



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NUMBER 275 OF 2010

**JOSEPH KINYANJUI MWAI
t/a Sandworth Printing & Packaging..... APPELLANT**

VERSUS

KENYA POWER AND LIGHTING COMPANY LIMITED. RESPONDENT

RULING

Before me is a Notice of Motion filed on 18th February, 2010 by the respondent. The application was filed under Section 1A & B of the Civil Procedure Act (Cap 21) and Order 42 of the Civil Procedure Rules 2010. The prayers are as follows: -

- 1. The memorandum of appeal and supplementary record of appeal be struck out, alternatively, that pages 56 to 60; 73 -77; 95-98 and 188 – 195 of the memorandum of appeal and pages 1- 28; 67 & 70 – 72 of the supplementary record of appeal be struck out.***
- 2. Subject to any orders made on prayer 1 above, that there be a stay of proceedings pending the determination of the respondents appeal to the Court of Appeal in Civil Appeal 311 of 2010 against the order of Mr. Justice Khamoni extending the time for lodging the appeal to the High Court.***
- 3. That cost of the application be provided for.***

The application has grounds on the face of the Notice of Motion. It was filed with an affidavit sworn on 18th February, 2011 by Beatrice Muendo – Meso described as the Deputy Manager, Legal Services of the Respondent.

The grounds are two. I will reproduce them verbatim. They are as follows: -

- a. Documents have been included in the memorandum of appeal and the supplementary record of appeal which were not before the Energy Regulatory Commission or the Energy Tribunal.***
- b. The respondent has appealed to the Court of Appeal against the order of Mr. Justice Khamoni extending the time for lodging the appeal to the High Court. The respondent has requested that the appeal to the Court of Appeal be expedited. It is in the interest of justice that the appeal to the Court of Appeal be heard first so as to determine whether the appeal to the High Court should be allowed to proceed and to avoid rendering nugatory the appeal to the Court of Appeal.***

In the affidavit filed with the application, it was deponed, inter alia, that the appellant on the 23rd March 2010, applied to the High Court in Misc. Civil Application 111 of 2010 for an extension of time to file an appeal to the High Court against the decision of the Energy Tribunal. That the respondent opposed the application but on 2nd July 2010 Mr. Justice Khamoni granted an extension of time to the appellant to lodge the present appeal to the High Court. That on receipt of the memorandum of appeal the advocates for the respondent Ms Hamilton Harrison and Matthews wrote to the appellant's advocates Boniface Njiru & Co. Advocates on 19th August 2010 expressing concern about the documents included in the memorandum of appeal. That as consequence of the said letter, the appellant filed a supplementary record on 16th September, 2010 and that the respondent's advocates on 10 & 29th September, 2010 wrote to the appellants advocates expressing concern about the documents in the supplementary record.

That the said documents were included in the record and supplementary record of appeal improperly. That the respondent's advocates wrote additional letters to the appellant's advocates on the same subject. That the respondent on 12th July, 2010 filed a Notice of Appeal against the ruling of Mr. Justice Khamoni and on 7th December, 2010 filed Civil Appeal No. 311 of 2010 in the Court of Appeal. That the respondent had requested the Court of Appeal to grant an expedited hearing of the appeal. That the respondent was concerned that documents which were not before the Energy Regulatory Commission or the Energy Tribunal had been included in the Memorandum of Appeal and the Supplementary record in such a way that the court hearing the appeal might not appreciate that such documents were not before the Commission or the Tribunal. That if the appeal in the High Court proceeded before the decision of the Court of Appeal on extension of time, the appeal to the Court of Appeal would be rendered nugatory and judicial time wasted.

The respondent, through their counsel, filed written submissions on 4th April 2011. A background to the application was given. It was contended that following the letters of complaint from the respondent's advocate regarding the documents improperly included in the record of appeal and supplementary record, on 8th December, 2010 Mr. Justice Maraga asked the respondent to file a supplementary record. However, the judge did not address the question of documents wrongly included in the record and supplementary record. The respondent's advocates again raised the question of documents improperly included in the record of appeal and the supplementary record of appeal, but there had been no response and hence the necessity for the first prayer in this application.

It was contended that the court had general powers to rectify the situation under Order 42 rule 13(3) of the Civil Procedure Rules (2010), which was previously Order 41 rule 8B (3) of the repealed Civil Procedure Rules.

It was contended that before allowing an appeal to go to hearing, the court must be satisfied that all documents were included. The court was also equally duty bound to ensure that documents which were not before the lower court were not included. It was wrong, therefore, to have before the appellate court, documents which were not before the lower court or tribunal, because an appeal was based on the evidence and documents which were before the lower court or tribunal unless leave to adduce additional evidence was sought and granted.

It was contended that contrary to the contents of paragraphs 4 – 6 of the appellant's affidavit, the supplementary record filed did not cure the situation as it could not remove the improper documents. It was also contended that the attempt by the appellant in paragraph 7 of the affidavit to justify the inclusion of the improper documents was not founded on the law, and that there was a danger of the High Court relying on the documents which were not before the Commission or Tribunal. It was, therefore, contended that the court should either direct the withdrawal of the said documents or strike out the record and supplementary record. That was the basis of prayer 1 of the application.

On prayer 2 for stay of proceedings, it was argued that an appeal to the Court of Appeal had already been filed. It was contended that the respondent had asked the Court of Appeal for a priority hearing date which had now been granted and the appeal was due to be heard by the Court of Appeal on 27th July, 2011. It was contended that Justice Khamoni had in fact stated in his ruling the difficulties presented in

the arguments as to whether the Civil Procedure Rules or the Court of Appeal Rules apply for appeals from the Energy Tribunal. It was therefore, important to establish which rules applied to an appeal from the Energy Tribunal both for the purposes for extension of time for filing the appeal and for determination of any matters which might arise in the cause of hearing the appeal.

It was contended that the appellant would not suffer any prejudice by waiting for the hearing of the appeal in the Court of Appeal on 27th July 2011. Counsel emphasized the contention that under Order 42 rule 13 (3) of the Civil Procedure Rules (2010), and under the inherent power of the court, together with the overriding objective under section 1A & 1B of the Civil Procedure Act (Cap 21), a stay if granted would be in the interests of justice and enable proper use of judicial time. That was the basis of prayer 2.

Counsel asked that the application be allowed with costs.

The application is opposed. A replying affidavit sworn by the appellant Joseph Kinyanjui Mwai on 15th March 2011 was filed. It was deponed in the said affidavit, inter alia, that the respondent on 8th December, 2010 made similar complaints as those in this application orally before Justice Maraga. The judge directed the respondent's counsel to file a supplementary record with the documents that they thought were relevant. That on 21st December, 2010 the respondent's counsel did file the supplementary record and served it on the appellant's advocates on 22nd December, 2010. That by the respondent filing a supplementary record, whatever defects which might have been on the appeal record were cured. That the appellant's counsel had sent a written request to the Energy Tribunal to be availed the records of the tribunal, but had not received a response. The records of the tribunal had also not been forwarded to the High Court. That the appellant had diligently prosecuted the appeal.

The appellant, through their counsel, filed written submissions on 5th April 2011. It was contended that the filing of an appeal could not, per se, operate as a stay of execution or proceedings. Reliance was placed on Order 42 rule 6 (1) of the Civil Procedure Rules. That rule, it was contended, provided that the filing of an appeal or a second appeal did not operate as a stay of execution or proceedings under the decree or order appealed from.

It was contended that the respondent was confusing the proceedings in this present appeal with proceedings in High Court Misc. Civil Application No. 111 of 2010. It was contended that the order by Justice Khamoni was subject to an appeal in the Court of Appeal Civil Appeal No. 311 of 2010, but that appeal emanated from High Court Misc. Civil Application No. 111 of 2010 and not from the present appeal. Therefore, the proper place for filing an application for stay of proceedings would either be in High Court Misc. Civil Application No. 111 of 2010 or the Court of Appeal where the applicant had filed his appeal. This court, therefore, lacked jurisdiction to stay proceedings since there were no orders in this Civil Appeal No. 275 of 2010 which were subject to an appeal to the Court of Appeal. In addition, since proceedings in High Court Misc. Civil Application No. 111 of 2010 were now overtaken by events, there was nothing for stay. It was emphasized that the Hon. Justice Khamoni on 2nd July, 2010 granted the appellant extension of time to file an appeal from the ruling of the Energy Tribunal of 20th November, 2009 and this present appeal was filed within time on 16th July, 2010. It was contended that Misc. Civil Application No. 111 of 2010 was now spent since the appeal had already been filed.

On the prayer for striking out the memorandum of appeal and supplementary record of appeal or parts thereof, it was contended that same was not merited. The respondent orally brought a similar complaint before Justice Maraga on 8th December 2010 and his Lordship directed the respondent's advocates to file their own documents which they did. Therefore, any defects were cured. Reliance was placed on Article 159 (2) (d) of the Constitution which enjoined courts and tribunals to be guided by the principle that justice should be done without undue regard to procedural technicalities. It was submitted that the errors/mistakes complained of were not grounds for striking out an appeal. In fact the original record had not been forwarded to the High Court from the Energy Tribunal and it was not known whether those original records were presently in existence.

On the hearing date Mr. Otaba for the respondent and Mr. Njiru for the appellant relied on the

written submissions. Mr. Otaba emphasized that the Court of Appeal had given 27th July 2011 as the priority dated for the hearing of the appeal.

I have considered the application, documents filed and the submissions for both parties.

This application was brought under Section 1A & 1B of the Civil Procedure Act (Cap 21), which provides for Overriding Objective in civil proceedings. The said section was brought into law under Act No. 6 of 2009. The overriding objective provides that the provisions of the Act and Rules are to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. Courts are enjoined to exercise their powers to give effect to the overriding objective.

The application was also brought under Order 42 of the Civil Procedure Rules 2010. Order 42 deals with filing and service of appeals, amendments to memorandum of appeals, and directions before hearing, as well as the court's powers on appeal, inter alia.

The substantive prayers in the application are two. The first is for striking out of the memorandum and supplementary record of appeal or striking out some particular specified pages or paragraphs of the same. The second substantive prayer is for stay of proceedings herein pending determination of an appeal filed in the Court of Appeal against an order by Justice Khamoni extending time for lodging the appeal to the High Court herein.

On prayer 1, rule 13 of Order 42 is relevant. Rule 13 (3) and (4) is particularly relevant. It provides: -

“13(3) The judge in chambers may give directions concerning the appeal generally and in particular directions as to the manner in which the evidence and exhibits presented to the court below shall be put before the appellate court and to typing of any record or part thereof and any exhibits or other necessary documents and the payment of the costs of such typing whether in advance or otherwise.

(4) Before allowing the appeal to go for hearing the Judge shall be satisfied that the following documents are on the court record, and such of them as are not in possession of either party have been served on that party that is to say:

- (a) The memorandum of appeal***
- (b) The pleadings.***
- (c) The notes of the trial magistrate made at the hearing.***
- (d) The transcript of any official shorthand, typist notes, electronic recording or palantypist notes made at the hearing.***
- (e) All affidavits, maps or other documents whatsoever put in evidence before the magistrate.***
- (f) The judgment, order, or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal.***

Provided that: -

- (i) A translation into English shall be provided to any document which is not in that language.***
- (ii) The judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraph (a), (b) and (f).”***

It is clear from the above that the Judge is bound to give directions on what documents may be used or filed before an appeal is heard.

The respondent has asked for striking out of the record of appeal as well as the memorandum of appeal filed by the appellant either in total or relating to specific pages. They have relied on Order 42 rule 27 of the Civil Procedure Rules which provides that an appellant shall not be entitled to produce any additional evidence either oral or documentary in an appeal, unless with leave of the court. They contend that the appellant has filed documents in this appeal which were not before the Regulatory Commission or the Tribunal.

It seems to have been admitted that some of the documents filed by the appellant might not part of the evidence tendered to the Tribunal. It is not in contest that the respondent was also allowed and filed a supplementary record of appeal as an attempt to possibly regularise the situation. The appellant claims that he has not so far managed to get the record of the proceedings from the Tribunal.

In my view, the confusion herein arises from the lack of the record of proceedings from the Tribunal. I cannot grant prayer 1. The first reason is that it is premature. The issue of correct and relevant documents will be addressed when the Judge is giving directions in total regarding the documents, and evidence exhibited, as well the typing of the record of the Tribunal. It is not possible for the court now to determine which documents to strike out before seeing the Tribunal's record, or being satisfied that record does not exist. It is at that point, that the court can give directions on which documents (if at all) between those filed by the appellant and those filed by the respondent can be relied on.

The second reason why I will not grant prayer 1 is that the respondent has stated that they filed an appeal against an order given by Justice Khamoni which extended the time to file the appeal to the High Court herein. If this court grants prayer 1, it is likely to pre-empt the decision to be made in the Court of Appeal, which will be wrong. This court must first know whether the extension of time granted to file a supplementary record of appeal is valid. It is only thereafter, that a decision or directions can be made on whether documents filed in this appeal are genuine. In my view, this court will have to await the decision of the Court of Appeal before it can determine which documents may or may not be relied upon by the parties.

For these reasons, I will not grant prayer 1.

Prayer 2 is for stay of proceedings herein pending the respondent's appeal to the Court of Appeal. Counsel for the appellant opposes the stay on the ground that Civil Appeal 311 of 2010 arises not from a decision made in this present file, but in a separate file that is High Court Misc. Civil Application 111 of 2010. That this application was erroneously made in this file.

The facts and evidence placed before me herein show that Civil Application No. 111 of 2010 was for extension of time to file an appeal in this present matter. Therefore, in my view, even if a separate file was used, the order of Justice Khamoni which is being challenged by the respondent in the Court of Appeal is relevant and operative in this appeal to the High Court. Therefore, it was proper for the respondent to make this application in this file.

The respondent's counsel has stated that they asked the Court of Appeal to determine their appeal as a matter of priority and that a hearing date for the same has been given for 27th July, 2011. In my view, the interests of justice will require that the appeal filed against the order of Mr. Justice Khamoni extending time for lodging the appeal in the High Court herein, must be determined first before any further proceedings can sensibly proceed herein.

In view of the wide discretion granted to the court under section 1A and 1B of the Civil Procedure Act (Cap 21), I am of the view that this court has the powers and mandate to order a stay of proceedings herein, pending the hearing and determination of the respondent's appeal in the Court of Appeal. A stay of proceedings order will serve the best interests of justice. It will also be in line with the overriding objective in the Civil Procedure Act that is, to provide and facilitate the just and proportionate resolution of civil disputes. We cannot have parallel proceedings proceeding in a higher court and lower court at the same time on the same subject. I will grant this prayer.

The third prayer is for costs. This application is an application within the appeal proceedings. In my view, costs should be determined following substantive decisions to be made in the appeal herein. I will, therefore, order that costs be in the cause.

Consequently, I allow the application in part. Prayer 1 is disallowed. I grant prayer 2. Costs will be in the cause.

As I have been told that the appeal in the Court of Appeal is due for hearing on 27th July, 2011, and again in line with the overriding objective under the Civil Procedure Act, I will order that this matter be mentioned next court term. I will give a mention date hereafter.

Dated and delivered at Nairobi this 23rd day of June 2011.

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GEORGE DULU
JUDGE

In the presence of

Mr Fraser for appellant

Mr. Kinyanjui for respondent

C Muendo – court clerk