



NO.212

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**MISC.APPL. NO.20 OF 2015**

**KENYA POWER & LIGHTING CO. LIMITED.....APPELLANT/APPLICANT**

**VERSUS**

**DAVID OBARE OMWOYO**

**t/a OMWOYO AUCTIONEERS.....RESPONDENT/APPLICANT**

**RULING**

The applicant/intended appellant, Kenya Power & Lighting Company Limited has moved this court in a Notice of Motion (exparte) dated 12<sup>th</sup> March 2015 under **Order 42 Rule 6** and **Order 51 Rule 1** of the **Civil Procedure Rules 2010** for Orders that

- a) **This application be certified as urgent**
- b) **Service of this application be dispensed with in the first instance.**
- c) **The court be pleased to grant leave for the applicant to file appeal out of time with respect to the ruling and decision of the Chief Magistrate's court delivered in Kisii CMCC Misc. Application No.157 of 2009 in 15<sup>th</sup> April 2010.**
- d) **That pending the hearing and determination of this application there be stay of execution of the said ruling and order that is subject to leave herein to appeal out of time and further in the alternative status quo be maintained to safeguard the decretal dues.**
- e) **This Honourable Court be pleased to grant temporary stay of execution orders in terms of prayer (d) above pending the hearing and determination of this application inter partes and/or further orders of this court.**
- f) **Such other orders be made as just and expedient.**
- g) **Costs be in the cause.**

The above application is premised on the affidavit of H. P. Wekesa the advocate of the applicant and Emily Kirui a legal officer in the appellant's firm who averred that the applicant prepared a Memorandum of Appeal and the same was filed on 4<sup>th</sup> March 2010, similarly, the applicant also prepared a record of Appeal dated 17<sup>th</sup> May 2012 and filed the same on 8<sup>th</sup> May 2012. Consequently, the appeal was then

fixed ,for mention for directions on The 12<sup>th</sup> February 2013 when all documents were certified to be in order and directions on the disposal of the appeal were issued. Subsequently, the appeal was fixed and came up for highlighting of submissions on various dates from 13<sup>th</sup> November 2013 to 10<sup>th</sup> March 2014 when the same was highlighted and the respondents raised a preliminary objection as to the aptness of the record of appeal. Hence the appeal was subsequently struck out for having an improper record of appeal on 17<sup>th</sup> December 2014 as the order intended to be appealed was inadvertently found not to be on the record of appeal.

The applicant acknowledges that there was such a genuine inadvertent error in the incorporation of the Record of Appeal or subsequent to filing of the record of appeal, that are now oversight was unintended and the applicant has taken the necessary steps to correct this anomaly and he is now ready to have the appeal, lodged, heard and determined on merit. Furthermore; the applicant has contended that there are decisions of the High Court to the effect that even if a document is left out of the Record of Appeal, normally the entire court file and record of lower court is availed during hearing of the appeal and can be referred to hence non-inclusion is not necessarily fatal to the appeal. Thus he contended that the applicant is desirous of pursuing an appeal against the said decision.

In addition to this the applicant had contended that the High Court decision of 17<sup>th</sup> December 2014 was delivered, he did not come to know about the same until on 20<sup>th</sup> January 2015 when they received a letter from the respondent's advocates dated 12<sup>th</sup> January 2015. That upon receiving the said letter they expeditiously asked their clerk to obtain a copy of the High Court decision from the High Court in Kisii which they were able to record and peruse on 21<sup>st</sup> January 2015.

That on writing to their client immediately notifying them of the decision and seeking further instructions they have accordingly mounted an appeal noting that their earlier appeal was not disposed off on merit but merely struck out. He further contended that while there is indication of a counsel holding brief for them during the delivery of the decision of the High Court on 17<sup>th</sup> December 2014, they have not received any telephone call or letter from him to date and neither did they instruct any counsel to hold brief. Furthermore, he contends that they never recalled any notice that there was a ruling/judgment to be delivered.

The respondent in their part opposed the above application by filing grounds of opposition dated 15<sup>th</sup> March 2015 citing the following grounds:

1. The instant Notice of Motion application is pre-mature, misconceived, Incompetent and other misc. legally untenable.
2. The limb of the application herein seeking for leave to appeal out of time, has not only been mounted with unreasonable and inordinate delay, but same is also misconceived and mischievous.
3. The limb of the application touching and/or concerning stay of execution of (sic) the ruling sought to be appealed against, has been made in vacuum, in so far as no appeal has been filed and/or mounted to warrant the application for stay of execution.
4. In any event, the application for stay of execution does not satisfy and/or meet the minimum statutory others hold provided for pursuant to the provisions of Order 42 Rules 4 and 6 of the Civil Procedure Rules, 2010.
5. The applicant herein is non-suited.
6. The instant application amounts to and/or constitutes an abuse of the due process of court in so far as similar application had hitherto been made entertained and adjudicated upon.
7. At any rate, the instant application is res-judicata to the extent that an application for stay of

execution relating to the ruling rendered, on the 15<sup>th</sup> April 2010 had been entertained and disposed of. Consequently, the instant application is based by the provisions of **Section 7 of the Civil Procedure Act, Chapter 21 Laws of Kenya.**

8. Notwithstanding the foregoing, the instant application does not raise and/or capture any reasonable cause of action whatsoever.

9. In any event, the instant application is an attempt by and/or at the instance of the applicant to delay, obstruct and or otherwise defeat the due process of the Honourable court.

10. On the other hand the applicant herein has neither established nor laid out any sufficient cause and /or basis to warrant the orders sought, whatsoever and/or however consequently the instant application is an affront to the provisions of **section 79 (1) of the Civil Procedure Act , Chapter 21 Laws of Kenya.**

11. At any rate, the applicant herein is guilty of misrepresentation of material and relevant information, including but not limited to having retained and/or engaged an advocate to hold brief, during the scheduled delivery of the judgment on the 17<sup>th</sup> day of December 2014.

12. Besides, the instant-application constitutes and/or amounts to an abuse of the due process of court.

13. In the premises, the Notice of Motion application herein is devoid of merits, what so ever and/or howsoever.

When the matter came before me on 7<sup>th</sup> July 2015 counsel for the applicant Mr. Bett submitted by stating that they wished to rely on the affidavit of M. A. Wekesa and Emily Kirui. He also relied on **Patrick Kimunva Kithinji vs Victor Muoira Marete (2015) Eklr,** He urged this court to give leave to file afresh against the decision of the lower court in CMCC No.157 of 2009.

Mr. Ochwangi counsel for the respondent opposed the above application by relying on grounds of opposition. He further submitted that **Order 42 Rule 6(2) of the Civil Procedure Rules** is not useful for this application and the same is incompetent and legally untenable. He further submitted that the applicants Were seeking leave to file an appeal out of time for a decision that was made on 15<sup>th</sup> April 2010, the delay in 8 months is not explained and hence termed the above application by the applicant as misconceived. He further submitted that the applicants cannot be granted leave as the matter is *res judicata*. Furthermore, he submitted that a stay is tenable if there is an appeal or execution and there is neither an appeal nor execution to Warrant a stay and the applicant has not provided any security.

Lastly, be contended that there was actually a representative on the applicant's behalf in court on the day of ruling i.e. 17<sup>th</sup> December 2014 and what the applicant is trying to do is to misrepresent facts and mislead the court hence he submitted that the application has not established any sufficient cause to be granted as the orders sought pursuant to **Section 79 g of Civil Procedure Act** thus he urged this court to dismiss the application with costs to the respondents.

Mr. Bett counsel for the respondent in reply submitted by denying that they had sent someone to hold their brief on the day of ruling and submitted that a decretal sum of Ksh.816 860.40 on 11<sup>th</sup> January 2012 and based on the ruling delivered on 19<sup>th</sup> June 2015 this money is still deposited.

### **Determination**

After considering the applicant's affidavits, the respondent's grounds of opposition, and the submissions in court and the applicant's authority, it is an undisputed fact that the ruling dated 17<sup>th</sup> December 2014 Sitati J, struck out the applicants record of appeal on the basis that such record of appeal did not contain the decree/ruling which was being appealed against. According to the applicants, they did not send an

advocate on the date of the ruling to hold their brief since they were unaware that such court was to issue a ruling on the said date. They were only notified of the said ruling by the respondent's advocate on 20<sup>th</sup> January 2015 after which they hurriedly perused the court file and with further instructions from their client, they now wish to seek leave out of time and mount a fresh appeal. It is also to be noted that after striking out applicant's Appeal, on 12<sup>th</sup> February 2015 the respondents came to this court seeking the amount of Ksh,816,860/40 deposited in court on the 11<sup>th</sup> January 2012 to be released to their advocate for the M/S Oguttu Mboya & Company Advocates for onward transmission to the Respondent. I disallowed the said application by the respondent after much opposition by the applicants who insisted that they are more than willing to prosecute the said appeal since it was struck out and also the fact that Sitati- J's, ruling did not address the merits of the appeal.

The appellant in this application now seeks for leave to file out of time and for stay of execution orders. In the case of **Gachau & Another vs Pioneer Holdings (A) Ltd & Another (2008) KLR 310** although considering an application for extension of time to file and serve record of appeal under the court of appeal rules that court had the following to say;

**The powers of the Court of Appeal in an application for extension of time (under the court of Appeal Rules, Rule 4), were discretionary and unfettered. However in exercising its discretion, the court would consider the length of the delay, the explanation or reasons given for it, (and) whether the intended appeal was arguable.....'**

In the instant case, the applicant's present application was filed on 12<sup>th</sup> March 2015, the said ruling striking out the record of appeal was delivered on 17<sup>th</sup> December 2015 and according to the applicant's supporting affidavit he only got to know of the ruling on 20<sup>th</sup> January 2015. In my humble view therefore the applicant took 1 1/2 months before he applied to file his appeal to be filed out of time and that to me is not a lengthy delay as his explanation for the said delay is also convincing, The applicant has also attached to his application a record of appeal and upon perusal of the same in my view it is arguable.

The applicant has also made an application of stay of execution under **Order 42 rule 6 of the Civil procedure Rules**. Stay of execution pending appeal when it is sought from the High Court is governed by **Order 42 of the Civil Procedure Rules** which has set out the conditions the party applying must satisfy. These conditions are that :

- a) Substantial loss may result to the applicant unless the order is made
- b) The application has been made without unreasonable delay
- c) Such security as the court orders has been given by the applicant.

### **Substantial Loss?**

The cornerstone of the jurisdiction of the Court under **Order 42 of the Civil Procedure Rules** is that substantial loss would result to the applicant unless a stay of execution is granted. What constitutes substantial loss has been elaborated in the case of **Bungoma HCC Misc.Appl. No.42 of 2011 (2013) eKLR** that:

**'The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential cores of the applicant as the successful party in the appeal. This is what substantial loss would entail.'**

Similar sentiments were also echoed in **BGM HCCA No.107 of 2012 (2013) eKLR** that:

**'The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that**

**both parties have rights; the appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory, and the decree holder to the decree which includes full benefits under the decree. When the court is faced with a word task of balancing the two competing rights to an almost constitutional symmetrical bound I am persuaded to accept that substantial loss would occur to the applicant unless a stay of execution is ordered especially taking into account that to allow the realization of the amount by respondent will be contrary to upholding the applicant's right appeal.**

I am persuaded to accept that substantial loss would occur to the applicant unless a stay of execution is ordered especially taking into account that to allow the realization of the amount by the respondent will be contrary to upholding the appellants right of appeal.

### **Security**

The applicant's Ksh.816,860/40 was deposited in court on 11<sup>th</sup> day of January 2012 vide receipt number **010** and **925** In line with the consent order made on 11<sup>th</sup> day of January 2012 which js still held as security in this court since the respondent's application dated 12<sup>th</sup> February 2015 arguing the court to release the said amount was denied. Therefore, the issue of security does not suffice as the same has already been provided for.

I therefore make the following orders:

- 1. The applicant is hereby granted leave to file appeal out of time with respect to the ruling and decision of the Chief Magistrate's court delivered in Kisii CMCC Misc. Application No.157 of 2009 on 15<sup>th</sup> April 2010.**
- 2. Such leave will act as an automatic stay of execution of the decision of the Chief Magistrate's Court delivered in Kisii CMCC Misc. Civil Application No.157 of 2009 on 15<sup>th</sup> April, 2010.**
- 3. The applicant should set his appeal forthwith within 30 days in the High Court at Kisii failure to which such stay will lapse.**

Orders accordingly.

**Dated, signed and read in open Court at Nyamira this 27th November, 2015.**

**HON. C.B. NAGILLAH**

**JUDGE**

In the Presence of:

Kibichy (absent) for the Applicant

Onchwang'i for Respondent

Omayio —Court Clerk