



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 80 OF 2017

THE KENYA POWER & LIGHTING

COMPANY LIMITED..... APPELLANT

VERSUS

ANDY INTERNATIONAL RESPONDENT

RULING

1. The appellant/applicant has moved this court through an application dated 18th April, 2017 brought under the provisions of Section 79G of the Civil Procedure Act, Order 50 rule 6 and Order 42 rule 6 of the Civil Procedure Rules, 2010 and under the inherent powers of the court, for the following orders:-

(i) Spent;

(ii) Spent;

(iii) Spent;

(iv) That there be a stay of the award of interest in the sum of Kshs. 663,698.58 and costs of Kshs. 231,116.15 set out in the decree dated 22nd March, 2016 (sic) arising out of the judgment of the Hon. Mr. F. Kyambia, Senior Resident Magistrate dated 20th February, 2017 and the warrants of attachment issued against the appellant on 12th April, 2017 pending the hearing and determination of the appeal filed herein;

(v) The time to file the appellant's memorandum of appeal be extended to 18th April, 2017 and the memorandum of Appeal filed on the said 18th April, 2017 be deemed to be properly on record; and

(vi) The costs of this application be provided for.

2. The application is premised on the grounds in support of it and by the affidavit of Jude Ochieng, the applicant's Chief Legal Officer sworn on 18th April, 2017. The respondent filed a replying affidavit sworn by Thurania Andrew Kiogora the respondent's Director on 27th April, 2017, to oppose the application.

3. The applicant's Counsel filed her written submissions on 17th May, 2017 and Counsel for the respondent filed his on 5th June, 2017. Ms. Moka, Learned Counsel for the applicant highlighted her submissions by stating that she was seeking stay of execution of the award of interest in the sum of Kshs. 663,698.58 and costs in the sum of Kshs. 231,116.15 which arose from the judgment of Hon. Kyambia delivered on 20th February, 2017 and the warrants dated 18th April, 2017. She also sought extension of time for filing an appeal. She prayed for the memorandum of appeal filed herein to be deemed as being properly on record.

4. Counsel applied to amend paragraphs 2 and 3 of the present application under the provisions of Section 100 of the Civil Procedure Rules with regard to the date of the decree, so as to read 22nd March, 2017 instead of 22nd March, 2016. Counsel stated that the annexure attached to the respondent's replying affidavit and marked as TAK was written on a "without prejudice" basis and could not be relied upon by the respondent. She contended that the applicant is likely to suffer substantial loss if it pays off the sums claimed. She relied on **Halai and Another vs Thornton and Turpin** [1963], Ltd [1990] KLR, to support the foregoing submission. She argued that the respondent had in its affidavit not shown the assets at its disposal. She submitted that they filed their application for stay of execution without undue delay.

5. On the prayer for grant of extension of time to file an appeal, Counsel relied on the case of **Edward Kamau and Another vs Hannah Mukui Gichuki and Another** [2015] eKLR to show that the court should grant extension of time to file an appeal since the present application was filed without undue delay.

6. Ms. Moka stated that the award made in the suit in the lower court was paid on 13th April, 2017. She submitted that the applicant was ready and willing to deposit security in an interest earning joint bank account in the names of the Advocates for the parties herein. She stated that although the Hon. Magistrate found that there were fraudulent alterations made in the transaction that forms the subject matter in the court below, he went ahead to award costs to the respondent herein.

7. Mr. Ananda, Learned Counsel for the respondent opposed the application by stating that judgment was delivered on 20th February, 2017 wherein the applicant was to pay Kshs. 2,885,646 being the principal sum. He stated that the said amount was paid on 13th April, 2017. Interest added up to the sum of Kshs. 663,698.58 and costs at Kshs. 231,116.15. He submitted that the applicant signed a draft decree and that the application for stay of execution was filed on 18th April, 2017 after delivery of the judgment on 20th February, 2017.

8. Counsel for the respondent stated that the application was filed almost a month afterwards. He argued that Section 79G of the Civil Procedure Act has not been complied with. He added that no reasons have been given as to why leave to appeal out of time should be granted. He stated that in the case of **Edward Kamau** (supra) the court held that a proper reason must be given for leave to appeal out of time to be granted. He cited the case of **Mbogo and Another vs Shah** [1968] EA on the issue of exercise of a court's discretion. He submitted that the delay in making the outstanding payment is meant to defeat the cause of justice as costs follow the event.

9. Mr. Ananda indicated that no reason has been given as to why costs and interest were being withheld. He relied on **Nalin Kumar M. Shah vs Mumias Sugar Company Ltd.** [2010] eKLR on the award of interest. He further submitted that Ms Moka had not shown that substantial loss would be suffered by the applicant if the outstanding payment is to be made. He relied on the case of **HFCK vs Sharok Kher Mohamed Ali Hirji and Another** [2015] eKLR to show that the applicant has no arguable appeal.

10. Ms. Moka in response to the foregoing submitted that there has been no inordinate delay in filing the application for stay of execution and leave to appeal out of time. She indicated that the delay has been explained in the supporting affidavit. She submitted that the applicant has in his replying affidavit not shown how he will repay the costs and interest, if the appeal will be successful. She prayed for the application to be allowed.

ANALYSIS AND DETERMINATION

The issues for determination are:-

- (i) If there has been inordinate delay on the part of the applicants in filling the application for leave to appeal out of time; and
- (ii) If the applicant has satisfied the principles for grant of the orders sought for stay of execution.

11. A perusal of the applicant's affidavit reveals that the judgment was delivered on 20th February, 2017 and the applicant was granted stay of execution for 30 days by the lower court. The applicant on 13th April, 2017 made a payment of Kshs. 2,885,646.00 being the principal sum after it received the extracted decree on 24th March, 2017, from its Advocates on record.

12. The applicant's deponent avers in paragraph 11(e) of his affidavit that they were dissatisfied with the award of interest and costs and on 29th March, 2017, they instructed their lawyers to appeal. The said Advocates wrote to the Executive Officer Mombasa Law Courts on 3rd April, 2017 requesting for certified copies of the proceedings to enable them file a record of appeal. A follow up letter was sent to the Chief Magistrate Mombasa on 6th April, 2017, the lower court file was then traced. Copies of the said letters are attached to the applicant's affidavit.

13. In paragraph 11(f) of the applicant's affidavit, the deponent states that the delay in issuing instructions to appeal was for the reasons that a copy of the judgment setting out the reasons for awarding interest and costs; was supplied late by the Chief Magistrate's Court Registry.

14. Mr. Ananda's objection for grant of orders for the applicant to appeal out of time is based on correspondence attached to the respondent's affidavit which shows that the issue of the respondent filing an appeal did not arise until the 11th April, 2017. It is clear that the impression given by the applicant's Counsel to the respondent's Counsel had been that the applicant was ready to settle the principal amount, costs and interest. The letter dated 5th April, 2017 attached to the respondent's affidavit and marked as TAK-8, from the applicant's Counsel reads that they would send the respondent's Advocate money as soon as they received it (from the applicant).

15. The Memorandum of Appeal herein was filed on 18th April, 2017 which was almost a month after the 30 days period set aside for filing of appeals. Bearing in mind that it took time for the applicant's Advocate to obtain a handwritten copy of the judgment, the delay in filing the appeal has been explained to the satisfaction of this court. It is also clear that the applicant's Counsel had all along been cooperative to having the decretal amount, interest and costs paid. The applicant, who was the instructing client seems to have had a change of heart after reading the judgment in issue. It is well within its rights to appeal.

16. It is my finding that the delay was also not inordinate and for the said reason, the memorandum of appeal filed on 18th April, 2017 is hereby deemed to be properly on record.

17. Courts have discretionary powers in granting orders for stay of execution subject to the conditions set out in Order 42 Rule 6 (2) of the Civil Procedure Rules which are to the effect that: -

(i) The application must be made without undue delay;

(ii) That applicant must demonstrate that he will suffer substantial loss unless the order sought is granted; and

(iii) 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.

18. In the case of **National Industrial Credit Bank Ltd vs Aquinans Francis Wasike, Court of Appeal Civil Application No. 238/2005**, the Court of Appeal held:-

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegations that an appeal would be rendered nugatory because the respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.”

19. The respondent's deponent did not show what means the respondent had at its disposal that would enable it to make full restitution to the applicant if the appeal succeeds. I am therefore satisfied that the applicant stands to suffer substantial loss if this court declines to grant orders for stay of execution pending the hearing of the appeal.

20. The applicant has offered to deposit security in the sum of Kshs.663,698.58 for interest and Kshs. 231,116.15 for costs in a joint interest earning bank account in the names of the Advocates for the parties herein pending the hearing and disposal of the appeal.

21. The said proposal is a reasonable. I therefore grant orders for stay of execution pending the hearing of the appeal herein. The applicant/appellant will within 45 days from the date of this ruling deposit the total sum of Kshs. 894,814.73 in a joint interest earning bank account in the names of both Advocates on record. Costs of the application will abide the outcome of the appeal.

DELIVERED, DATED and SIGNED at MOMBASA on this 23rd day of February, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Masila holding brief for Ms. Moka for the applicant

Mr. Mulali holding brief for Mr. Ananda for the respondent

Mr. Oliver Musundi - Court Assistant