

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND MISC. CIVIL APP. NO. 232 OF 2013

KENYA POWER & LIGHTING CO. LIMITEDAPPLICANT

VERSUS

KENNEDY OPIYO KASIMBARESPONDENT

RULING

1. What is before me is the applicant's application dated 3rd October 2013. Prayer 1 of the application is spent while prayers 2 and 3 were compromised by the parties on 19th November, 2013. The only prayer left for determination is that seeking stay of execution of the judgment entered in Oyugis SPMCCC No. 118 of 2012, Kennedy Opiyo Kasimba –vs- Kenya Power & Lighting Co. Limited ("**lower court case**") on 30th July 2013. The applicant's application which is supported by the affidavit of Isaac M. Wamasa, advocate was brought on the grounds that the applicant is dissatisfied with the said judgment of the lower court and has instructed its advocates on record to appeal against the same. The applicant has contended that the intended appeal has good chances of success in that the respondent had failed in the lower court to prove that he is the owner of the property that was in dispute namely; LR no. Central Kasipul/Kamuma/5186 ("**the suit property**").
2. The applicant has contended further that the applicant was ordered by the lower court to remove its power lines from the suit property which lines serve third parties who were not parties to the suit in the lower court. The applicant has contended that if the said power lines are removed the said third parties would suffer irreparable loss and damage without being heard. The application was opposed by the respondent through the affidavit of his advocate Benard Nyagaka Ogari sworn on 12th November 2013. In the said affidavit the respondent has contended that the applicant's application for stay has been brought after inordinate delay which delay has not been explained. The respondent has contended further that the applicant will not suffer substantial loss if orders sought are not granted because the third parties being served with the power lines in contention have their own parcels of land where the said lines can be shifted.
3. On 19th November 2013, the advocates for the parties agreed to argue the applicant's application by way of written submissions. The applicant filed its submissions on 3rd December 2013 while the respondent filed his submissions in reply on 3rd March 2014. I have considered the applicant's application, the affidavit filed by the respondent in opposition thereto and the respective submissions filed by the advocates for the parties. The applicant's application has been brought under order 42, rule 6 of the Civil Procedure Rules 2010. As was rightly submitted by the applicant, the court will not grant an order for stay of execution unless the application is brought without delay and it is demonstrated that the applicant for such order will suffer substantial loss unless the order is granted. Further, the applicant must be willing to provide security for the satisfaction of the decree sought to be stayed. See, **Carter and Sons Ltd. vs. Deposit Protection Fund Board and Another, Civil Appeal No.291 of 1997(unreported)**.
4. I am not satisfied on the material before me that the applicant has satisfied the conditions for granting stay of execution. The applicant has not demonstrated that it will suffer substantial loss unless the order of stay is granted. The possible loss which has been highlighted by the applicant is the loss likely to be suffered by third parties who were not parties to the lower court case. The applicant has not pointed out any loss that will be suffered by the applicant directly unless the judgment of the lower court delivered on 30th July 2013 is stayed. The applicant has also not provided any security for the due performance of the said judgment. I do not think that the

payment that the applicant claims to have made towards the settlement of the costs in the lower court case can be termed as security.

5. In the lower court case, the applicant was accused of trespass. The applicant was said to have entered the suit property owned by the respondent without the respondent's permission and erected electricity poles in the middle of the said property thereby hindering development of the same by the respondent. The lower court in the judgment sought to be stayed had ordered the applicant to remove the said poles from the suit property. If the stay sought herein is granted, the said electricity poles will remain in place meaning that the respondent would still be denied the use of the suit property where the said poles stand. In the event that the applicant's intended appeal fails and the applicant has to remove the said poles, the respondent would have suffered loss of use of the land where the said poles were erected. The applicant ought therefore to have proposed a suitable security to cover such loss. The applicant having failed to satisfy the conditions for granting stay of execution, its application dated 3rd October 2013 must fail. In conclusion therefore, I hereby decline to grant prayer 4 in the application dated 3rd October 2013. The respondent shall have the cost of this application.

Delivered, signed and dated at KISII this 31st day of July, 2014.

S. OKONG'O

JUDGE

In the presence of:-

N/A for the applicant

N/A for the respondent

Mr. Mobisa Court Clerk.

S. OKONG'O

JUDGE