



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 522 OF 2004

KENYA POWER & LIGHTING COMPANY LIMITED.....1ST APPELLANT

CHARLES JUMA WAKO.....2ND APPELLANT

VERSUS

ZAKAYO SAITOTI NAINGOLA.....1ST RESPONDENT

GEORGE KATUNGA SILA.....2ND RESPONDENT

RULING

1. The Notice of Motion dated 5th May 2019 filed by the appellants/applicants, *Kenya Power & Company Limited* and *Charles Juma Wako* refers. The substantive prayers in the motion are that the court be pleased to review its orders of 5th February 2019; that the supplementary affidavit filed on 4th February 2019 be deemed to have been filed with leave of the court and that the costs of the application be provided for.
2. The application is premised on grounds that the court declined to extend orders of stay of execution pending the hearing of the applicants' application dated 6th December 2018 on grounds that the outgoing advocate for the applicants had not been served with the application which has since been done; that the court's refusal to extend the orders of stay of execution exposed the applicants to execution and if execution proceeded, the pending application will be rendered nugatory; that the application was filed timeously and if it was allowed, the respondents are not likely to suffer any prejudice. The application is also supported by the depositions made in the supporting affidavit sworn on 5th February 2019 by *Mr. Sospeter Opondo Aming'a*.
3. The motion is opposed through grounds of opposition dated 12th February 2019. The points taken in opposition to the motion are two fold, namely, that the application is incompetent, frivolous and lacks merit and that the supplementary affidavit filed on 4th February 2019 was not served upon the respondents.
4. The motion was argued orally before me on 12th February 2019 by learned counsel *Mr. Mwaura* who represented the applicants and learned counsel *Mr. Mege* who appeared for the respondents.
5. In his submissions, *Mr. Mwaura* expounded on the grounds anchoring the motion and the depositions in the supporting affidavit. He in addition explained that the supplementary affidavit was meant to correct the wrong description of the deponent to the affidavit sworn in support of the motion dated 6th December 2018. He emphasized the point that if the court did not review its orders of 5th February 2019, the applicants will be exposed to the risk of execution whereas if the application was allowed, the respondents will not suffer any prejudice.
6. On his part, *Mr. Mege* in his submissions reiterated the respondents' view that the application is incompetent on grounds that the court's jurisdiction to review its orders had not been invoked and the conditions precedent to the court's jurisdiction to review its orders had not been satisfied by the applicant. Counsel further argued that there was no legal basis on which the court could extend the orders of stay since the application on which the interim orders of stay had been issued was spent. He urged the court to dismiss the application for lack of merit.
7. I have considered the application, the affidavits on record, the grounds of opposition filed by the respondents and the submissions made by both counsel on record. I have also perused the court record.
8. Having done so, though I will not go as far as holding that the motion is incompetent, I agree with *Mr. Mege's* submissions that the jurisdiction of the court to grant the orders of review as sought has not been properly invoked in the motion. The jurisdiction of the court to review its own orders is donated by *Section 80* of the *Civil Procedure Act* and *Order 45* of the *Civil Procedure Rules* and not the provisions of the law cited in the motion. The motion is expressed to be premised on *Sections 1 A; 3 A and 79 G* of the *Civil Procedure Act* and *Orders 50 Rule 6; 51 Rule 1 and 42 Rule 6* of the *Civil Procedure Rules 2010*. Those provisions mainly provide for the overriding objective of the *Civil Procedure Act* and the inherent powers of the court to do justice; the lodging of appeals to the High Court and stay of execution

pending the disposal of an appeal.

9. Section 80 of the Civil Procedure Act provides as follows:

“Any person who considers himself aggrieved—

a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

Order 45 of the Civil Procedure Rules reiterates the power of the court to review its own judgments or orders but proceeds to specify the circumstances under which the court may exercise its power of review. Order 45 Rule 1 (b) expressly provides that a court can review its judgment or order if an applicant satisfies any of the following conditions:

(i) That he has discovered new evidence which after the exercise of due diligence was not within his knowledge or was not available at the time the order was made;

(ii) That there was a mistake or error apparent on the face of the record; and

(iii) That there is sufficient reason to warrant the review sought and that the application had been made timeously.

10. In this case, the applicants have not satisfied any of the above conditions. They have not claimed that they have discovered any new evidence that was not in their possession prior to 5th February 2019 or that there is a mistake on the face of the proceedings or orders made by this court on 5th February 2019. They have sought to have the aforesaid orders reviewed only on grounds that if they are not reviewed and the stay orders are reinstated, the respondents are likely to execute for the decree obtained in their favour in the year 2004. This with due respect does not constitute sufficient reason to warrant review of orders regularly made by a court especially in a case like the instant one where it is not disputed that the appeal filed against the judgment that gave rise to the decree now sought to be stayed through a review of the orders of 5th February 2019 was heard and dismissed on merit on 5th December 2008 about 11 years ago.

11. It is important to bear in mind that in his submissions on 5th February 2019 when responding to the applicants’ prayer for extension of interim orders, Mr. Mege submitted that the decree sought to be stayed had actually been fully settled including costs and what was pending was the accumulated interest generated by the decretal amount which had been deposited in an interest earning account. The facts stated in those submissions were admitted by the applicants’ counsel.

12. The above undisputed facts are what informed the court’s decision declining to extend the interim orders issued on 11th December 2018 and extended to 5th February 2019 on 17th January 2019. Contrary to what is claimed in the motion, the court did not refuse to further extend the interim orders because the applicants had not served the outgoing advocates with their application for leave to come on record for the applicants. It is not disputed that the application in which the interim orders of stay were issued is the Notice of Motion dated 6th December 2018 which was determined by this court on 12th February 2019. It is also not contested that the applicants appeal was heard and dismissed and given that the Notice of Motion dated 6th December 2018 has also been determined, there is nothing pending before this court which would form the basis for grant of interim orders of stay of execution which are the orders the applicants are seeking in the instant application though disguised as prayers for review of orders issued on 5th February 2019.

13. For the foregoing reasons, I am satisfied that the applicants have not laid down any basis to warrant a review of my orders issued on 5th February 2019. It is my finding that the Notice of Motion dated 5th May 2019 lacks merit and it is hereby dismissed with costs to the respondents.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 28th day of March, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Ndegwa holding brief for Mr. Mege for the respondents

No appearance for the appellants though duly notified of the ruling date

Mr. Salach: Court Assistant