



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL APPEAL NO. 45 OF 2013

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

VERSUS

BRIGADIER (RTD) PETER NYANGWESO

(suing on behalf of Jalath Ramoya).....1ST RESPONDENT

ELSEBIUS BARASA RAMOYA.....2ND RESPONDENT

RULING

1. The Applicant, Kenya Power & Lighting Company Ltd has moved this Court through a Notice of Motion application dated 21st December, 2015 brought under sections 1A, 1B and 3A of the Civil Procedure Act, Cap 21, Order 42 Rule 6(1) and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and seek orders as follows:

“(1) THAT this application be certified as urgent and the same be heard ex-parte in the 1st instance in respect of prayer 2 below.

(2) THAT this Honourable Court be pleased to grant a stay of execution of the Decree in BUSIA CMCC NO. 70 OF 2013 pending the hearing and determination of this application.

(3) THAT this Honourable Court be pleased to grant stay of execution of the decree in BUSIA CMCC No. 70 OF 2013 pending the hearing and determination of the Appeal filed in the Court of Appeal at Kisumu.

(4) THAT a date for inter-partes hearing of this application be given.

(5) THAT the costs of this application be provided for.”

The application is supported by the grounds on its face and an affidavit sworn by the Legal Officer of APA Insurance Company Limited, Paul Kibiku Kariba on 21stDecember, 2015.

2. The respondents, Brigadier (Rtd) Peter Nyangweso Ramoya (suing on behalf of Jalath Ramoya) and Eusebius Barasa Ramoya opposed the application through grounds of opposition dated 2nd February, 2016.

3. At this point in time the only prayers in the application that requires the determination of this Court are number 3 and 5 as the rest were addressed at the ex-parte stage by F. Tuiyott, J on 29th December 2015.

4. In **Mukuma v Abuoga [1988]** KLR 645, the Court of Appeal at page 647 summarized the grounds governing grant of stay pending appeal as follows:

“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. The discretion under Rule 5(2) (b) is at large, but as was pointed out in the *Kenya Shell* case substantial loss is the cornerstone of both jurisdictions. That is what has to be prevented, because such loss would render the appeal nugatory. Therefore it is necessary to preserve the *status quo*.”

Those are the guiding principles in considering an application like the one before this Court.

5. The Applicant’s grounds in support of the application are

“(a) THAT the Appellant/Applicant has filed a Notice of Appeal in the Court of Appeal at Kisumu against the Judgment of the Trial Justice F. Tuiyott delivered on the 9th December 2015.

(b) THAT an Appeal to the Court of Appeal is deemed to have been filed once a Notice of Appeal has been filed.

(c) That with due respect and humility the Appeal has good chances of success.

(d) THAT the Respondents/Decree Holders herein are persons of straw as per their evidence in court and as such if the decretal amount is paid to them the Appeal will be rendered nugatory as it will be well nigh impossible to recover the decretal amount from the Respondents/Decree Holders if the Appeal succeeds.

(e) THAT the Appellant/Applicant is willing to furnish such security/meet such terms or undertaking as the Honorable Court may order for the due performance of the Decree including depositing the decretal sum in joint names of Counsels on record pending hearing and determination of the Appeal.”

The supporting affidavit reiterates those grounds.

6. On their part the respondents assert that the application is an afterthought and an abuse of the court process; that the application has no merit; that there are no valid grounds to warrant the issuance of the orders sought; and that the application is frivolous, vexatious, an abuse of the court process and ought to be dismissed with costs.

7. Mr. Ashioya for the respondents submitted that a party seeking an order of stay of execution should not simply flash a memorandum of appeal but must indeed satisfy the Court that the appeal is merited.

8. It was his position that the Applicant has not satisfied this Court that the appeal is merited.

9. Counsel for the respondents also took up an argument based on a point of law to the effect that the order that was initially appealed against was that of a lower court in which the Applicant was denied an opportunity to adduce additional evidence. According to the respondents, that is a matter that required the leave of the Court prior to appeal under Order 43 of the Civil Procedure Rules and Section 75 of the Civil Procedure Act.

10. The respondents asserted that the Applicant had not sought leave both before the lower Court and this Court and failure to seek leave makes the appeal incompetent. The respondents asserted that they did

not find any reason for preparing an affidavit on their means as there is no proper appeal before the Court of Appeal.

11. Finally, counsel for the respondents submitted that if the Court finds any merit in the application, then it should order the Applicant to pay half the decretal amount to the respondents.

12. In support of this proposition, reliance was placed on the decision of F. Tuiyott, J in a ruling delivered on 19th December, 2013 in Busia **H.C. Civil Suit No. 48 of 2005, Mohamed Turkey Abdi v East African Sea Foods.**

13. The starting point is to consider the question whether leave was required before the appeal was first filed before this Court and subsequently in the Court of Appeal. Order 43(1) of the Civil Procedure Rules, 2010 provides the orders and rules under which an appeal shall lie as of right. Order 43 Rule 2 then proceeds to provide that an appeal shall lie with the leave of the Court from any other order made under the Civil Procedure Rules. Section 75(1) of the Civil Procedure Act, Cap 21 likewise provides the orders from which an appeal shall lie as of right and proceeds to state that an appeal **“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.”**

14. Mr. Ashioya for the respondents is thus right that in certain circumstances the leave of the court which made an order being challenged or the court to which the appeal is to be preferred must be obtained before an appeal can be filed. He submits that in the case at hand leave ought to have been first obtained. In my view, this argument has been made before the wrong forum. That issue ought to have been taken up before F. Tuiyott, J who heard the appeal. It can also be taken up before the Court of Appeal where an appeal is pending. To try and interrogate that issue would amount to sitting as an appellate court over the decision of my brother F. Tuiyott, J or usurping the mandate of the Court of Appeal. I do not have jurisdiction to do either and I refuse to be drawn into making a finding on this particular issue. It is only sufficient to note that the Applicant herein has already filed an appeal.

15. That then leaves me with the question as to whether the Applicant has met the conditions for grant of orders of stay pending appeal.

16. The judgment which the Applicant seeks to stay was delivered on 9th December, 2015. This application was filed on 21st December, 2015. It was thus filed without undue delay and the Applicant has thus passed the first test set by Order 42 Rule 6(2) of the Civil Procedure Rules.

17. The Applicant has also indicated willingness to furnish such security as the Court may order. The second test for grant of stay has thus been met by the Applicant

18. The third and final test is whether the Applicant has satisfied the Court that substantial loss may occur to it unless an order of stay is made.

19. In paragraph 9 of the supporting affidavit of Paul Kibiku Kariba, the deponent has clearly come out to state that it may be impossible to recover any decretal amount paid to the respondents as they are **“not persons of means”**.

20. From there, the burden of proof shifted to the respondents to demonstrate that they are able to refund any money paid to them were the appeal to succeed. They have not done so. It thus follows that the Applicant has passed the third test namely that its appeal would be rendered nugatory unless stay is granted.

21. What are the appropriate orders to be made in this case? Mr. Ashioya for the respondents invited me to direct payment of half the decretal amount to his clients as was done by F. Tuiyott, J in **Mohamed Turkey Abdi** (supra). I am not persuaded by this supplication for the circumstances in that case are different from those in the case before me. In that case the respondent had adduced evidence that it had income from a transport business and any money paid to it could be refunded were the appeal to succeed.

In the case at hand, there is no iota of evidence to show that the respondents have any source of income. There is therefore no guarantee that the respondents are in a position to pay back the decretal amount if the appeal succeeds.

22. In view of what I have stated, I order stay of execution on condition that the Applicant deposits the entire decretal amount, assessed costs and interest in an interest earning account in a reputable bank in the names of the advocates on record for the parties within 30 days from today's date. Failure to comply will lead to the automatic termination of the stay granted herein.

23. Each party shall bear own costs of these proceedings.

Dated, signed and delivered at Busia this 21st day of June, 2016.

W. KORIR,

JUDGE OF THE HIGH COURT

21.6.2016

Before W. Korir J

C/Assistant – Orwasa

Mr. Ipapu h/b for Mr. Ashioya for Respondent – present

N/A for Applicant

Court: Ruling dated 21.6.2016 read and signed in open court.

W. KORIR

JUDGE OF THE HIGH COURT