



Mwagafwa v Kenya Power & Lighting Company Ltd (Civil Appeal E052 of 2022) [2024] KEHC 6794 (KLR) (11 April 2024) (Ruling)

Neutral citation: [2024] KEHC 6794 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E052 OF 2022
GMA DULU, J
APRIL 11, 2024**

BETWEEN

EPHRAHIM MUGHADI MWAGAFWA APPELLANT

AND

KENYA POWER & LIGHTING COMPANY LTD RESPONDENT

RULING

1. Before me is an application by way of Notice of Motion dated 6th November 2023 filed by the applicant Kenya Power & Lighting Company Ltd through counsel Mogaka Omwenga & Mabeya Advocates.
2. The application was filed under Section 1A, 1B, 3A, 63(e) of the *Civil Procedure Act*, and Order 22 rule 22, Order 42 rule 6 and Order 51 rule 1 of the *Civil Procedure Rules* and seeks the following orders:-
 1. (Spent).
 2. (Spent).
 3. That there be a stay of execution of the judgment, decree and all consequential orders until the full hearing and determination of the respondent preferred appeal to the Court of Appeal.
 4. The costs of the application be provided for.
3. The application has grounds on the face of the Notice of Motion that a Notice of Appeal dated 18th October 2023 has been filed; that the existing stay of execution orders lapsed on 6th November 2023; that if the orders sought are not granted the applicant will suffer irreparable loss, damage and prejudice that may not be adequately compensated with an award of costs since the decretal amount is colossal and the appellant's ability to refund the sum is unknown; that the court has inherent powers to order a stay of execution pending hearing and determination of appeal.



4. The application was filed with a supporting affidavit sworn on 6th November 2023 by Caroline Warui a Legal Officer of the applicant Kenya Power & Lighting Company Ltd which annexes the Notice of Appeal filed.
5. The application is opposed through a replying affidavit sworn by the respondent Ephraim Mughadi Mwagafwa on 10th November 2023 in which it is deponed that he is employed as a mason thus in gainful employment; that in case the court allows this application, it should order that he be paid half of the decretal amount.
6. The application was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by Mogaka Omwenga & Mabeya Advocates for the applicant and the submissions filed by S. M. Righa & Company Advocates for the respondent.
7. This is an application for stay of judgment or decree pending appeal. Other than the provisions of Order 42 Rule 6 of the Civil Procedure Rules, the respondent has raised the issue of this court being *functus officio*.
8. In my view, even though this court granted interim stay of execution orders for a period of 30 days, this court is not rendered *functus officio*, as this court has powers under the Civil Procedure Act to consider and grant stay of execution orders, pending an appeal against its decision or judgment.
9. The substantive considerations for an application for stay of execution of judgment or decree are contained in Order 42 Rule 6(2) of the Civil Procedure Rules which state as follows:-

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- (2) No order of stay 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 unreasonable delay; and
 - b. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

10. The judgment herein was delivered on 6th October 2023 and 30 days stay of execution orders granted by this court. The present application was dated and filed on 6th November 2023. In those circumstances, I find that the application was filed without unreasonable delay.
11. Will the applicant suffer substantial loss if the stay of execution orders sought are not granted? The applicant says so on the grounds that the amount of award is large, and the means of the respondent to refund are unknown. The respondent on his part maintains that he is an employed mason and has the means to repay. He also urges that in case stay of execution is granted, he be paid half of the decretal amount.
12. On my part, having considered the facts and circumstances disclosed to me at this stage, and since the dispute herein is on liability rather than quantum of damages awarded, and the respondent having not given any information of the exact place and terms of employment, I am persuaded that the applicant will suffer prejudice, and to grant stay of execution orders pending appeal. I will also not order payment of any part of the decretal sum as the issue in contest is on liability not quantum of damages.



13. I note however, that the applicant has not filed or disclosed any draft Memorandum of Appeal or grounds, and I will thus grant conditional stay of execution as one of the considerations for stay of execution in the Court of Appeal is the arguability of the appeal.
14. As for provision of security, the applicant has deponed to be willing to comply with any orders the court will give. This condition can thus been satisfied by the applicant.
15. I thus allow the application in the following terms:-
 - i. I grant orders of stay of execution of judgment or decree herein pending determination of appeal in the Court of Appeal provided the Memorandum of Appeal is filed by 30th April 2024. Otherwise the stay orders herein granted will automatically lapse and be of no effect.
 - ii. The costs of this application will follow the outcome of the appeal in the Court of Appeal.

DATED, SIGNED AND DELIVERED THIS 11TH DAY OF APRIL 2024 IN OPEN COURT AT VOI VIRTUALLY.

GEORGE DULU

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JUDGE

In the presence of:-

Alfred – Court Assistant

Mr. Abaja for applicant

Mr. Kiwinga for respondent

