



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 50 OF 2016

KENYA POWER & LIGHTING COMPANY LTDAPPELLANT

VERSUS

SOPHIE NGELE MALEMBA & WILHELM

MAGHANGA GABRIEL (*Representatives of the estate of*

GABRIEL MGHALU MALEMBA).....RESPONDENTS

(Being an appeal from the Judgment of the Principal Magistrate's Court at Mavoko by Hon. L.A. Mumassabba (RM) in Civil Case No. 292 of 2013 dated 12th May, 2016)

RULING OF THE COURT

Introduction

1. The Notice of Motion application before the court is dated **6th October, 2016** and is filed by the appellant under **Order 42 rule 8 and Order 51 rule 1** of the **Civil Procedure Rules**. The application prays for the following orders;

- a. That this matter be certified as urgent and heard *ex parte* in the first instance.
- b. That there be a temporary stay of execution of the judgment issued against the appellant in Mavoko PMCC No. 292 of 2013 pending *inter partes* hearing of this application.
- c. That the court may be pleased to order stay of the judgment issued against the appellant in Mavoko PMCC.NO. 292 of 2013 pending the hearing and determination of this appeal.
- d. That in the alternative to prayer 3 above, the court be pleased to vary or alter the stay conditions issued by the lower court on 15th September, 2016 and grant stay of execution on condition that the entire judgment sum is secured by depositing the same in a bank account to be opened in the joint names of the two firms on record for the appellant and the respondents or securing the same in any other manner as may be ordered by court pending the hearing and determination of this appeal.

e. That the costs of this application be in the cause.

2. The application is premised on the grounds set out therein and is supported by affidavit of **Peter Ohanya** sworn on **6th October, 2016**. The deponent to the affidavit is an officer with the appellant's company and depones that he is competent to swear the said affidavit. It is also supported by a further affidavit sworn by **Benjamin Mutuku Mbithi** on **4th November, 2016**.

The application

3. The applicant's case is that the appellant herein was the defendant in Mavoko PMCC No. 292 of 2013 filed by the respondents. The above stated suit proceeded for hearing before the lower court and judgment was delivered on the 12th May, 2016 by Hon. L.A. Mumassabba (Mrs) Resident Magistrate. This appeal arises from said judgment which was in the respondents favour as follows:

Liability 100%

Damages

i. General damages for loss of dependency	Kshs. 1,831,110.80
ii. Damages for pain and suffering	Kshs. 50,000.00
iii. Loss of expectation of life	Kshs. 100,000.00
iv. Special damages	Kshs. 1,075.00

Total **Kshs. 1,982,185.80**

Plus costs and interest.

4. The appellant submitted that the judgment amount is quite substantial. The appellant was dissatisfied with the said judgment on both liability and damages award and filed this appeal against the whole of the said decision. The appellant's case is that the respondents are persons of unknown financial means and income. The respondents filed the suit in Mavoko PMCC No. 292 of 2013 as administratrix and administrator respectively of the estate of **Gabriel Mghalu Malemba** (*the deceased*) who died in the subject incident. Once the decretal sum is paid, the respondent will be under an obligation as the administratrix and administrator to distribute the same to the deceased's dependants and beneficiaries of his estate some of whom are not parties to this appeal. The appellant's case is that should the appeal succeed after payment of the decretal sum, the appellant will not be able to recover the same or any portion thereof from the deceased's dependant's and beneficiaries. In any event the respondent's financial status is unknown. There is no guarantee that they would be in a position to refund the decretal sum. The appellant therefore seeks stay of execution pending hearing and determination of this appeal. The respondent's advocates have written to the appellant's advocates threatening to commence the execution process. The appellant, through its insurer, is willing and able to furnish security by depositing the entire judgment sum in an interest earning account to be opened in the joint names of the two firms of advocates representing the appellant and the respondent herein or securing the same in any other manner prescribed by court.

5. The appellant sought stay of execution at the lower court vide Notice of Motion application dated 1st July, 2016. The application was argued before the lower court which rendered ruling on 15th September, 2016 granting stay of execution on condition that the appellant releases Kshs. 900,000/= of the judgment sum forthwith to the respondents and deposits the balance in joint interest earning account to be opened in joint names of the two law firms on record for the appellant and respondents. However, the appellant is

dissatisfied with the lower court's condition that it releases Kshs. 900,000= of the judgment sum forthwith to the respondent. It has therefore lodged this second application for his court's consideration. The appellant submitted that the appeal challenges both the liability finding and damages award.

The response

6. The application is opposed by the respondent vide a replying affidavit sworn by **Wilhelm Maghanga Gabriel** on **31st October, 2016** on his own behalf and on the behalf of other respondents. The respondent's case is that the application has no merits and should be dismissed. The respondents' further depone that a conditional stay was already issued by the trial court which ordered the appellant to release a sum of Kshs. 900,000= to the respondents. However, the appellant has failed to do that and so the respondents have commenced execution proceedings. The respondents' case is that the appellant has come to court with unclean hands and are in contempt for failure to comply with the trial court's conditional stay order, and so this court should not hear the appellant.

Disposition

7. Parties did not make any submissions, and relied on their own pleadings in support of their various positions.

8. I have carefully considered the application and opposition to it. The starting point for this court, and the only issue for determination, is whether there are orders which were issued by the trial court in granting stay, and whether those orders have been complied with. Both parties agree that the trial court on 15th September, 2016 granted a conditional stay order upon the appellant forthwith releasing Shs. 900,000= to the respondents. It is also agreed that the appellant has not complied with the said condition, causing the respondents to commence execution proceedings for the said Shs. 900,000=. The appellant now prays that this court stops the said execution.

9. The issue for this court is in regard to obedience of court orders. That order was issued on 15th September, 2016. That order still subsists and has not been complied with. The appellant is a financially able party. This court cannot understand how it can fail to release the said Shs. 900,000= even if it intends to appeal the order. The law requires obedience first, and application for variation or setting aside of the same may follow. It is the finding of this court that the applicant has come to court with unclean hands, is in contempt of court, and does not deserve the mercy of this court. In fact, since the applicant did not comply with the condition to release Shs. 900,000= forthwith to the respondents, the entire judgment sum should now be due. However, for the sake of justice this court will not order for the payment of the entire decretal sum, as this may unduly prejudice the appellant's intended appeal.

10. The best this court can do is to order the appellant to comply with the conditional stay order granted by the trial court. That should be done within seven (7) days from the date hereof, failure whereof the respondents are at liberty to proceed with execution.

11. Save as stated above, the application herein is dismissed with costs to the respondents.

Orders accordingly.

DATED AND DELIVERED AT MACHAKOS THIS 30TH DAY OF NOVEMBER, 2016.

E. OGOLA

JUDGE

In the presence of:

M/S Wanjiru holding brief for Mbithi for appellant/applicant

Mr. Ogutu holding brief for Oonge for respondent

Court Assistant – Mr. Munyao