



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 14 of 2004

KENYA POWER & LIGHTING CO. LTD ... PLAINTIFF/RESPONDENT

VERSUS

General

JULIUS OLE SUNKULI - Acting Secretary

MOHAMED YUSUF HAJI - National Treasurer

General (all of)

BONAYA GODANA - Deputy Secretary

KENYA AFRICAN NATIONAL UNION ... DEFENDANT/APPLICANT

R U L I N G

1. Before Court is an application brought by the Defendant seeking for orders for the stay of execution of the judgment of Mutava, J delivered on 8th November, 2012. The application dated 23rd November, 2012 is brought under the aegis of **Order 42 Rules 6(1) and (2)** of the *Civil Procedure Rules*, **Sections 1A, 1B and 3A** of the *Civil Procedure Act*. The application is premised on the grounds that an intended appeal by the Defendant would be rendered nugatory should the said orders sought not be issued and that the Respondent threatens to levy execution against the Applicant.

2. The application is supported by the Affidavit of **Nick Salat** sworn on the same date as the application. The deponent avers that the Respondent intends to execute the Decree by disposing of land Parcel No. **Nakuru Municipality Block 93/1**, property belonging to the Applicant. The deponent alleges that the Applicant stands to suffer irreparable and substantial loss should the intended execution proceed. Further, it is averred that the Applicant is willing to furnish such security as may be imposed by the Court, if it allows the application.

3. The application is opposed through the Replying Affidavit of **Ngure Muturi** sworn on 5th February, 2013. The deponent averred that the disposal of the suit property would only realize a small proportion of the decretal sum, which in any event, the Applicant is unable to pay and if the intended appeal is successful, it would not be rendered nugatory.

4. The Applicant relied on **Order 42 Rules 1 and 2** of the *Civil Procedure Rules*. The Order provides for the procedural law in making applications for appeals against any order or judgment that a party may feel aggrieved by. It provides the fundamental procedural framework for an application for stay, such as

the one before Court. **Rule 6 (2) (a)** reads-

“(2) No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that *substantial loss* may result to the applicant unless the order is made and that the application has been made without unreasonable delay;

In determining what amounts to substantial loss, Musinga, J (as he then was) in **Daniel Chebutul Rotich & 2 Others v Emirates Airlines Civil Case No. 368 of 2001** held that;

“... substantial loss” is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum.”

5. The applicant has not established how it stands to suffer substantial or prejudicial loss should the orders sought not be granted. In following the ruling in **Daniel Chebutul Rotich v Emirates Airlines** (supra), substantial loss is one of the grounds that needs to be established in order for the court to make appropriate orders. During depositions at the hearing of the application, Mr. Morintet, on behalf of the Applicant, stated that the amount claimed by the Respondent is a substantial amount, which if levied against the said property, would bring the Defendant to its knees. He further submitted that the value of the suit property was substantial and the intended sale would severely affect the applicant. He did not however, furnish any evidence as to how the applicant would be ‘*severely affected*’. This does not establish ‘substantial loss’ within the purview of the aforementioned case nor as provided for under **Order 42 Rule 6 (2) (a)**.

6. However, after careful consideration of the application, the oral submissions of counsel for the Applicant and the response thereto, this Court would make a determination for stay orders in pursuance of **Order 42 Rule 6 (2) (b)** and **Section 1A** for the expeditious, fair and just determination of matters. **Rule 6 (2) (b)** reads:

“(b) such *security* as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

7. Mabeya, J in **Kenya Tanzania Uganda Leasing Co. Ltd v Mukenya Ndunda [2013] eKLR** on the issue of an applicant furnishing security in such an application held as follows;

“As I stated in the case of KENYA COMMERCIAL BANK LIMITED Vs SUN CITY PROPERTIES LIMITED & 5 OTHERS [2012] eKLR “*in an application for stay, there are always two competing interests that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should always be balanced. ... In a bid to balance the two competing interests, the Courts usually make an Order for suitable security for the due performance of the Decree as the parties wait for the outcome of the Appeal. I do not see, why the same should not be applicable in this case.*”

The issues elucidated in the aforementioned case are similar to those in the present case before Court. Both the applicant and the respondent are not opposed to the deposit of adequate security, and which indeed the applicant has expressed itself that it would be ready and willing to adhere to and comply with this Court’s conditions as to security. Mr. Fraser on behalf of the respondent, submitted that the security, should the Court allow the application, must be for the full decretal amount, preferably in the form of a bank or insurance bond.

8. I am prepared to grant the orders sought i.e. c) and d) of the Application. However, the applicant is to furnish security within 30 days of the date hereof, in either of the following forms, failure to which this Application stands dismissed:

- i. A bank or insurance bond for Kshs. 483,217,081/- or;**
- ii. The deposit of the decretal amount i.e. Kshs. 483,217,081/- in an interest earning account to be opened in the joint names of the Advocates for the Applicant and the Advocates for the Respondents with a reputable bank to be agreed upon by the respective firms.**

There will be liberty to apply.

DATED and delivered at Nairobi this 23rd day of May, 2013.

**J. B. HAVELOCK
JUDGE**