REPUBLIC OF KENYA,

IN THE HIGH COURT OF KENYA AT KERUGOYA

HIGH COURT CIVIL APPEAL NO. 326 OF 2013

KENYA POWER & LIGHTING Co. LTD.....…...….....……..APPLICANT

VERSUS

ESTHER WANJIRU WOKABI.....RESPONDENT

RULING

1. What falls for my determination is the application by way of Notice of Motion dated 25th day of September 2013 in which ***Kenya Power and Lighting Company Limited*** (the applicant) mainly seeks an order of stay of proceedings in ***KERUGOYA S.P.M.C.C No. 237 of 2012*** pending the hearing and determination of an appeal filed against the ruling deliveredby the Senior Principal Magistrate Honourable T. Ngugi on 12th day of September, 2013.

The applicant also prays that the order of this court (presumably the order issued after determinationof this matter) be served on the Honourable Magistrate through the Executive Officer of Kerugoya Law Courts and that it be awarded costs of the application.

The application was filed under ***Order 51 rule 1*** and ***Order 42 rule 6*** of the ***Civil Procedure Rules***. It is premised on the grounds stated on the body of the motion and is supported by two affidavits sworn by its Legal Officer Emily Kirui on 25th September, 2013 and 22nd October, 2013 respectively.

2. The facts leading to this application are straight forward and are undisputed. The respondent ***Esther Wanjiru Wokabi***sued the applicantin civil case No 237 of 2012 in the Resident Magistrate's Court at Kerogoya seekingamong other reliefs general damages for trespass.

3. After the suit was filed, summons were issued and served on the defendant (the applicant) through a Mr Nyingi who was working in its Kerogoya branch office. The applicant did not however enter appearance or file a defence and consequently, interlocutory judgement was entered in favour of the plaintiff (the respondent) . Formal proof proceeded thereafter in the absence of the applicant at the end of which final judgment was entered against the applicant. When the applicant was subsequently notified of entry of final judgment against it, it moved the lower court in an application filed under certificate of urgency dated 2ndJuly 2013 seeking to set aside the said judgment and leave to defend the suit.

4. In a ruling delivered on 12th September 2013, the learned magistrate allowed the application on condition that the applicant deposited in court as security the decretal amount awarded to the respondent in the sum of kshs 100,000 and paid the respondent throw away costs assessed at kshs 40,000 within 14 days of the ruling.

5. Aggrieved by that decision, the applicantfiled a memorandum of appeal on 23rd September 2013 challenging the learned magistrate's finding that service of summons on its branch officer was proper service in law and her decision to award the respondent throw away costs of ksh 40,000.

In the appeal, the applicant prayed inter alia that the ruling and order of the Honourable Magistrate dated 12th September 2013 be set aside but limited only to the finding that service of summons upon the applicant was proper and that the respondent was entitled to an award of costs of kshs 40,000 or at all.

6.The application was canvassed by way of written submissions which were highlighted before me by Learned counsel for the respective parties. Ms. Ameyo argued the case for the applicant while Mr. Rurige held brief for Mr Gikandi for the respondent.

The applicant's case as can be discerned from the depositions in the affidavits sworn in support of the application and the submissions filed on its behalf is that it has an arguable appeal which has high chances of success as in its view , the learned magistrate erred in law and fact in finding that the service of summons on the applicant company was proper. That ***Order 5 Rule 3 of the Civil procedure Rules, 2010***(the ***Rules***) sets out the procedure of service for summons and court process on a corporation, which in the instant case was not followed by the respondent.

7.It was the applicant's contention that the summons to enter appearance in the suit in question was served on a ***Mr. Nyingi***, its branch officer and not on its Corporation Secretary, Director or Principal Officer of the company as required by the law and that therefore such service was invalid. For this proposition, reliance was placed on the case of ***Co-operative Insurance Company Limited Vs Fairsure Insurance Brokers Limited (2008) eKLR.***

8.It was also the applicant's case that if the application was not allowed, the company would be condemned to pay costs of Kshs. 40,000 to the respondent, a person of unknown means; that this would render its appeal nugatory in the sense that if the appeal was successful, the respondent may be unable to refund to the company money paid to her as throw away costs.The applicant advanced the view that there was no basis for the award of such costs which were in any event excessive. M/s Ameyo urged the court to exercise its discretion in favour of the applicant and grant the prayers sought as the applicant had demonstrated that its appeal had high chances of success and the application had been filed without delay.

9.The Respondent opposed the application through her Replying Affidavit sworn on 10th October, 2013. She disputed the applicant's claim that its appeal had high chances of success and contended that in determining the application to set aside judgment entered against the applicant, the lower court exercised its discretionary jurisdiction and it had not been alleged in the grounds of appeal that the learned magistrateexercised her discretion capriciously, whimsically or unreasonably; that in the circumstances, the applicant did not have an arguable appeal with any chance of success.

10. The respondent further asserted that service of summons on Mr Nyingi on behalf of the applicantconstituted proper service as it was not disputed that at the time the summons were served, Mr Nyingi was the officer in charge of the applicant's Kerogoya office and no evidence had been availed to the court to show that in accepting service and embossing the applicant's official stamp on the summons, the officer acted beyond his powers; that in any event,the applicant had not listed in any public document the officers who are the principal or appropriate officers to receive court process on its behalf.

11. In response to the submissions by the applicant, learned counsel Mr. Rurige submitted that the application lacked merit and ought to be dismissed. It was Mr. Rurige's argument that for the instant interlocutory application to succeed, the applicant must satisfy the requirements of ***Order 42 rule 6*** of the ***Rules***the main one being proof that if the application was not allowed, the applicant would suffer substantial loss or damage which the applicant had failed to do in this case; that the appeal only seeks to set aside the learned magistrate's discretionary order awarding the respondent throw away costs of ksh 40,000 and the applicant has not demonstrated that this is money which cannot be recovered from the respondent in the event that the appeal was successful.

12. Counsel further submitted that the application was only meant to delay the trial process in the suit filed in the lower court and that if the application was allowed, the respondent would suffer prejudice as she would be prevented from enjoying her land as long as the suit remained pending. For the foregoing reasons and relying on the persuasive authority of ***Alfred Wekesa Kizito V Nick Wafula Walela (2007) eKLR,***the respondent urged the court to dismiss the application with costs.

13. I have read and considered the application, the affidavits on record, the written and oral submissions made by Counsel for both parties as well as the authorities cited.

I note that this application is premised on ***Order 42 rule 6*** of the ***Rules*** which specifies the circumstances under which either the trial court or an appellate court may order stay of execution of a decree or order pending an appeal.

Rule 6(2)lays down the conditions which an applicant must satisfy in order to deserve orders of stay of execution pending appeal. I must hasten to add here that the conditions set out in ***Rule 6(2)*** onlyserve as guidelines which the court can use as beacons in exercising its unfettered discretion in deciding whether or not to grant stay of execution pending appeal depending on the circumstances of each case. Theapplicant must satisfy the court that he/she stands to suffer substantial loss if stay is not granted and that the application had been filedwithout unreasonable delay. The applicant must also show that he was willing to offer such security as may be ordered by the court.

14. Having analysed the provisions of ***Order 42 rule 6*** of the ***Rules***, it is clear to me that the said provisions only apply to applications for stay of execution of a decree or order issued by acourt pending hearing of an appeal but the same donot apply to applications for stay of proceedings such as the application nowbefore me. It is apparent from the face of the application and from the submissions made by the parties that counsel for both parties were operating on the mistaken belief that the conditions prescribed in ***Order 42 rule 6(2)*** were alsoapplicable to applications for stay of proceedings which is not the case.

15. Having made that finding, it is obvious that ***Order 42 rule 6(2)*** cannot come to the aid of the applicant. The court must be guided by other considerations in making its decision whether or not to grant stay of proceedings as sought herein but then, what are those considerations?

In answering this question, I wish to borrow from the wisdom of **Ringera J (**as he then was **)** when he stated the following when confronted by a similar application in the case of ***Global Tours &Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000***

"As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice .... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously" (emphasis added)

To my mind, the courts discretion in deciding whether or not to grant stay of proceedings as sought in this application must be guided by any of the following three main principles;

a) Whether the applicant has established that he/she has a prima facie arguable case.

b) Whether the application was filed expeditiously and

c) Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.

16. Looking at the instant application from the above perspective,I wish to state from the outset that it is not contested that the application was filed expeditiously given that the Memorandum of Appeal was lodged on the 25th September 2013 and the application was filed on the following day, that is, on the26th September 2013.

What is in contention however is whether the applicant has an arguable appeal and whether it would be in the interest of justice to order stay of proceedings of the suit in the lower court pending the hearing of the appeal filed by the applicant.

17. At the hearing of the application, Ms. Ameyo submitted that the applicant has an arguable appeal in that the service of summons upon the applicant company was not done in accordance with ***Order 5 Rule 3*** *of the* ***Rules*** which sets out the procedure of service on a corporation. Both parties werein agreement that the summons to enter appearance in the suit was served on aMr. Nyingi, the regional manager of the applicant's Kerugoya branch.

Having considered the parties rival submissions on this point, and though at this interlocutory stage it is not possible for the court to make any finding on the merits of the appeal, I am prepared to find on the basis of the material placed before me that the appeal cannot be said to be a frivolous one. It is important to point out that an arguable appeal is not one that will necessarily succeed but one which raises triable issues.

I think that the applicant has demonstrated that it has an arguable appeal regarding whether the manner in which the summons and other pleadings were served on it constituted proper service as envisaged in ***Order 5 Rule 3 of the Rules***andwhether in finding that service was properly effected on the applicant , the learned magistrate made an error of law which apparently formed the basis of awarding the respondent throw away costsalso challenged in the appeal.

18. But having said that, I think that the most important consideration that this court should bear in mind in determining this application is whether the applicant has established sufficient cause to convince the court that it would be in the interest of justice to allow the application. Put another way, has the applicant demonstrated that if the court were to decline granting orders of stay as sought it will suffer prejudice which will expose it to injustice?

19. To address this question, I need to revisit the prayers sought by the applicant inits appeal. As stated earlier, all the applicantseeks in theappeal are orders setting aside the learned magistrate's finding that service upon it was properly effected and setting aside of the order for payment of costs in the sum of ksh 40,000 to the respondent.

Bearing this in mind, I find that it goes without saying that whether the appeal eventually succeeds or fails, its outcome will not affect the hearing of the respondents suit on the merits considering that the decision to give the applicant leave to defend the suit was not challenged except the condition requiring payment of throw away costs. What purpose then willbe served by staying proceedings in a case where the issues raised on appeal have no bearing on the merits of the respondent's case and where the hearing of the appeal or the result thereof will not affect the merits of the suit one way or the other?

20. On the material placed before me, I find that staying of the proceedings in the lower court is not necessary in this case since the applicant has already been granted leave to defend the suit and the intended appeal does not touch on the merits of the suit. Given the prayers sought in the intended appeal I do not see how the hearing of the suit would render the intended appeal nugatory.It is my considered view that allowing this application would only cause unnecessary delay in the hearing of the respondent's suit and may have the effect of needlessly increasing costs for the parties which will be against the interests of justice. Taking into account the nature of the dispute between the parties and the fact that the suit sought to be stayed was filed in August 2012 nearly two years ago, I find that allowing the application in the circumstances of this case would not only be against the interests of justice but will also frustrate the court's overriding objective of facilitatingaffordable and expeditious resolution of civil disputes.

21. Turning now to the argument that if the application is not allowed the appeal will be rendered nugatory as the applicant will be forced to pay the throw away costs ordered by the court in order to defend the suit,my take is that even if this was true, payment of the costs will not render the appeal nugatory and is not likely to occasion the applicant any prejudice since as correctly submitted by the respondent, it has not been proved thatthe kshs 40,000 assesed as costs payable to the respondent is such a colossal sum of money that its payment would adversely affect the applicant's operations given its size or that it is an amount which is not recoverable from the respondent. It has not also been demonstratedthat the respondent is a person of straw who has no means whatsoever of compensating or refunding thesaid money to the applicant should the appeal be determined in its favour.

22. Though the respondent did not demonstrate in her replying affidavit her financial capability, she averred in her pleadings that she worked for gain in Mombasa and that she was the sole proprietor of the parcel of land the subject matter of the suit. These averments have so far not been challenged by the applicant. It is therefore my opinion that if I decline to allow the application and the applicant pays the throw away costs of kshs 40,000, the applicant will in all probability be able to recover the money fromthe respondent if it succeeds in its appeal.

23. In view of the foregoing reasons, I am satisfied that theapplication dated 25th September 2013 is devoid of merit and it is consequently dismissed with costs to the respondent.

C.W. GITHUA

JUDGE

DATED,SIGNED AND DELIVERED AT KERUGOYA THIS 15THDAY OF AUGUST 2014 in the presence of:

M/S Ameyo for the applicant

M/S Kiragu holding brief for Mr Gikandi for the Respondent

Willy Mwangi Court Clerk