



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISCELLANEOUS CIVIL APPLICATION NO. 3 OF 2018

KENYA POWER & LIGHTING CO. LTD.....APPLICANT

VERSUS

BALOZI KENGA.....RESPONDENT

RULING

[NOTICE OF MOTION DATED 5TH FEBRUARY, 2018]

1. The Applicant, Kenya Power and Lighting Company Ltd has brought the notice of motion dated 5th February, 2018 under sections 1A, 1B, 3, 3A, 79G and 95 of the Civil Procedure Act and Order 50 Rule 6 of the Civil Procedure Rules. The key prayers in the application are for leave to file appeal out of time and stay of proceedings in Malindi CMCC. No. 400 of 2013, Balozi Kenga v Kenya Power & Lighting Company Ltd pending the hearing and determination of the intended appeal. The application is supported by the grounds on its face, the supporting affidavit of Jude Ochieng, a supplementary affidavit sworn by Priscah Obura on 11th April, 2018 and annexures to the affidavits.

2. The Respondent, Balozi Kenga, swore an affidavit on 28th February, 2018 in opposition to the application. He filed a notice of preliminary objection together with the said affidavit on 1st March, 2018.

3. The advocates for the parties agreed to dispense with the application by way of written submissions. A perusal of the pleadings and submissions discloses the following issues:

- a) Whether the Applicant ought to have sought leave from the trial court for the filing of the intended appeal;
- b) Whether leave to appeal out of time is deserved;
- c) Whether the trial court's proceedings should be stayed pending the hearing and determination of the intended appeal; and
- d) Costs of the application.

4. In the notice of preliminary objection the only issue to be considered is whether the intended appeal offends or does not comply with the mandatory provisions of Order 43 Rule 1(1) and (2) of the Civil Procedure Rules, 2010 (CPR) and Section 75 of the Civil Procedure Act, Cap. 75 (CPA).

5. Submitting on the issue, counsel for the Respondent asserted that the order appealed from requires the leave of the court before an appeal can be made. According to the Respondent, any leave to appeal granted to the Applicant will not serve any purpose as no leave to appeal has been sought and obtained as required by Order 43 Rule 1(1) and (2) of the CPR and Section 75 of the CPA.

6. Discussing the same issue, the Applicant posits that the order they intend to appeal against deals with the jurisdiction of the trial court to hear the matter and the issue of jurisdiction is not expressly provided for under the CPR. It is the Applicant's position that an appeal arising out of matters touching on jurisdiction shall lie as of right to any person aggrieved by the trial court's decision. Further, that leave to appeal is only required for orders provided for under the CPR.

7. Section 75 CPA provides that:

“75. Orders from which appeal lies

(1) An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted—

- (a) an order superseding an arbitration where the award has not been completed within the period allowed by the court;**
- (b) an order on an award stated in the form of a special case;**
- (c) an order modifying or correcting an award;**
- (d) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;**
- (e) an order filing or refusing to file an award in an arbitration without the intervention of the court;**
- (f) an order under section 64;**
- (g) an order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;**
- (h) any order made under rules from which an appeal is expressly allowed by rules.**

(2) No appeal shall lie from any order passed in appeal under this section.”

8. The cited provision specifically provides the orders from which an appeal shall lie as of right. They include orders made under the CPR from which an appeal is expressly allowed by the rules.

9. Any order not specified in Section 75 or for which the rules do not expressly allow an appeal would require the leave of the trial court or the court to be appealed to before an appeal can be filed.

10. Order 43(1) of the CPR specifies the orders and rules from which appeals shall lie as of right.

11. The decision the Applicant desires to appeal against is the dismissal of its notice of preliminary objection dated 26th April, 2017. It falls into the category of **“any other order”** specified by Section 75 of the CPA and such an order can only be appealed against with the leave of the court. However, such leave would not have been necessary on the part of the Respondent had the Applicant’s preliminary objection succeeded – see Order 43 Rule 3 CPR.

12. In the circumstances, the preliminary objection succeeds and the instant application is struck out for not deserving a hearing on merits.

13. I will not stop at this point as I find it necessary to address the other identified issues.

14. The Applicant supports its failure to file the appeal within 30 days from the date of the delivery of the order appealed against by averring that the ruling was delivered on 30th October, 2017 without notice to it. There is no averment by the Respondent to rebut this assertion. Indeed the Respondent indicates that it would not be opposed to the extension of time for filing an appeal.

15. I note that this application for extension of time was filed about two months after the delivery of the decision to be appealed against. The Applicant has offered a satisfactory reason why the appeal could not be filed within the statutory period. There is therefore no good reason for denying the Applicant leave to appeal out of time.

16. The other issue is whether the proceedings before the trial court should be stayed pending the hearing of the appeal. The Respondent opposed the application for stay of proceedings asserting that the matter the Applicant seeks to stay was commenced in 2013 and the Applicant only raised the issue of jurisdiction in 2017, four years later. The Respondent contends that the Applicant has all along delayed the hearing of the matter and it is only after it was denied adjournments that it introduced the issue of lack of jurisdiction by the trial court.

17. The Respondent submitted that one defence witness is yet to testify and the Applicant’s claim that a stay will save the trial court from wasting its time on a trial which may be blocked by a successful appeal is without merit.

18. The Respondent submits that the Applicant will not suffer any prejudice if the appeal succeeds since the entire trial will be rendered a nullity. The Respondent asserts that on the other hand a stay would be prejudicial to him as his power was disconnected in 2013 thus

grounding his posho mill business. He contends that staying the proceedings before the trial court would further delay the trial.

19. On this issue, it is submitted for the Applicant that without a stay the appeal would be rendered nugatory. According to the Applicant, if the proceedings are not stayed, the appeal will be rendered nugatory. Also, that allowing the matter to proceed would be a waste of the court's precious time.

20. A stay of proceedings should only be granted where the court is of the view that such proceedings should not be allowed to continue. Staying proceedings not only affects the parties but also affects the calendar of the trial court. It is only in a situation where the continuation of proceedings would result in injustice that the court should consider staying the proceedings.

21. In the instant case the application leading to the decision being appealed was filed four years after the institution of the suit. The application concerned the alleged lack of jurisdiction and was premised on Section 61(3) of the Energy Act, 2006. The Act was therefore in force at the time the suit was filed. The law was known to the Applicant's counsel and for the Applicant to take four years before making such an application only points to lack of seriousness on the part of the Applicant.

22. It is also noted that were the appeal to succeed, the Respondent's case can be struck out at any time before execution. The Applicant will not be prejudiced at all. In fact were the appeal to succeed the Respondent would be the greatest loser considering the time and finances expended on the litigation.

23. In short, I find no reason why the trial should be stopped at this stage. The application for stay of proceedings is without merit and the same is dismissed.

24. In summary, the instant application is dismissed as no leave was obtained for filing an appeal against the order intended to be appealed against. Granting leave to appeal out of time would therefore be an exercise in futility. Had leave to appeal been obtained, I would have extended the time for appealing but without staying the proceedings before the trial court. In view of the outcome of this application, I award costs to the Respondent against the Applicant.

Dated, signed and delivered at Malindi this 26th day of July, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT