



Kenya Electricity Transmission Company Ltd v Kibotu Limited (Environment & Land Case 118 of 2021) [2022] KEELC 2711 (KLR) (7 July 2022) (Ruling)

Neutral citation: [2022] KEELC 2711 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE 118 OF 2021
MN MWANYALE, J
JULY 7, 2022
(FORMERLY ELDORET ELC CASE NO 107 OF 2019)**

BETWEEN

KENYA ELECTRICITY TRANSMISSION COMPANY LTD PLAINTIFF

AND

KIBOTU LIMITED DEFENDANT

RULING

1. The Judgment creditor/Applicant has vide its application dated 20/4/2022 sought orders.
 - i) Spent
 - ii) Spent
 - iii) That pending hearing and determination of the Appeal thus Honorable Court be pleased to grant a stay of execution in respect of judgement delivered on 16/3/2022 in this mater, to wit, Kapsabet Environment and Land Case No. 118 of 2021 – Kenya Electricity Transmission Company Limited vs Kibotu Limited.
2. The Application is expressed to be under Order 42 Rule 6 of the *Civil Procedure Rules* and is grounded on grounds interalia;
 - i) That there is a judgment of kshs. 14,263,000/= and costs and interests of the suit, the Applicant being dissatisfied with the decision, intends to appeal against the Judgement and has lodged a Notice of Appeal without undue delay.
 - ii) That the intended appeal has merit and reasonable chances of success.
 - iii) There is probability of the Defendant executing the decree, rendering the appeal nugatory



- iv) That the Applicant deposited kshs 5,159, 448 in a joint interest earning account in the name of the Advocates, parties and that the same is sufficient security to cater for a stay pending appeal.
3. The Application is further supported by the Supporting Affidavit of Walter Chiboli a legal officer of the Applicant who deposes, therein, that;
 - i) They had lodged a Notice of Appeal timeously and the intended appeal is meritorious and has a probable chance of success.
 - ii) The Plaintiff/Applicant is apprehensive that decree holder will proceed to execute the decree if stay is not ordered.
 - iii) The Applicant will suffer substantial and irreparable loss if stay of execution is not granted as it will be unable to recover the said money once it is paid to the Respondent.
 - iv) That there is a deposit of kshs 5,159,448 in a joint interest earning account in the name of the party's advocates held at M Oriental Bank Ltd which sum is intact and the same is sufficient security to grant the Plaintiff/Applicant stay of execute pendency appeal.
 - v) That the Applicant is ready to abide by any conditions as the Court may deem fit in the interest of justice.
 - vi) Application is made timeously and in good faith
4. In opposition to the stay of execution application, the Defendant/Respondent has filed a Replying Affidavit through its Director Aron Tuikong, and he deposed that;
 - i) That the Applicant did not serve the Notice of Appeal within the required period
 - ii) That the Applicant had admitted the Defendant of kshs 5,159,448 was deposited in the names of the Advocates.
5. The Respondent deposed that it has the capacity to refund any sums should an appeal succeed, but has not annexed its Bank statements.
6. That the Respondent further deposes that if stay pending appeal is granted, then the undisputed sum of kshs 5,159,448 together with ½ of the other heads of damages together with interest be released to it.
7. Parties herein filed submissions on the Application. Being an application for stay pending appeal under order 42 Rule 6, the issue for determination is thus whether the Applicant has satisfied the conditions for a stay pending appeal (Under Order 42 Rule 6). Under Order 42 Rule 6, provides "No order for stay of execution shall be made under sub rule 1 unless;
 - a) the court is satisfied that substantial loss may result to the applicant unless the order is made and the application has been made without unreasonably delay and
 - b) such security as the Court orders for the due performance or order as may be ultimately be binding on him has been given by the Applicant."
8. On substantial loss, the Applicant submits that the Appeal has a high chance of success and intended appeal will be rendered nugatory. Towards this end the Applicant has cited the decision in *Century Oil Trading Limited vs Kenya Shell Limited (Nairobi)* Milimani No. 1561 of 2007. Where the Court stated "the word substantial cannot mean the ordinary loss to which every judgement debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the code expressly prohibits stay of execution as an



- ordinary rule it is clear the words substantial loss, the financial position of the Applicant and that of the Respondent becomes an issue. The Court cannot shut its eyes where it appears the possibility is doubtful of the Respondent refunding the decretal sum in the event that the Applicant is successful in his appeal. The Court has to balance the interest of the Applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the Respondent who is seeking to enjoy the fruits of his judgment,”
9. On substantial loss, the Respondent submits that the Applicant has not demonstrated in any way how substantial loss would occur, since execution is a lawful process, and that apprehension does not in any way demonstrate substantial loss.
 10. In support of this submission the Respondent places reliance on the decision in *Nicholas Stephen Okaka and Another vs Aggrey Odhiambo Odundo* where the Court observed that:

“No doubt in law, the fact that the process of execution has been put in motion or is likely to be put in motion, by itself does not amount to substantial loss...”
 11. The Applicant submits that the Respondent is unable to refund the decree sum and, in this regard, cites the decision in Civil Appeal No. 19 of 2019 – *Victory Construction vs B. M. (a minor suing through next friend one PMM)* (2019) eKLR. “where the allegation is that the Respondent will not be able to refund the decretal sum if paid to him in satisfaction of the decree, the burden is upon the Applicant to prove that is the position.” and the Applicant submits that they discharged that burden.
 12. Application made without unreasonable delay.
 13. On this issue the Applicant submits that it filed its Notice of Appeal within time and the application was filed 3 days after the 30 days stay of execution. It is the Applicant submission that it has moved with speed and without any unreasonable delay and it is capable of satisfying the decree, upon the intended appeal.
 14. The Respondents did not submit on this issue but instead submitted on the security as a condition for granting of stay pending appeal.
 15. In their submission the Respondent submit that the undisputed sum of kshs 5,159, 448 currently held in the joint names of the Advocates together with kshs 4,551, 776 making it a total of kshs 9,711,224 be released to it. In supporting of this submission, the Respondent places reliance on the decision in *Catherine Mwenwa Mwirigi vs Progressive Credit Limited* (2021) eKLR where the Court said.... “the Court would require as a condition of the stay that the Appellant pays the undisputed amount to the Respondent.”
 16. The Applicant has submitted on security for costs instead of security for stay pending appeal; and states that the sums deposited in the joint Account is sufficient security.

Analysis and Determination:-

17. On the principles set out in Order 42 Rule 6 as set out above, it is the Courts finding that the application filed herein was filed without unreasonable delay, on the substantial loss, the Respondent has deponed that it is capable of refunding any sums paid to it by the Applicant in satisfaction of the decree. The onus of proof was shifted to the Applicant who did not file a further affidavit to controvert the same.
18. The decretal sum of kshs 14,263,000/= which is a colossal sum by any means. Out of this sum, there is an undisputed sum of kshs 5,159,448/= being held by the Advocates for the parties herein. If the



Applicant is to succeed in the appeal the refund of the kshs 14.263,000/= being a colossal sum would cause a substantial loss, noting no Bank Statements were exhibited in Court.

19. Accordingly, it is the Court's view the Applicant has made a case for a stay of execution pending appeal having satisfied the conditions in Order 42 Rule 6 and in order to balance the interest of the parties, the stay of execution pending appeal is hereby granted on condition that the undisputed sum of kshs 5,159,448 together with interest accrued be released to the Decree holder within 30 days from today failure to which the stay of execution orders lapse.
20. Orders accordingly

DATED AND DELIVERED IN KAPSABET THIS 7TH DAY OF JULY, 2022.

HON. M. N. MWANYALE,

JUDGE

In the presence of;

Mr. Mwetich for Respondent

Mr. Achola holding brief for Mr. Opiyo for Applicant

