



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 28 OF 2017

KENYA POWER & LIGHTING..... APPELLANT/APPLICANT

V E R S U S

JAMES MURITHI MWANIKI.....RESPONDENT

R U L I N G

1. In its notice of motion dated 14/06/2017, the applicant seeks for orders for stay of execution of the judgment and decree in Embu CMCC No. 210 of 2011 pending the hearing and determination of the appeal it is grounded on the affidavit of Paul Kariba the legal officer APA Insurance Co. Ltd.

2. The background facts are that the parties recorded a consent on 27/09/2016 for repair of the respondents entire building which was damaged by an electric pole which fell on it. This was in CMCC No. 210 of 2011 from which this appeal arose.

3. The damage was on the hang beam and the applicant did not expect that it would exceed Kshs.100,000/=. The advocate on record for the applicant misconstrued the instructions and entered a consent for the repair of the entire building not minding the fact that the building had pre-existing defects.

4. The applicant applied tot he court to set aside the consent in CMCC No. 210 of 2011 which application was not successful prompting filing of this appeal.

5. The applicant further sought for leave to file an appeal against its ruling delivered on 21/02/2017 dismissing the application which was refused. The applicant was aggrieved by the decision of the learned magistrate and wants to challenge it. It is argued that if the orders sought are not granted, the appeal will be rendered nugatory.

6. The application was opposed by the respondent relying on its grounds of opposition. It was argued that the requisite conditions set out under Order 42 Rule 6 have not been satisfied. The applicant has not shown that he is likely to suffer substantial loss and has not offered security for the due performance of the decree.

7. The respondent relied on the case of **MASISI MWITA VS DAMARIS WANJIKU NJERI [2016] eKLR** where it was held that the act of execution or the risk of it does not amount to substantial loss. The applicant has to demonstrate that in the event that the orders are denied, he will suffer substantial loss.

8. The respondent further argued that it has not been shown that the respondent is a man of straw and incapable of refunding the decretal amount should the appeal be successful. The judgment is a money decree and would be easily reimbursed. The respondent works in the United Kingdom and is a person of means. For this argument the respondent relied on the Court of Appeal case of **KENYA HOTEL PROPERTIES LTD VS WILLEDEN PROPERTIES** where it was held in a money decree, that an appeal would not be rendered nugatory for the reason that the money would be easily reimbursed. The citation of the case was not provided by the respondent.

9. Order 42 Rule 6 sets out three conditions that must be satisfied by the applicant in an application of this nature as follows:-

(a) That substantial loss may result to the applicant unless the orders sought are granted;

(b) That the application is made without unreasonable delay.

(c) That security has been provided on such conditions as the court finds appropriate.

10. The orders appealed against were made on 6/06/2017 and this application was filed on 15/06/2017. This was about nine (9) days after the said orders. I am satisfied that the applicant moved with speed and there was no unreasonable delay herein.

11. On substantial loss, the applicant argues that it may suffer enormous losses if its assets are sold in execution of the decree. It is further stated that the respondent has no financial ability to reimburse the decretal amount. The burden is on the applicant to satisfy the court that the respondent is a man of straw lacking the capacity to refund the decretal amount. In the **MASISI MWITA** case relied on by the respondent the court held:-

No doubt in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has levied and completed, the at is to say, the attached properties have been sold, as in the case here, does not in itself amount to substantial loss under Order 42, Rule 6 of the CPR. This is so because execution is a lawful process.

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the Appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein Vs Chesoni.

12. The issue which arises is whether the applicant has demonstrated substantial loss. Except the risk of execution which is a lawful process, the applicant has not shown any other factors which may lead to irreparable loss. I agree with the **MASISI MWITTA** case (*supra*) that the applicant needs to demonstrate that he will suffer irreparable loss in the event that the orders are denied.

13. The parties in this case entered into a consent judgment that the applicant would repair the building of the respondent caused by its negligence. The applicant later claimed that his advocate misconstrued the instructions given to him. The applicant says he did not agree to repair the entire building and expected that the cost of the repair would not exceed Kshs.100,000/=.

14. The annexed loss assessment report amounts to Kshs.514,000/= which has not been shown to be substantial on part of the applicant who is a reputable company. It was not disputed that the respondent is said to be working in the United Kingdom. The applicant has failed to show that the respondent is incapable of refunding the amount if the decree is executed. Being a money decree, and an amount which cannot be regarded as substantial, the applicant has failed to satisfy the court that he is likely to suffer substantial loss. It is trite law that an appeal will not be rendered nugatory if the decree is a money decree.

15. It is important to note that the consent order did not limit the cost of the repair leaving it open for both parties to deal.

16. The applicant offers to deposit half or the whole decretal amount in court pending the hearing and determination of the appeal but has not annexed any evidence of the said security.

17. I reach a conclusion that the application has no merit and it is hereby dismissed with costs to the applicant.

DELIVERED, DATED AND SIGNED AT EMBU THIS 21ST DAY OF FEBRUARY, 2018.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Muriuki for Manasseh for Applicant

Mr. Njoroge for Kathungu for respondent