



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Appeal 76A of 2006

KENYA POWER & LIGHTING CO. LTD.....APPELLANT

Versus

BROOKFIELD ACADEMY LTD.....1ST RESPONDENT

MARY WAMBUI KANYONYO.....2ND RESPONDENT

(Being an application for stay of execution pending appeal against the whole of the judgment of the Chief Magistrate's Court of Kenya at Nyeri by Honourable Mr. R. Nyakundi delivered on the 22nd day of September 2006)

RULING

The Applicant herein is the Appellant who, after the delivery of judgment by the Learned Chief Magistrate Nyeri, was aggrieved by that judgment then proceeded to file the present appeal. The judgment of the Learned Chief Magistrate was delivered on the 22nd September 2006. The Memorandum of Appeal was filed on the 23rd October 2006. In my view the Memorandum of Appeal was filed within the thirty days provided by *Section 79 (g)* of the Civil Procedure Act.

I begin by stating so because the Respondent in opposing the Appellant's application for stay did argue that the appeal was not filed within time. By virtue of *Section 57* of the Interpretation and General Provisions Act computation of time is provided. That section provides that in computing time for the purpose of a written law the period for the doing of an act is to be deemed to be exclusive of the day on which the event happens or the act is done. What that means is that since the judgment in this case was read on 22nd September 2006, in the computation of the 30 days allowed for filing an appeal, the 22nd of September would be excluded in that computation. Being so the thirty days would hence begin to run from the 23rd September 2006. Therefore the appeal having been filed on the 23rd October 2006, I do find that it was within time. For better understanding of this argument, it is necessary to reproduce *Section 57* of the Interpretation and General Provisions Act which is as follows:

“In computing time for the purposes of a written law, unless the contrary intention appears –

(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;

(b) If the last day of the period is Sunday or a public holiday or all official non-working days, (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;

(c) **Where an act or proceeding is directed or allowed to be done or taken on a certain day, then, if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;**

(d) **Where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time**

Having dealt with that argument the court will now proceed to consider the application argued by the Appellant. The same was by Notice of Motion dated 14th March 2007. It was brought under *Order XL1 Rule 4* of the Civil Procedure Rules and *Section 3A* of the Civil Procedure Act. The application seeks an order for stay of execution pending the hearing and determination of the appeal against the whole judgment of the Chief Magistrate's Court of Kenya at Nyeri. The grounds upon which that application is based are that:

- 1. That the applicant has lodged an appeal against the decision by the Hon. Mr. R. Nyakundi which appeal is arguable.**
- 2. The Respondent is likely to proceed with execution and substantial loss will result the Appellant unless an order of stay is granted.**
- 3. That the application has been brought without unreasonable delay since the receipt of the copy of the judgment from the court.**
- 4. That the Appellant is willing to abide by such orders as to security to the decretal sum as the court may order.**

The affidavit in support reiterated those grounds and further stated that the Appellant is apprehensive that in the event the Respondent is paid the decretal amount and if the appeal was successful the Respondent will not be able to refund the same.

In response to the grounds brought by the Appellant, the Respondent filed a Replying Affidavit. In that affidavit the pertinent issues that have been raised are that the Respondent is able, if the appeal is successful, to refund the decretal amount to the Appellant. It was deponed in that Replying Affidavit that the Respondent company was registered in 1995 and that it currently has an enrolment of over 350 students. Further that the Respondent is a profitable entity which runs other businesses with a gross turnover of Kshs.20,000,000/-. In support of that contention the Respondent annexed the audited accounts for the year ended 2006. In response to that Replying Affidavit counsel for the Appellant in submissions argued that the audited accounts were tailor-made to respond to the present application for indeed that they were prepared on 22nd March 2007 sometimes after this application was filed in court. In response to that counsel for the Respondent stated that the Replying Affidavit gives factual basis on which the application for stay is opposed. He further submitted that before the court can grant an order for stay it was necessary for the Appellant to satisfy three grounds as provided in *Order XL1 Rule 4 (2)* of the Civil Procedure Rules. The first ground that the Appellant would have to satisfy is that there is sufficient cause why stay should be granted. Secondly that the Applicant ought to show that it will suffer substantial loss if stay is not granted and finally that the Applicant is willing to offer security for the stay order. In this present case the Respondent was of the view that the Appellant had fallen short of satisfying those three conditions. In respect of the Appellant's argument that the appeal is arguable, the Respondent stated that if the ground upon which the Appellant was appealing against was that it was entitled to indemnity against the 2nd Respondent who in the original suit was a third party, that the law does not support that ground of appeal. The Respondent referred to *Order 1 Rule 17* and *16* and submitted that that rule provides that the Appellant ought to satisfy the judgment against it before seeking indemnity from the 2nd Respondent. In respect whether there has been a delay in making the present application the respondent submitted that the Appellant had waited for six months after the judgment before filing the application for stay.

Order XL1 Rule 4 (1) provides that no appeal would operate as stay of execution or stay of proceedings. That same rule provides that the court may, for sufficient cause, order stay of execution of decree or order. What does sufficient cause mean? As defined by Black Law Dictionary, "**sufficient cause**" means "**a legally sufficient reason**". In this case a legally sufficient reason would mean whether or not the Appellant has an arguable appeal.

I have examined the Memorandum of the Appeal and I do find that there is a reasonable arguable appeal demonstrated therein. The Appellant is further required to satisfy the conditions set out in *Rule 4 (2)* of that same Order. The same provides that a stay of execution shall not be made unless the court is satisfied that substantial loss may result to the Applicant. The Appellant in this regard argues that the Respondent may not be in a position to refund the decretal amount if the appeal is successful. I find that the Respondent has sufficiently responded to that argument by annexing

audited accounts of the year 2006. The Appellant was not found to challenge those audited accounts other than to say that they were tailor-made to meet the present application. That, in my mind, are not sufficient arguments to dislodge the submissions of the Respondent that they are capable of refunding. I therefore find that the Appellant has not shown that it will suffer substantial loss particularly when one considers the amount of judgment in this matter was Kshs.160,000/-. The other condition that ought to be satisfied before the court issues an order for stay is the condition of making the application for stay without unreasonable delay. I find that the judgment of the subordinate court was certified on 15th February 2007. Having that date in mind I am of the view that in filing the application for stay on the 14th March 2007 the application was made without unreasonable delay. The third condition that ought to be satisfied is that there ought to be security as the court orders for the due performance of the decree. The Appellant in making the present application did state that they would be willing to abide by any orders that would be made by the court. In totality, however, in considering the *Order XLI Rule 4*, I find that there isn't sufficient ground for granting stay to the Appellant. I am persuaded in that regard by the ruling of the case **REDLAND ENTERPRISES LTD. -V- PREMIER SAVINGS & FINANCE LTD (2002) 2 KLR** where the court in considering an application similar to the present one held that

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

In considering the present application and in balancing both the interests of the Appellant and the Respondent, I find that there isn't a just cause for depriving the Respondent the enjoyment of the fruits of the judgment it obtained at the subordinate court. Accordingly, the application by Notice of Motion dated 14th March 2007 is hereby dismissed with costs to the Respondent. Orders accordingly.

Dated and delivered at Nyeri this 8th day of June 2007.

MARY KASANGO

JUDGE