



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
MISC. APPLICATION NO.3 OF 2012

BETWEEN

KENYA POWER & LIGHTING CO. LTD..... DEFENDANT/APPLICANT

VERSUS

HEZRON M. ONCHOKEPLAINTIFF/RESPONDENT

RULING

1. The applicant herein, Kenya Power & Lighting Company Limited has brought this application under **Order 42 rules 6 and 7, Order 51 Rule 1** of the **Civil Procedure Rules 2010** and **Sections 3 and 3A** of the **Civil Procedure Act** and all enabling provisions of the law seeking an order of stay of execution of the decree in KISII CMCC NO.144 OF 2007 pending hearing and determination of Appeal No. HCCA NO.267 OF 2011.

2. The application is premised on the grounds on its face and is supported by the affidavit of J.T. Kemei sworn on 16th January 2012. The gist of this application is that the applicant is aggrieved by the judgment of the trial court and has already filed its Memorandum of Appeal against the said judgment which was delivered on 24th November 2011. The applicant also contends that unless the stay order sought herein is granted, the appeal is bound to be rendered nugatory for the reason that the Respondent, who is a man of straw, has no capacity of refunding the decretal sum should the same be paid out to him before the appeal is heard and determined. That the applicant will thus be greatly prejudiced should the appeal succeed.

3. The application is not opposed though the Respondent's counsel was duly served with the application on the 18th January 2012. The applicant, through its counsel, Mr. Terigin, has asked this court to allow the application as prayed.

4. The applicant has filed two (2) other similar applications, namely **Misc. Application No. 4 of 2012 – Kenya Power & Lighting Co. Ltd. –vs. - Kennedy Mwamba** and **Misc. Application No.5 of 2012 – Kenya Power & Lighting Co. Ltd. –vs. - Caleb Ogendi**. Judgment in both of these other matters was delivered on the same 24th November 2011. The advocate for the Respondent in these two matters is the same advocate who appears in the instant application. For the above reason, counsel for the applicant prays that any orders made in this file do apply, *mutatis mutandis* in application numbers 4 and 5 respectively.

5. I have now carefully considered the application and the grounds upon which the same is anchored. For the applicant to succeed on this application, it must fulfill the following conditions which are set out under **Order 42 Rule 6 (2)** of the **Civil Procedure Rules, 2010:-**

(a) that substantial loss may result to the applicant unless the order is made; and

(b) that the application has been made without unreasonable delay; and

(c) 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.

6. The applicant is thus under a duty to fulfill all the three conditions and not just one or two of them. These conditions differ from those required of an applicant who seeks stay of execution from the Court of Appeal where such applicant would be required to show that he has an arguable appeal and that such appeal would be rendered nugatory if stay was not granted. This distinction is necessary because a number of litigants seeking stay orders from the High Court do stray every now and again into the arena of similar applications to the Court of Appeal and try to meet the conditions set by the Court of Appeal rules, and especially **Rule 5 (2) (b)** of those rules.

7. The question to ask at this point is whether on the basis of the pleadings on record, the applicant herein has satisfied all the three conditions for the granting of the order sought. In my considered view, I think that the applicant has satisfied all the three conditions for the granting of an order for stay of execution.

8. I shall start with the second condition which is that the applicant must demonstrate that the application has been made without unreasonable delay. Judgment in the lower court was delivered on 24th November 2011. On the 29th December 2011, the applicant drew its Memorandum of Appeal, though the same was not filed until 17th January 2012. The deponent of the Replying Affidavit also avers that on the 20th December 2011, his firm filed an application under Certificate of urgency seeking stay of execution. The application was received in court on 20th December 2011 but the same could not be prosecuted because the court file could not be traced, hence this application. I am satisfied that the instant application was thus made without unreasonable delay.

9. The second condition I wish to consider now is one of security. It has been deponed in the Supporting Affidavit that the applicant is ready and willing and able to abide by such reasonable stay terms as the court may order in the interest of both parties and justice. Noting that the applicant is a large public company operating throughout the Republic of Kenya, I am persuaded that it will be in a position to comply with such terms as this court may, in its absolute discretion, impose.

10. Finally, can it be said that the applicant will suffer substantial loss if the stay order sought herein is not granted? Through the supporting affidavit of J.T. Kemei, advocate, the applicant avers that it is likely to suffer loss if the decretal sum is paid out to the Respondent before the appeal is heard and determined. The argument put forth by the applicant is that the respondent herein is a man of straw and that should the decretal sum be paid out to him meantime and the appeal eventually succeeds, the respondent will be hard put to refund the amount. It is for this reason that the applicant says substantial loss may result unless the order sought is granted.

11. In the case of Mungai –vs.- Ndaba [1981] KLR 367, the Court of Appeal held, *inter alia*, that –

“Before a stay of execution can be granted, the applicant must

satisfy the court that there is good reason to do so. In exercise of its discretion the court looks at the circumstances and facts of the case.”

12. In the instant case, I am alive to the fact that the Respondent has not come to court to rebut the allegation that he is a man of straw and therefore financially incapable of refunding the decretal sum should the same be paid out to him now and the appeal eventually succeeds. I am therefore persuaded that the Respondent’s failure to refund the decretal sum should the appeal succeed would result into substantial loss to the applicant.

13. In the premises and for the reasons above given, I hereby allow the applicant's application upon the following terms:-

- 1) **The applicant shall deposit the full principal sum on the judgment into court within the next Ten (10) days from the date of this ruling.**
- 2) **In default of (1) above, the stay order granted herein shall lapse.**
- 3) **This order shall apply, *mutatis mutandis* to Misc. Applications 4 and 5 of 2012.**
- 4) **There shall be no order as to costs of this application**

14. It is so ordered.

Dated and delivered at Kisii this 1st day of February, 2012

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. Terigin (present) for Applicant

N/A for Respondent

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.