



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL APPEAL NO. 142 OF 2010**

**BETWEEN**

**KENYA POWER & LIGHTING CO.  
LIMITED:::PLAINTIFF**

**AND**

**JOHN MOTURI  
OKIOGA:::RESPONDENT**

***(Being an appeal from the decision of the Resident Magistrate Hon. I. Maisiba dated 6<sup>th</sup> May, 2010 in Eldoret Chief Magistrate's Court Civil Case No. 69 of 2005)***

**RULING**

This application seeks an order to stay proceedings in Eldoret CMCC No. 69 of 2005 pending the hearing and determination of the appeal filed herein. The application is expressed to be brought under Sections 1(A) (B) 63(C) of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules. The application is made on the main ground that unless the order is made, the appeal may very well be rendered nugatory.

The application is supported by an affidavit sworn by **Denis Onyimbo Onyonkwa**, the applicant's advocate. In the affidavit, it is deponed, *inter alia*, that the respondents said suit was dismissed and several applications were made to reinstate the same without success. Notwithstanding the orders made refusing to reinstate the suit, the respondent lodged yet another application to reinstate the same suit which was allowed. That is the order that is being challenged in this appeal. According to the applicant, the last application to reinstate the suit was caught by *res judicate* by reason of the earlier unsuccessful applications. In the premises, according to the applicant, unless proceedings in the said suit are stayed the eventual success of its appeal will be rendered nugatory.

The application is opposed and there is a replying affidavit sworn by the respondent. He has deponed, *inter alia*, that the application has been made in bad faith and aims to deny the respondent his day in court; that the appeal is based on technicalities and is not arguable; that application was dismissed by the lower court and that the applicant will suffer no prejudice if the stay is refused.

The application was canvassed before me on 5<sup>th</sup> July, 2011 by **Mr. Onyinkwa** Learned Counsel for the applicant and **Mr. Omboto** Learned Counsel for the respondent. Counsel reiterated the stand-points taken by their clients in their respective affidavits.

I have considered the application, the affidavits filed both for the applicant and for the respondent and the submissions of counsel. Having done so, I take the following view of this matter. The provisions to guide me on what to consider are found in Order 42 Rule 6 of the Civil Procedure Rules although the rule is more elaborate with respect to applications for stay of execution which is not the case here.

With regard to delay, I observe that the applicants' application for stay of proceedings was dismissed on 15<sup>th</sup> April, 2011. It then lodged this application on 22<sup>nd</sup> June, 2011. The delay involved is therefore of about 2 months. Given that the appeal hearing was lodged way back in August 2010 I do not consider the delay of 2 months as inordinate.

With regard to the establishment of substantial loss, the applicant says that its appeal, if it eventually succeeds will be rendered nugatory unless the order of stay is granted. The order appealed from allowed reinstatement of the suit. Unless stay is ordered the suit in the lower court will proceed to hearing. If that event occurs then any success the applicant may achieve in its appeal will be of no value to it and its plea of *res judicata* will only be of academic interest. That being my view of the matter, I have come to the conclusion that substantial loss will result to the applicant unless the proceedings of the lower court are stayed.

With regard to security, I observe that the order appealed against merely allowed – re-statement of the respondent's suit without more. If the appeal is lost the suit will proceed to hearing. Any delayed hearing can adequately be compensated in costs. In the premises I find and hold that the requirement for security need not be satisfied and was not in any event urged.

With regard to the challenge that the applicant's application is *res judicate* by reason of the dismissal of its application before the lower court, I am of the view that it is not as the Civil Procedure Rules accords such an applicant a right to move the High Court a fresh.

In all the above premises, I find that the applicant has demonstrated sufficient cause to order a stay of proceedings of the Lower Court. Accordingly the application dated 22<sup>nd</sup> June, 2011 is allowed in terms of prayer 3 thereof.

Costs shall abide the results of the appeal.

It is so ordered.

**DATED AND DELIVERED AT ELDORET  
THIS 27<sup>TH</sup> DAY OF JULY, 2011**

**F. AZANGALALA  
JUDGE**

**Read in the presence of parties and their advocates.**

**F. AZANGALALA  
JUDGE  
27<sup>TH</sup> JULY, 2011**