



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 133 OF 2019

KENYA POWER AND LIGHTING COMPANY LTD.....APPELLANT

-VERSUS-

DICKSON KIPTANUI MISOI.....RESPONDENT

RULING

[1] Before the Court for determination is the Notice of Motion dated **5 May 2020**. It was filed by the respondent pursuant to **Sections 1A, 1B, 3A, 65 and 66** of the **Civil Procedure Act**, and **Order 42 Rule 11, 13 and 35** of the **Civil Procedure Rules** for the striking out the Memorandum of Appeal dated **13 September 2019** and for costs of the application. The application was predicated on the grounds that the respondent has a decree in his favour in the sum of **Kshs. 573,000/=** issued in **Kapsabet SPMCC No. 37 of 2019**; and that the appellant was granted stay of execution on condition that it deposits the decretal sum, but failed to comply with that condition.

[2] In response to the application, the appellant relied on the affidavit of **Beatrice Musyimi**, sworn on **30 June 2020** wherein it was averred that the appellant duly complied with the condition aforementioned by issuing a cheque for **Kshs. 475,200/=** on **9 January 2020** in the names of both advocates on record for the parties; and that, if anything, it was the respondent's advocate who failed to perform his part, in that he failed to sign the requisite documents to give a go-ahead for the opening of the joint account. She annexed several documents to her affidavit to back up her averments, including copies of the cheque and the forwarding letter dated **17 January 2020**.

[3] The application was canvassed by way of written submissions, and in this respect, **Dr. Chebii**, learned counsel for the respondent submitted that the appeal is incompetent and cannot be entertained as it is premised on the conditions of stay of execution which have not been complied with. Counsel relied on **Section 1A(3)** of the **Civil Procedure Act** to support his assertion that the appellant is under obligation to comply with the directions and orders of the Court; and that failure so to do attracts sanctions. He consequently prayed for the striking out of the appeal for failing to comply with the conditions precedent to the appeal.

[4] **Mr. Kamau**, counsel for the appellant, on his part reiterated the stance that the appellant did its part and complied with the court order dated **4 December 2019** within the 21 days provided for. Counsel relied on **Rules 4 and 5** of **Order 50, Civil Procedure Rules** to support his contention that the period between **21 December 2019** and **13 January 2020** ought not to be counted in computing the 21 days. Hence, in his submission the 21 days lapsed on **18 January 2020**; and that since the cheque was issued on **9 January 2020** and submitted to counsel for the respondent on **17 January 2020**, the appellant duly complied. He accordingly urged that the appeal is competent and ought to be heard and disposed of on the merits.

[5] In the light of the foregoing, the single issue that presents itself for determination is the question whether justifiable cause has been shown for the striking out of this appeal; and in considering that issue, a brief background would help put matter in its proper context. From the copy of the Judgment delivered in **Kapsabet SPMCC No. 37 of 2019**, which was annexed to the respondent's Supporting Affidavit, it is manifest that the suit was resolved in the respondent's favour on **24 July 2019**. In the last paragraph of the said Judgment, the trial magistrate had the following to say:

“The plaintiff computed his claim and even served on the defendant the demand letters dated 17/10/17, 10/4/2018 and 30/8/2018 which did not elicit any response or any denial of liability. I deem that the claim is uncontested. The plaintiff claim is allowed as prayed in the plaint. Interest to accrue from date of filing suit at court rates...”

[6] And, according to the Plaint dated **24 January 2019**, the particulars of loss and damage suffered by the respondent was given at paragraph 6 thereof to be **Kshs. 475,200/=** only; **Kshs. 200,000/=** being the value of the cow and **Kshs. 275,200/=** being the loss of income from milk at 22 litres per day at **Kshs. 60/=** per litre for 365 days. The appellant then applied for stay of execution but his first application dated **31 July 2019** was dismissed on **4 September 2019**. In that same application, the appellant had asked for the setting aside of the *ex parte* Judgment dated **24 July 2019** and all consequential orders emanating therefrom; and to be allowed to adduce evidence in its defence. It

was upon the dismissal of that application on **4 September 2019** that the instant appeal was filed. The appellant thereafter filed a second application dated **19 September 2019** which was determined by the lower court on **4 December 2019**. A copy of the ruling is marked **Annexure DKM4** to the respondent's Supporting Affidavit; and the conclusion reached by the lower court was as hereunder:

“There is no doubt an appeal has been lodged at the Eldoret High Court Civil Appeal No. 133 of 2019. I find that in light of the averments that Respondent is a man of straw and may not be in a position to refund the decretal sum if paid, and which averments was only denied; I find that the application is merited and the order for stay in terms of prayer 3 is granted but the stay shall be conditional. The court directs that the full decretal amount to be deposited in court within 21 days of today in the event that the parties' advocates on record shall not have reached a consensus to deposit and would have not deposited the full decretal amount in a reputable bank in Kenya in joint interest earning account of both parties' advocates on record.

Failure to comply with above condition the stay of execution order shall lapse and the respondent shall be at liberty to move as appropriate.

Costs of the application shall abide the outcome of the appeal...”

[7] It is plain therefore that the condition for stay, given on **4 December 2019**, had nothing to do with the appellant's right to appeal or the competence of the appeal itself; for the Memorandum of Appeal had already been filed by the time the ruling aforementioned was delivered. The record shows that the Memorandum of Appeal was filed on **18 September 2019**; a fact that was acknowledged by the subordinate court in the subject ruling. Moreover, an appeal from a decision made pursuant to **Order 10 Rule 11** of the **Civil Procedure Rules**, which provides for the setting aside of default judgment, is appealable as a matter of right by dint of **Section 75(1)(h)** of the **Civil Procedure Act**, as read with **Order 43 Rule 1(g)** of the **Civil Procedure Rules**. Consequently, the lower court could not; and did not purport, to limit or fetter that right by imposing conditions, as urged by counsel for the respondent.

[8] Consequently, for purposes of the appeal, the question as to whether or not the appellant complied with the conditions set by the lower court is immaterial. That question would only arise in the event of an application for execution before the hearing and determination of the appeal. Nevertheless, credible evidence was presented before the Court to demonstrate that a cheque was raised on behalf of the appellant in the joint names of counsel for the parties, receipt of which was acknowledged by counsel for the respondent vide a letter dated **21 January 2020**. Apparently, counsel for the respondent took issue with the fact that the cheque was for a lesser amount than the sum of **Kshs. 573,000/=** for which the respondent was poised to levy execution; which amount included costs. Moreover, granted the tenor and effect of the order of **4 December 2020**, the appellant may be excused for having taken it to mean the payment of the principal sum only.

[9] Thus, had the issue arisen herein, I would have surmised that there was compliance on the part of the appellant. In any event, it is now a constitutional imperative that, so far as practically feasible, disputes should be heard and determined on the merits. Hence in **Banco Arabe vs. Bank of Uganda** [1999] 1 EA 22, it was held that:

"The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors, lapses should not necessarily debar a litigant from the pursuance of his rights and unless lack of adherence to rules renders the appeal process difficult and inoperative. It should seem that the main purpose of litigation, namely, the hearing and determination of disputes should be fostered rather than hindered."

[10] In the result, it is my finding that the application dated **5 May 2020** is completely devoid of merit and is hereby dismissed with costs.

It is so ordered.

DATED SIGNED AND DELIVERED AT ELDORET THIS 29TH DAY OF OCTOBER 2020

OLGA SEWE

JUDGE