



**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 2<sup>nd</sup> 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. On 30<sup>th</sup> April 2020, I delivered a ruling herein, in which I dismissed an application, by the appellant, dated 4<sup>th</sup> July 2019, seeking stay of execution, pending appeal.
2. The appellant has come back to court, by way of another application, dated 29<sup>th</sup> June 2020, seeking review of the orders of 30<sup>th</sup> April 2020. The appellant now says that it has since obtained the documents that were missing from the record at the time of the dismissal, and is asking the court to review its dismissal order and grant stay. I had ruled that a copy of the judgment appealed against or the decree in question had not been attached. The appellant has now attached a copy of a decree of the trial court dated 9<sup>th</sup> April 2019.
3. The respondent has filed a reply, through an affidavit, sworn on 7<sup>th</sup> July 2020, by one of its directors, Alfred Limisi. It is averred that after the ruling of 30<sup>th</sup> April 2020, the appellant went back to the trial court and obtained stay orders on 16<sup>th</sup> June 2020, after there had been an attachment. The application at the lower court was subsequently withdrawn. It is further averred that the appellant is abusing the court system.
4. Directions were given for filing of written submissions. Both sides have complied, by filing their respective written submissions, which I have read through, and noted the arguments made.
5. The grounds upon which a court can review its orders are notorious. Firstly, the court can do so upon new evidence being placed before it, which the applicant for review had no access to as at the time the order sought to be reviewed was made. It is described as discovery of new important evidence. Secondly, the court will review its order where there is an error apparent on the face of the court record. This essentially refers to a mistake or error on the part of the court, and not the parties. Thirdly, the court may review its orders on the basis of any other sufficient reason. The courts have stated that this omnibus ground applies only where the reason is analogous to the other two. It must be something that was beyond the parties.
6. I dismissed the application dated 4<sup>th</sup> July 2019 because the appellant had not attached any documents to demonstrate that there was indeed a decree or order that had been made by the trial court, the one that formed the foundation for the application, the one whose execution was sought to be stayed. An applicant for stay of execution of an order or decree of a trial court must place proof before the appellate court that the decree or order sought to be stayed in fact existed, so that the court does not act in vain. If such an order or decree existed, it should not have been difficult for the appellant to get it from the trial record.
7. In the Motion dated 29<sup>th</sup> June 2020, the appellant is now telling me that it now has the decree that it had not attached to its earlier application, and it is inviting me to review my order of 30<sup>th</sup> April 2020. It is not alleged that the court fell into any error or made a mistake of some sort, that is now sought to be rectified. Nor is it being argued that the appellant stumbled on a very important piece of evidence that would have tipped the scales had it been placed before the court. The copy of the decree, attached to the application dated 29<sup>th</sup> June 2020,

shows that the same was served upon and received by the appellant on some unclear date in April 2019. It was not discovered after 30<sup>th</sup> April 2020. The appellant has had it since April 2019, and even as it filed its Motion, dated 4<sup>th</sup> July 2019, the basis for the ruling of 30<sup>th</sup> April 2020, it had it, but chose not to attach it to its papers.

8. The appellant is basing his review application on the amorphous ground of other sufficient reason. What is this other reason? I have read and reread the affidavit sworn in support of the said Motion, and I do not see any reason, let alone sufficient, given in there for failure to adequately support the application of 4<sup>th</sup> July 2019, with the relevant documentation, when the appellant all along had the most critical document, the decree.

9. I am not persuaded that the appellant has any reason to seek review of the orders of 30<sup>th</sup> April 2020. Consequently, I find no merit in the application dated 29<sup>th</sup> June 2020, and I do hereby dismiss the same for being misconceived, poorly thought out and incompetent.

10. I have, though, seen and perused the record of appeal that has been lodged herein by the appellant. Purely in the interests of justice, and particularly because the appellant is a public utility entity, whose asset base the court can take judicial notice of, I am minded to grant stay of execution pending appeal, to enable the appellant have its day before the appellate court. The said stay order shall be conditional upon the appellant depositing a sum of Kshs. 2, 000, 000.00 in court, within fourteen (14) days of the date of this order, in default of which the respondent shall be at liberty execute the decree without any further reference to the appellant. Costs shall be in the appeal. It is so ordered.

11. To move the matter forward, I hereby direct the Deputy Registrar to call for the original trial records from the trial court. The matter shall thereafter be mentioned, on a date that I shall give at the delivery of this ruling, for directions on the disposal of the appeal, and to also confirm whether the appellant will have complied with the terms upon which stay has been conditioned.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 16<sup>th</sup> DAY OF October 2020**

**W. MUSYOKA**

**JUDGE**