REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

MISC. CIVIL APPLICATION NO. 4 of 2018

KENYA POWER AND LIGHTING CO. LTD.....APPLICANT

VERSUS

SAMUEL KAMAU KUNG'U.....RESPONDENT

RULING

1. In the present Application, the Applicant seeks orders for enlargement of time to file an Appeal out of time and for stay of execution pending the hearing and determination of the Intended Appeal. The intended appeal is from a ruling delivered in Limuru PMCC No. 59 of 2015 on 29/11/2017. The Application is supported by a Supporting Affidavit by George Onsombi, an Advocate of the High Court of Kenya who has the conduct of the matter on behalf of the Applicant.

2. The Respondent has filed a detailed Replying Affidavit sworn by Marcelino Simon Lesaigor, an Advocate of the High Court of Kenya who has the conduct of the matter on behalf of the Respondent.

3. Briefly, the facts are as follows. The Respondent filed suit against the Applicant for general damages; special damages; and liquidated future medical expenses. The Applicant failed to enter appearance and interlocutory judgment was entered. The matter, then, proceeded to formal proof. Before judgment could be given on quantum, the Applicant entered appearance on 19/08/2015. Contemporaneously, the Applicant filed an application to set aside the interlocutory judgment.

4. On 20/01/2016, the Trial Court set aside the interlocutory judgment on condition that the Applicant files its defence within 14 days of the ruling. The Applicant failed to comply.

5. Nine months later, on 08/09/2016, the Applicant approached the Trial Court again seeking to enlarge time within which to comply with the ruling of 20/01/2016. The Court directed the Applicant to fix the application for hearing within 30 days. Pursuant to this, a hearing date of 25/10/2016 was fixed. On that day, neither the Applicant nor the Respondent was in Court prompting the Court to dismiss the Application dated 08/09/2016 for non-attendance.

6. Three months later, the Applicant approached the Trial Court again – in an application dated 21/12/2016 – seeking to reinstate its application dated 08/09/2016 (the one that was dismissed for non-attendance).

7. The Applicant found Court's favour – again -- in a ruling dated 18/07/2017. The ruling reinstated the application dated 08/09/2016 on condition that the same is fixed for inter partes hearing within thirty days. Again, the Applicant failed to fix the application for hearing within the 30 days dictated by the Court.

8. The Respondent proceeded to fix the main suit for hearing on 29/11/2017. When it came up, the Applicant informed the Court that its application dated 08/09/2016 was still pending. With its directions of 18/07/2017 in mind, the Court proceeded to dismiss the application dated 08/09/2016. The main suit proceeded and the judgment was delivered on 22/12/2017.

9. The Applicant was, apparently, aggrieved by the ruling dated 29/11/2017. It has until 28/12/2017 to file its Memorandum of Appeal at the High Court. It was late to do so. Instead, through its lawyers, it has approached this Court through its present Application to be permitted to file a suit out of time. This Application was filed on 16/12/2018. Depending on who is counting that is either 18 days late or not late at all. I say so because after filing the present Application, it would appear that the Applicant's counsel discovered Order 50, Rule 4 of the Civil Procedure Rules which tolls the time between 21/12 of any year to 13/01 of the next year in terms of computing time for doing anything under the Act or Rules. If one takes that into account, then by the 16th January, 2018 when the present Application was filed, the Applicant was still within time to file an appeal.

10. Only it did not. Instead, it filed the present Application. This means that as things stand, there is no appeal in place; only this

Application is in place.

11. The first question the Respondent asks is whether any such appeal can stand even if timeously filed in the face of a substantive judgment. The Respondent argues that since the Court proceeded to give a substantive judgment disposing the entire suit on 22/12/2017, that is the decision the Applicant should be appealing against if at all it is aggrieved by the outcome of the suit.

12. I propose not to answer that question at this stage. I will, instead, leave it for the substantive appeal. This is especially because I do not believe I have received the benefit of fully developed arguments on the point.

13. I will, instead, apply the straightforward principles the High Court uses to determine if to grant an extension to a party to file an appeal out of time.

14. Section 79G of the Civil Procedure Act is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. The section provides as follows:

> *Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:*
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> *Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.*

15. Our case law has now provided guidelines on what will be considered "good cause" for purposes of permitting a party who is aggrieved by a lower court judgment or ruling to file an appeal out of time. The most important consideration is for the Court to advert its mind to the fact that the power to grant leave extending the period of filing an appeal out of the statutory period is discretionary and must be granted on a case by case basis. While not a right, it must be exercised judiciously and only after a party seeking the exercise of the discretion places before the Court sufficient material to persuade the Court that the discretion should be exercised on its behalf and in their favour.

16. Our case law has developed a number of factors which aid our Courts in exercising the discretion whether to extend time to file an appeal out of time. Some of these factors were suggested by the Court of Appeal in ***Mwangi v Kenya Airways Ltd [2003] KLR***. They include the following:

i. The period of delay;

ii. The reason for the delay;

iii. The arguability of the appeal;

iv. The degree of prejudice which could be suffered by the Respondent is the extension is granted;

v. The importance of compliance with time limits to the particular litigation or issue; and

vi. The effect if any on the administration of justice or public interest if any is involved.

17. Looking at all these factors I am not persuaded that the Court should not use its discretion in this instance to permit the Applicant to file its appeal out of time. The paramount factor in my view is the fact that there was very little delay if any in bringing the Application. It is important that, wherever possible, parties are given an opportunity to ventilate their cases on their merits. In this case, at the very worst, the Applicant was 18 days late in filing their Appeal; this during the festive season. It would be fair to conclude that the slight inconvenience caused to the Respondent is worth the price of allowing a party to ventilate its appeal.

18. I must next determine if the Applicants are entitled to a Stay of execution. This prayer is vehemently opposed by the Respondent.

19. The Application for stay of execution is governed, primarily, by the terms of Order 42 Rule 6 of the Civil Procedure Rules. The conditions to be met by an Applicant in order to be entitled to an order for stay are encapsuled in that Rule in the following terms:

> *6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.*
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> *(2) No order for stay of execution shall be made under sub-rule (1) unless—*
>
> > *(a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and*
> >
> > *(b) 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.

20. The law regarding the grant of stay of execution is well established in Kenya. Among the legion of authoritative cases establishing it, the judges of the Court of Appeal were both concise and emphatic in ***Rhoda Mukuma v John Abuoga***:

> *It was laid down in **M M Butt v The Rent Restriction Tribunal, Civil Application No Nai 6 of 1979**, (following **Wilson v Church (No 2) (1879) 12 Ch 454 at p 488**) that in the case of a party appealing, exercising his undoubted right of appeal, the court ought to see that the appeal is not rendered nugatory. It should therefore preserve the status quo until the appeal is heard.*
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> *Granting a stay in the High Court is governed by Order XLI rule 4(2), the questions to be decided being – (a) whether substantial loss may result unless the stay is granted and the application is made without delay; and (b) the applicant has given security*.

21. In ***Antonie Ndiaye v African Virtual University [2015] eKLR*** which has been cited by both parties, Gikonyo J. set out the guiding principles in the determining whether to grant a stay of execution or not in these terms:

> *The discretion must be exercised judicially, that is to say, judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. And in determining whether sufficient cause has been shown, the Court should be guided by the three pre-requisites provided under Order 42 Rule 6 of the Civil Procedure Rules.*

22. Hence our decisional law applying Order 42 Rule 6 of the Civil Procedure Rules has set out a four-part test which an Applicant for a stay of execution must satisfy in order to be successful. Such a party must demonstrate that:

a. The appeal he has filed is arguable;

b. He is likely to suffer substantial loss unless the order is made. Differently put, he must demonstrate that the appeal will be rendered nugatory if the stay is not granted;

c. The application was made without unreasonable delay; and

d. He has given or is willing to give such security as the court may order for the due performance of the decree which may ultimately be binding on him.

23. The Respondent argues three points in this regard:

a. First, that the Applicant does not have an arguable appeal;

b. Second, that the Applicant has not demonstrated that it will suffer substantial loss if stay is not granted; and

c. Third, that the Application was not brought timeously.

24. The Respondent claims that the Applicants have not demonstrated that they have an arguable appeal. Indeed, he positively argues that the chances of the appeal succeeding are dismal. I have perused the Memorandum of Appeal filed in this case. I am unable to say that the grounds of appeal enumerated are in-arguable. I should point out that to be entitled to a stay of execution, one is ***not*** required to persuade the Appellate court that the filed appeal has a high probability of success. All one is required to demonstrate is the arguability of the appeal: a demonstration that the Appellant has plausible and conceivably persuasive grounds of either facts or law to overturn or vary the original verdict. The Appellants here seek to persuade the Appellate Court that the Learned Magistrate erred in refusing to exercise his discretion to set aside the judgement. This is not eminently in-arguable.

25. I will easily dispose of the third objection – using the reasoning I deployed above to deal with the question of extension of time.

26. Next, I will dispose of the second objection. Has the Applicant demonstrated that it will suffer substantial loss if the stay is not granted? I am not persuaded that it has. Indeed, the Applicant has not – both in its Application and Submissions – attempted to demonstrate what substantial loss it will suffer if stay is not granted. The question is simply assumed. This is not good enough. A party is required to demonstrate what substantial loss it will suffer – enough to render the appeal nugatory or pyrrhic victory – if the stay is not granted. The Applicant has made no such showing. On this score alone, the Application fails.

27. There is another reason why the Application would fail: the Applicant has not given or pledged to give and shown willingness and ability to give such security as the court may order for the due performance of the decree which may ultimately be binding on it. This, on its own, disentitles it from the discretionary relief of stay.

28. In the end, therefore, the orders that the Court will give will be as follows:

a. **The Applicant is hereby allowed to appeal against the ruling dated 29/11/2017 out of time.**

b. **The Applicant shall file and serve a Memorandum of Appeal within seven days of the date hereof.**

c. **The Applicants shall file the Record of Appeal within sixty days from the date hereof.**

d. **The Applicant shall write to the Deputy Registrar requesting him to place the Appeal before the Judge for directions within fourteen days of the filing of the Record of Appeal.**

e. **The failure to abide by any of the conditions above will render the appeal automatically dismissed.**

f. **The prayer for stay of execution is disallowed.**

29. Orders accordingly.

Dated and delivered at Kiambu this 26th day of October, 2018.

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JOEL NGUGI

JUDGE