



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 155 OF 2017

KENYA POWER & LIGHTING CO. LTD APPELLANT

VERSUS

RASSUL NZEMBE MWADZAYA RESPONDENT

RULING

1. Through an application dated 24th August, 2017 brought under the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act and Order 42 rule 6 of the Civil Procedure Rules, 2010; the applicant seeks the following orders:-

(i) Spent;

(ii) Spent;

(iii) That this Honourable Court be pleased to order a stay of execution of the Judgment and decree delivered on 7th July, 2017 in Mombasa CMCC No. 2257 of 2012 (Rassul Nzembe Mwadzaya vs Kenya Power & Lighting Company Limited) and all other consequential orders emanating therefrom pending the hearing and determination of this appeal; and

(iv) That the costs of this application be provided for.

2. The application is premised on the grounds in support of it and the affidavit of Jude Ochieng, the Chief Legal Officer of the applicant sworn on 24th August, 2017. The respondent filed a replying affidavit sworn on 26th September, 2017. The applicant's Counsel filed her written submissions on 6th October, 2017. Counsel for the respondent filed hers on 13th October, 2017.

3. The court has perused the applicant's submissions which indicate that in order for the court to exercise its discretion in favour of the applicant under the provisions of Order 42 rule 6 of the Civil Procedure Rules, it must show that substantial loss would ensue from a refusal for grant of stay of execution. It was stated that the money decree arising from the lower court case plus costs add up to a sum of Kshs. 5,446,206.60, which they consider colossal. It was submitted that the applicant is likely to suffer substantial loss as the respondent may not be able to refund the said sum if the appeal succeeds.

4. It was further submitted that the respondent's financial status has not been disclosed to this Honourable court and as such, it would be prudent and in the interest of justice for this court to find that the applicant stands to suffer substantial loss unless stay of execution pending appeal is granted.

5. Counsel cited the case of **James Wangalwa & Another vs Agnes Naliaka** [2012] eKLR where the court held that in demonstrating substantial loss, the applicant must establish other factors which show that 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.

6. On the second condition for grant of orders for stay of execution, the applicant's Counsel submitted that the application has been made timeously and without unreasonable delay.

7. It was stated that on the third condition for grant of the orders sought, the applicant has expressed willingness to deposit such security as this Honourable court may order for the due performance of the decree.

8. Counsel for the applicant relied on the case of **Butt vs Rent Restriction Tribunal** [1979] eKLR, where the court stated that it is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in

the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in such a way as not to prevent the appeal, if successful from being rendered nugatory.

9. The court was urged to grant the orders sought as the appeal filed by the applicant has raised triable issues and it may be rendered nugatory if the orders are not granted.

10. The respondent's submissions are to the effect that although the granting of orders for stay of execution pending appeal is an exercise of discretion, it is fettered by the conditions set out in Order 42 rule 6(2) of the Civil Procedure Rules. The respondent's Counsel conceded to the fact that the present application was made without undue delay. It was however submitted that the applicant had not demonstrated that it will suffer substantial loss unless the order sought is granted.

11. The court was urged to take judicial notice of the fact that the money decree of Kshs. 5,161,367.00 was the value of the respondent's 6 bedroomed house as well as household goods as at 15th June, 2007 when the said house and household goods were razed down by a fire.

12. Counsel for the respondent cited the case of **Tropical Commodity Supplies Limited and Others vs International Trade Bank Limited** [2000] 2 EA, where the court stated that substantial loss does not represent any particular mathematical formula but is a qualitative concept that refers to any loss, great or small that is of real worth of or value or a loss that is of real value as distinguished from loss without value or loss that is merely nominal. It was submitted that it was essential for the applicant to show that it will suffer loss of real value.

13. In relying on the case of **James Wangalwa & Another vs Alice Naliaka** (supra), Counsel for the respondent argued that the applicant has to demonstrate other factors other than merely saying that the money decree is colossal and that the respondent may not be in a position to refund the same.

14. The respondent also relied on the case of **Machira T/a Machira & Co. Advocates vs East Africa Standard (No. 2)** 2002 KLR where the court held that in this kind of application for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific debate and particulars, where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay.

15. On the condition for deposit of security, the respondent urged the court to balance the rights of the parties by ordering the applicant to deposit Kshs. 5,446,204.60 being the decretal sum and costs in a joint interest earning account, in a reputable bank of their choice, in the names of the applicant's Advocate's law firm and the respondent's Advocate's law firm within 45 days or such reasonable time as the court may deem appropriate.

16. Counsel stated that by so doing, there will be no fear of the money being spent by the respondent and him not being able to refund if the appeal succeeds and there will be no fear of non-satisfaction of the decree by the applicant, if the appeal does not succeed.

ANALYSIS AND DETERMINATION

The issue for determination is if the applicant has met the necessary conditions for grant of stay of execution pending appeal.

17. In order for the applicant to benefit from the provisions of Order 42 rule 6 of the Civil Procedure Rules, it must meet three conditions provided therein. The applicant must establish that:-

- (i) It may suffer substantial loss unless the order is made;
- (ii) It made the present application without undue delay; and
- (iii) It has furnished security for the due performance of the decree being appealed from.

18. It was acknowledged by the respondent's Counsel that the application herein has been brought without unreasonable delay. This court notes that the respondent in his affidavit did not make any effort to show the means that he has at his disposal that would enable him to repay the decretal sum and costs in the sum of Kshs. 5,446,206.60 if the said amount was to be paid to him by the applicant.

19. The Court of Appeal while addressing a similar issue in the case of **National Industrial Credit Bank Limited vs Aquinas Francis Wasike & Another**, Nairobi Civil Application No. 238 of 2005 stated as follows:-

“This court has said before and it would bear repeating that while the legal duty is on the applicant to prove the allegation that an appeal would be rendered nugatory because a 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 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 this is a matter peculiarly, within his knowledge.” (emphasis added).

20. The applicant's Counsel was correct in submitting that no information was proffered by the applicant to show that he would afford to repay the decretal sum in the event that the appeal will be successful. In the said circumstances, it would be prejudicial to the applicant if this court was to order it to release the decretal sum and costs to the respondent.

21. In the case of **Absalom Dora vs Jaibo Transporters** [2013] eKLR the court held as follows:-

“The discretionary relief for stay of execution pending appeal is designated on the basis that no one would be worse off by virtue of an order of the court, as such order does not introduce any disadvantages but administers justice that the case deserves. This is in recognition that both parties have rights, the applicant to this appeal which includes the prospects that the appeal will not be rendered nugatory and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination.”

22. The respondent was not inimical to orders for stay of execution being granted as long as the applicant deposits the sum of Kshs. 5,446,206.60/= in a joint interest earning bank account in the names of the law firms representing the parties hereto. The applicant in paragraph 9 of its submissions has expressed its willingness to deposit security. The stance taken by the respondent’s Counsel is a proper one. In order to ensure that the decretal sum and costs are secure, I make the following orders:-

(i) The application dated 24th August, 2017 is hereby allowed on condition that the applicant herein deposits security in the sum of Kshs. 5,446,206.60 pending the hearing and determination of the appeal;

(ii) The said decretal sum shall be deposited in a joint interest earning bank account opened in a reputable bank, in the names of the two law firms representing the applicant and the respondent within 45 days from today.

(iii) That the costs of this application shall abide the outcome of the appeal;

It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 31st day of July, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

Ms Layoo holding brief for Ms Obura for the appellant/applicant

Mr Gachiri Kariuki holding brief for Ms Ngugi for the respondent

Mr. Oliver Musundi - Court Assistant