



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ELC. 1034 OF 2007

KENYA POWER & LIGHTING CO.

LTD.....PLAINTIFF

V E R S U S

PHILIP A. M.

KIMONDIU.....DEFENDANT

R U L I N G

The Respondent is owner of plot No. 6-106 (original plot No. 10967) on which the Applicant laid a 220KV power distribution line that runs from Kiambere Dam to Dandora aimed at boosting the energy capacity of the national power grid. The Respondent's 7.1 acres was in the process rendered almost useless. He sued the Applicant in trespass and sought to be compensated for the same. The parties agreed that there be judgment for the Respondent against the Applicant on liability at 100%. What was left for decision was the amount of compensation. Following evidence, the court made a total award of KShs. 5,550,000/= plus costs and interest. Judgment was delivered on 28th October 2010. On 25th January 2011 a certificate of costs in the sum of KShs. 391,530/= was issued.

On 4th November 2010 the Applicant filed a notice of appeal to the Court of Appeal, and on 2nd February 2011 filed the present application for stay of execution pending the hearing and determination of the intended appeal. The application was on the grounds that the Applicant will suffer substantial loss and damage if the execution is allowed to proceed. The Applicant is willing to deposit security as may be ordered by the court and that application was brought without delay, the grounds stated. The application was opposed by the Respondent.

Under Order 42 rule 6(2) of the Civil Procedure Rules the discretion of the court to grant stay of execution of a decree pending appeal is fettered by three conditions. The Applicant should show that he will suffer substantial loss; the application should be made without unreasonable delay; and the Applicant should provide security for the due performance of the decree as may ultimately be binding on him (**Halai**

& Another –Vs- Thornton & Turpin (1963) Ltd [1990] KLR 365).

In the affidavit sworn by Imelda Bore, legal officer of the Applicant, it was not alleged that the Applicant will suffer substantial, or any loss, if the application is not granted and execution is allowed to proceed. During the prosecution of the application, Mr. Kibathi for the Applicant submitted that the:-

“Respondent has not shown he can refund the money if the appeal is successful.”

The burden to show that the Applicant would suffer substantial loss if the application is not granted rested with it. This being a money decree, it was up to the Applicant, besides demonstrating that any success in the intended appeal would be rendered nugatory, to persuade the court that the Respondent was so impecunious that it (the Applicant) would never be able to get its money back (**Jethwa –Vs- Shah t/a Supreme Styles [1989] KLR 198**).

The supporting affidavit did not indicate what security, if any, the Applicant was willing to provide. It was in the submissions that its counsel indicated they could deposit the decretal sum. Submissions is not the place for evidence. In any case, depositing the decretal sum would be done if there is fear that the Respondent would not be able to refund. It should always be remembered that in dealing with this kind of application the court is considering two competing interests: the Respondent has a judgment whose fruits he is entitled to realise whereas the Applicant seeks to exercise its undoubted right of appeal and the court should ensure that the subject matter is preserved so that the appeal, if successful, is not rendered nugatory (**Kenya Shell Limited –Vs- Kibiru & Another [1986] KLR 410**). I have found that the Applicant has not shown that the appeal, if successful, will be rendered nugatory.

The judgment was delivered on 28th October 2010. The present application was filed on 2nd February 2011, over 3 months later. I agree with the Respondent whose replying affidavit in paragraph 4 stated as follows:-

“4. THAT there is no explanation at all for the delay in making the application.”

In conclusion, I find no merit in the application and dismiss it with costs.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF FEBRUARY 2011

A. O. MUCHELULE

J U D G E