexed letter or otherwise.

14. It was further submitted that staying the execution of the judgement delivered on 19th February 2020 will delay justice to the 1st Respondent. Counsel contended that the Applicant's application lacks merit and is frivolous. Counsel maintained that Under Rule 5 (2)(b) of the Rules of the Court of Appeal, the Applicant must satisfy the Court that his intended appeal is an arguable one or the intended appeal is not frivolous. In the instant application, it was contended that the Memorandum of Appeal annexed by the Applicant in their Supporting Affidavit does not meet the requirements set out under Order 42 of the Civil Procedure Rules and The Court of Appeal Practice Direction, 2015.

15. The 1st Respondent's counsel submitted inviting this court to find that the application herein lacks merit, is an abuse of the court process and an afterthought which is only meant to deny the Plaintiff/ 1st Respondent the enjoyment of the fruits of her judgement.

DETERMINATION

16. I have considered the application and prayers sought substantially, for leave to appeal out of the statutory stipulated period and secondly, stay of execution of decree of the lower court pending the lodging, hearing and determination of the intended appeal. The main issue for determination therefore is whether the application has any merit.

17. The following are the statutory provisions respecting an appeal from the judgment or decree of a subordinate court to the High Court: Section **75G of the Civil Procedure Act** provides that:

“79G. Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

18. Without belabouring too much into the merits and demerits of this prayer, it is not disputed that the judgment in the lower court was delivered on 19th February 2020 and that this application was filed on 20th April 2020 which was beyond the 30 days stipulated in section 79G of the Civil Procedure Act. The applicant's counsel has given an explanation that the instructions to appeal were given after the last date of filing an appeal. Albeit the 1st Respondent claims that there is no evidence of instructions to the advocate, there is no legal requirement that instructions to an advocate must be in writing. There is delay which is admitted. However, this court does not find that the delay is

inordinate as to deny the applicant an opportunity to ventilate its grievances by way of an appeal to this Court. This court takes judicial Notice that between 16th March 2020 to the date of filing of this application, there has been downscaling of court services owing to Covid 19 pandemic and which threw all persons in a spin of uncertainty as to how services were to be rendered.

19. No doubt, the 30 days fell in the Covid 19 pandemic situation and therefore the delay in filing the intended appeal was not inordinate. On whether the intended appeal has chances of success is not for this court to decide at this stage save that from the draft intended memorandum of appeal annexed, I am satisfied that the intended appeal is not frivolous on the face of it. The applicant will have an opportunity to satisfy the court on the merits of its appeal and the Respondents will have a chance to respond to the merits or demerits of the appeal once filed.

20. For the above reasons, I find and hold that the prayer for leave to appeal out of time is merited. The same is allowed and the applicant is granted seven days from the date of this order to file and serve the Respondents with the memorandum of appeal together with the order herein granting leave.

21. On the prayer for stay of execution of judgment or decree of the trial court pending the hearing and determination of the intended appeal, Order 42 Rule 6(2) of the Civil Procedure Rules which provides that:

“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.

22. This court enjoys discretion to grant stay of execution of decree pending appeal. In **JMM v PM [2018] e KLR** it was stated:

“As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.”

23. Order 42 rule 6 of the Civil Procedure Rules grants this court as an appellate court, as well as the trial court wide discretion to stay execution of decrees pending appeal. In the present case, there is no dispute that leave to appeal out of time has been granted and as stated above, from the draft Memorandum of Appeal, it is clear to me that it is not frivolous. It raises triable issues of whether or not the trial magistrate erred in law and fact in holding the appellant 100% liable for the occurrence of the accident. Indeed, the decree is a money decree and therefore the question of the appeal being rendered nugatory if successful does not arise as it was not shown that the Respondent decree holder is so impecunious that she cannot refund the decretal sum awarded if the same is paid out to her. Furthermore, in its pleadings, the appellant has not disclosed the quantum of damages awarded to the 1st respondent. It is therefore difficult for this court to establish whether such award was manifestly excessive or otherwise, and capable of interference by the court on appeal should the court find that the appellant was liable for the accident. The applicant has therefore not demonstrated that it will in any way suffer any loss in the event that stay is not granted. The applicant has offered security for the due performance of decree.

24. The above notwithstanding, it is also incumbent upon the Respondent decree holder to demonstrate that should the appeal be successful then she is in a position to refund the money decree paid to her. The court takes judicial notice of the fact that the appellant is monopoly in electric power supply in the whole country and therefore it is unlikely that it will be under by the time the intended appeal is heard and determined.

25. In addition, the appeal can be fast tracked to be heard expeditiously so that no party loses out.

26. For the above reasons, I exercise discretion and grant stay of execution of judgment /decree in Bondo PM CC No. 45 of 2017 until the intended appeal is filed, heard and determined, conditional upon the applicant issuing a Bank Guarantee to this court for the entire decretal sum awarded in Bondo PMCC No. 45 of 2017 from a reputable Commercial Bank within the next 21 days of this ruling in default the stay granted lapses.

27. Costs of this application which are assessed at Kshs 15,000 shall be paid by the applicant to the 1st Respondent within 15 days of today in default the 1st Respondent is at liberty to execute for recovery of the same.

Orders accordingly.

Dated, signed and Delivered at Siaya this 24th day of June, 2020

R.E. ABURILI

JUDGE