



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**  
**CIVIL APPEAL CASE NO. 5 OF 2016**

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

**AND**

**BRENDA NYAWIRA MWANGI (suing as the legal representative of the estate of  
GEOFFREY MUTHUI MUTHIKE (deceased) .....RESPONDENT**

**RULING**

1. This ruling is in respect to a Notice of Motion dated 10<sup>th</sup> February, 2016 brought by **Kenya Power and Lighting Company Limited** (the applicant herein) against **Brenda Nyawira Mwangi** (the respondent and legal representative of the estate of Geoffrey Muthui Muthike). The application is brought under **Article 159 (2)** of the **Constitution, Section 1A, 1B, and 3A** of **Civil Procedure Rules**. The applicant is seeking the following orders:
  - i. *That the application be certified urgent and heard exparte in the first instance.*
  - ii. *That this Hon. court be pleased to stay execution of an exparte judgment and all consequential orders emanating from Kerugoya S.P.M.C.C. No. 12 of 2013 pending the hearing and determination of this application.*
  - iii. *That this court be pleased to issue the orders in (ii) above pending the hearing and determination of the appeal filed herein.*
  - iv. *That costs of this application be provided for.*
2. The grounds upon which this application is brought are as follows:-
  - a. *That an exparte judgment was entered in the lower court on 17<sup>th</sup> April, 2015 in default of appearance and defence.*
  - b. *That the appellant vide an application dated 23<sup>rd</sup> November, 2015 in the subordinate court sought in vain to have the exparte judgment set aside and hence the appeal filed herein.*
  - c. *That the applicant stands to suffer substantial loss if the decretal amount of Kshs.1,637,375/= deposited in court is ordered to be released to the respondent herein in execution of the decree.*
  - d. *That the appeal filed herein has high chances of success as the applicant disputes service.*
  - e. *That the applicant has a good defence.*
  - f. *That the subordinate court's ruling issued on 5<sup>th</sup> February, 2016 was based on a technicality rather than substantial justice.*
3. Prayer (i) and (ii) of the application are already spent so this ruling relates only to prayer 3 and 4 of the said application.
4. The applicant has relied on an affidavit sworn by one Emily Kirui on 10<sup>th</sup> February, 2016 wherein

- the deponent has disputed service of summons and plaint in the subordinate court alleging that they only came to learn about the case upon being served with proclamation and warrants of attachment. The applicant disputed service done by the respondent stating service upon a corporation can only be effected upon the secretary, director or other principal officer.
5. The applicant has also deposed that its application dated 23<sup>rd</sup> November, 2015 was inadvertently sworn by the Advocate on record instead of an officer from the corporation which anomaly in their view could have been rectified had they got a chance and faulted the subordinate court for sacrificing substantial justice at the altar of a technicality contrary to the overriding objectives of the law.
  6. The applicant has submitted that it would suffer substantial loss in view of the amount awarded by the subordinate court which it submitted is Kshs.1,637,375/=. The applicant has submitted that the amount is huge and may not be easily recovered if the applicant succeeds on appeal. The applicant has faulted the respondent's claim in the lower court contending that there was no compliance with statutory requirements under **Insurance (motor vehicles Third Party Risks) Act Cap. 405 Laws of Kenya**. It is further contended that this application has been presented without delay and thus it is compliant with the rules of procedure (Order 42 Rule 6 Civil Procedure Rules).
  7. The applicant has relied on the authority in the case of **Elizabeth Kimotho -VS- John Njeru & 4 others [2013] eKLR** where the court laid out principles for granting a stay pending appeal.
  8. The respondent has opposed this application on the basis that the same in her view is frivolous and an abuse of court process aimed at only delaying the ends of justice. The respondent maintains that the applicant was duly served with the summons to enter appearance and the plaint which in her contention were duly received at the applicant's offices at Nyeri town. The respondent has further contended that the application to set aside exparte judgment dated 23<sup>rd</sup> November, 2015 at the lower court was not dismissed simply on account of affidavit being sworn by an incompetent person but the fact that the respondent had no draft defence to show that it had a good defence. The respondent has submitted that the application dated 23<sup>rd</sup> November, 2015 was dismissed on merit by the lower court.
  9. The respondent has further accused the applicant for coming to court with unclean hands stating that the contents of the affidavit in support of the application particularly paragraph 13, 14, and 15 are unfounded and should not form a basis to allow this application. The respondent has denied that she stands to suffer no prejudice if the application is allowed contending that she lost a bread winner and has a young family and as such she has suffered prejudice in the delay caused by this application.
  10. The respondent has further faulted the applicant by trying to draw sympathy by portraying the lower court's decision and its conduct in bad light without any justification or basis.
  11. I have considered this application and the submissions made by C. B. Mwangela & Company Advocates learned counsels for the applicants. I have also considered the response filed by the respondent and the submissions made on her behalf by Igati Mwai, her learned counsel. The application has raised a number of issues some of which touch on the merits of the appeal itself. In my considered view the issue of service of summons and plaint and the merits of the application dated 23<sup>rd</sup> November, 2015 are issues to be canvassed at the hearing of the appeal. To dwell on them now in my view is not only premature but will have undesired effect of determining the merits of the appeal before hearing the parties substantively. I will therefore at this stage only determine whether or not the applicant has made out a sufficient cause for this court to exercise its discretion under **Order 42 rule 6** to grant a stay of execution.
  12. This Court finds that the contention by the applicant that the power to grant a stay of execution is discretionary is correct and for a court to exercise that discretionary in favour of an applicant, he/she must satisfy the conditions set under **Order 42 rule 6 (2)** of the **Civil Procedure Rules**. More importantly the applicant must demonstrate that unless a stay pending appeal is granted he/she will suffer substantial loss. The applicant must also furnish security for satisfaction of such decree as may ultimately issue against him/her. The conditions that need to be satisfied under the above cited rules are:
    - i. That a substantial loss may result to the applicant unless an order of stay is granted.
    - ii. That the application for stay has been made without unreasonable delay and

iii. Such security as the court may order for the due performance of the decree or order as may ultimately be binding on the applicant has been given.

13. Applying the above principles in this present application, I find that the decretal amount in the subordinate court is substantial. An amount of Kshs.1,637,375/= is not a small amount and given that the respondent has deposed that she is not working at the moment, recovering such an amount may be an uphill task. The contention by the applicant that it is likely to suffer a substantial loss is therefore well grounded.

14. I also find that this application was presented to court without any delay. The ruling in the lower court was delivered on 5<sup>th</sup> February, 2016 and this application was filed on 12<sup>th</sup> February, 2016 which was less than a week after the ruling in the lower court. There was no delay in that event.

15. On the question of security, this Court is satisfied that with the deposit of the decretal amount in this Court, the applicant has made a strong case for this Court to exercise its discretion in its favour because it has satisfied all the conditions listed above. The response by the respondent in my view though strong are only relevant in determination of the appeal itself but not at this stage.

In the premises, this Court finds that the Notice of Motion dated 10<sup>th</sup> February, 2016 is merited. It is allowed on the following terms:

- i. There shall be a stay of execution pending the hearing and determination of the appeal herein.
- ii. The amount deposited in court (Kshs.1,637,375/-), shall act as security awaiting the determination of the appeal herein.
- iii. The applicant/appellant is directed to expedite the disposal of the appeal by taking the necessary action to have the appeal placed before this Court for further action as soon as possible.
- iv. Costs of this application shall be in the appeal.

***Dated and delivered at Kerugoya this 16<sup>th</sup> day of June, 2016.***

**R. K. LIMO**

**JUDGE**

16.6.2016

Before Hon. Justice R. Limo J.,

Court Assistant Willy Mwangi

Igati Mwai for Respondent

Gori for applicant.

**COURT:** Ruling delivered in the presence of Gori Advocate for the applicant and Igati Mwai for Respondent.

**R. K. LIMO**

**JUDGE**

16.6.2016