



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 111 OF 2012

KENYA POWER & LIGHTING CO. LTD APPELLANT

V E R S U S

KHAN NASSIR RUSTAM RESPONDENT

RULING

1. The Appellant/Applicant seeks by Notice of Motion dated 6th February 2013, stay of execution of the judgment of 20th April 2011, made in **MSA CMCC 2490 of 2003** pending appeal.
2. Judgement was entered by the Principal Magistrate's Court in that case, whereby the Appellant was ordered by mandatory injunction to demolish or remove the electric poles erected on Plot No. 1365/1/MN, without the Respondent's consent.
3. Appellant's application before the Magistrate's Court for stay pending appeal was dismissed on 7th July 2011, on the grounds that the Appellant had not by then filed an appeal. The Appellant after obtaining leave of the High Court on 26th June 2012 to file an appeal out of time proceeded to file the present appeal on 2nd July 2012.
4. Appellant deponed in its affidavit in support of the application for stay of execution that if stay is not granted it would suffer substantial loss. Further that it has a good and arguable appeal with a high probability of succeeding. In that regard the Appellant relied on the grounds in the memorandum of appeal. The appellant further deponed that the Respondent has threatened to execute the lower court's judgement. Indeed I have seen the Notice to Show Cause issued in the lower court matter on 14th November 2012. It is directed to the Appellant's manager Joseph Mkombo for him to show cause why a warrant of arrest should not issue for failure of the Appellant to remove the electric poles on Plot No. 1365.
5. The Respondent has opposed the application. In opposition to the application the respondent deponed that the appellant had failed to take steps to fix the appeal for hearing; that the appeal has no chance of success; that the appellant is insincere, dishonest and acting in bad faith; and that the application does not meet the requirements of a stay order. Further the Respondent deponed that he is entitled to enjoy the fruits of his judgement and will suffer if execution is granted.
6. The Appellants authorities deal with stay of proceedings pending appeal but not stay of execution. They are therefore not helpful to this court in respect to the present application. The Respondents authority **Halai & Another -Vs- Thornton & Turpin (1963) Ltd [1990] KLR** the Court of

Appeal had this to say-

“The High Court’s discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay.”

The other authority Thugge -Vs- Kenya Commercial Bank Ltd (1990) KLR the Court stated-

“1. Merely asserting that the appeal would nugatory because of the alleged inability of the decree holder to repay the decretal sum to the event of the appeal succeeding is not sufficient.

2. There must be some evidence to show that there would be substantial loss to the defendant if stay is refused.”

The other authority relied on by the Respondent was M/S Portreitz Maternity -Vs- James Karanga Kabia Civil Appeal No. 63 of 1997. In that case the High Court was entertaining an application for stay of execution pending appeal. The Court stated as follows-

“That right of appeal must be balanced against an equally weighty right, that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right.”

7. The parties in advancing their arguments have referred to the possibility or not of the appeal being rendered nugatory. Whether or not an appeal would be rendered nugatory is not a consideration in an application for stay of execution pending appeal before the High Court. That standard is only considered by Court of Appeal. The conditions to be satisfied by an applicant before the High court are as stated under Order 42 of the Civil Procedure Rules 2010. Those conditions are as set out in the case of Halai & Another -Vs- Thornton & Turpin (1963) Ltd [1990] KLR. The Appellant has supported its application in the grounds that it has a good and arguable appeal and that it will suffer substantial loss in execution is not granted. The Appellant did not elaborate on what loss it will suffer.
8. The lower court’s case requires the Appellant to remove its electric poles from the respondents land. It cannot escape my attention and indeed I do take judicial notice that Kenya Power & Lighting Co. Ltd is a company that transmits, distributes and retails electricity to its customers throughout Kenya. According to the emerging markets information services website, Kenya Power & Lighting Co. Ltd is responsible for the scheduling and dispatching of electricity to more than 500,000 customers. Undoubtedly if the order to remove the poles is effected it will definitely affect the Appellant’s customers. This can lead to substantial loss not only to the Appellant but also to its customers. I therefore find that the Appellant has met the requirements of granting a stay pending appeal. Financial loss is not the only loss that can be categorized as substantial loss. I therefore do not accept the argument of the Respondent in this regard. Even the loss of services to the Appellant’s customers can also be substantial enough to merit the orders of stay.
9. I wish to dis-suade the Respondent in its argument that the Appellant’s application should fail because the Appellant had failed to take steps to fix the appeal for hearing. As argued by the Appellant the appeal is presently not ready for hearing because the lower court record has not been availed to the High Court. The proceedings have also not been typed and the appeal has not been admitted for hearing. The Appellant has therefore not failed to fix the appeal for hearing because it is not ready for hearing. There is also no evidence of bad faith on the part of the Appellant.
10. In the end I find that it is in the interest of justice that stay of execution of the lower courts judgement be granted pending appeal. I proceed to grant the following orders-

- a. *That stay of execution of the judgement delivered on 20th April 2011 in Mombasa CMCC No. 2490 of 2003 be and is hereby granted pending the hearing and determination of this appeal.*
- b. *The costs of the application dated 6th February 2013 shall abide with the outcome of this appeal.*

Dated and delivered at Mombasa this 23rd day of August, 2013.

MARY KASANGO

JUDGE