



**Kenya Power & Lightning Company v Loiman & another (Suing as the Legal Representatives of Shadrack Kian) (Civil Appeal E10 of 2020) [2024] KEHC 9685 (KLR) (16 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9685 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAJIADO  
CIVIL APPEAL E10 OF 2020  
SN MUTUKU, J  
JULY 16, 2024**

**BETWEEN**

**KENYA POWER & LIGHTNING COMPANY ..... APPLICANT**

**AND**

**MUSIEKA ENE LOIMAN ..... 1<sup>ST</sup> RESPONDENT**

**LOIMAN OLE NKYOTO ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS THE LEGAL REPRESENTATIVES OF SHADRACK KIAN**

**RULING**

1. By a Notice of Motion application dated 16<sup>th</sup> February, 2024, the Applicant has moved this court under Order 42 Rule 6 (2) and Order 51 Rule 1 of the [Civil Procedure Rules](#) and Section 1A, 3A and 63(e) of the [Civil Procedure Act](#) seeking the following orders:
  - a. Spent.
  - b. That this court be pleased to issue an order for stay of execution of the decree issued pending the hearing and determination of this application.
  - c. That this court be pleased to issue an order for stay of execution of the decree issued pending the hearing and determination of the intended appeal.
  - d. That the cost of this application be provided for.
2. The grounds in support of the application are found on the face of it and in the Supporting Affidavit of Moses Barasa the Legal Officer at Madison Insurance Company Kenya Limited (the Applicant's insurer). That having being aggrieved by the terms of the judgement delivered on 11<sup>th</sup> December 2023 the Applicant has lodged an appeal. That the 45 days stay of execution granted by the Court lapsed on 17<sup>th</sup> February 2024. That the Appeal is arguable with high chances of success. That the substratum of



the appeal be preserved to enable them to prosecute their appeal. That the Respondent is a person of unknown means and may fail to reimburse the decretal sum in the event that the appeal succeeds. That should the orders sought be denied they will be greatly prejudiced as their right to appeal will have been denied. That no prejudice would occasion to the Respondent that cannot be adequately compensated by way of costs. Further that they are willing to offer a bank guarantee as security for cost.

3. The application was opposed via a Replying Affidavit sworn on 7<sup>th</sup> March 2024 in which it is deposed that the 45 days stay of execution granted by the Court lapsed on the 27<sup>th</sup> January 2024 and not on 17<sup>th</sup> February 2024 as argued by the Applicant. That the Applicant has not lodged an intended appeal but a notice of appeal. That no grounds of appeal have been furnished and therefore the arguable nature of the appeal is unknown. That no evidence has been given by the Applicant to demonstrate that the Respondents are persons of unknown means. That the financial ability of a decree holder is not a reason for allowing stay and that the Applicant has failed to produce any evidence of substantial loss/prejudice that will result if the orders sought are not granted.
4. The Respondents have averred, further, that granting of the stay orders would deny them the fruits of the judgement. That the security to be offered should not only be on cost alone but for the decretal sum, costs and interest of the judgement. That though the court has discretionary powers to grant stay, the court has an overriding objective to ensure that execution of the Applicant's right should not defeat the right of the Respondent. That the Application has not met the threshold as per Order 42 Rule 6(2) of Civil Procedure Rules and the same should not be granted.
5. They averred that should the court be inclined to grant stay, the same should be granted on condition that the Applicant pays to the Respondent half the decretal sum plus the consented costs and do give a bank guarantee to pay the remaining half together with accruing interest from a reputable financial institution.

### Submissions

6. The Application was canvassed through written submissions. I have read the submissions of the Application dated 6<sup>th</sup> May, 2024. Two issues have been raised for determination: Whether the applicant has demonstrated that the order for stay of execution pending intended appeal is merited and whether the intended appeal is arguable.
7. The Applicant has submitted that the principles guiding the grant of stay of execution pending appeal are found under Order 42 Rule 6(2) of the *Civil Procedure Rules*. It was submitted that the Applicant would suffer substantial monetary loss; that the trial court awarded Kshs. 21,341,350, which is inordinately high; that Court awarded general damages for pain and suffering at 12,000,000 which is not commensurate with the injuries suffered and that comparable amounts awarded for similar injuries is between Kshs. 1,500,000 to Kshs. 2,500,000.
8. It was submitted that the Respondent is a person of unknown means and that the Applicant is apprehensive that it would not be able to recover the decretal sum if the appeal succeeds; that the Respondent has not been able to demonstrate the contrary either through an affidavit of means or in any other form. The Applicant relied on *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR where it was held that:

“Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.”
9. It was submitted that the Applicant is willing to provide security in the form of a bank guarantee.



10. It was submitted that the application has been made without unreasonable delay; that judgement was delivered on 11<sup>th</sup> December 2023 and the Notice of Appeal was filed on 17<sup>th</sup> January 2024 and the application on 19<sup>th</sup> February 2024. The Applicant cited *Jaber Mohsen Ali & another v Priscillah Boit & another*(2014)eKLR as reiterated in *Philip Kiprotich Tuitok vEdna Jebiwott Kiplagat & 2 others*(2020)eKLR that unreasonable delay depends on the circumstances of the case.
11. It was submitted that Order 50 Rule 4 of the *Civil Procedure Rules*, provides that time for filing a Notice of Appeal is excluded by the Christmas vacation, from 21st December to 13th January.
12. On whether the intended appeal is arguable, it was submitted that the judgement award was excessively high and that there is need to interrogate whether the trial court exercised its discretion judiciously therefore raising triable issues. The Applicant relied on *Trust Bank Limited and Another v Investech Bank Limited and 3 others* [2000] eKLR where it was held that:
 

“It is now trite law that an arguable appeal is not one that must necessarily succeed but which ought to be argued fully before the court.”
13. It was submitted that the appeal has high chances of success and if the orders sought are not granted the appeal shall be rendered nugatory and that the fact that they did not attach a draft memorandum of appeal is not fatal (see *Visbva Stones Suppliers Company Limited v RSR Stone* [2020] eKLR and *Attorney General v Charles Otok Oliech* [2021] eKLR.
14. The Respondent’s submissions are dated 2<sup>nd</sup> May, 2024. The main issue raised for determination was whether the Applicant has met the threshold to warrant an order for stay of execution pending appeal.
15. The Respondent submitted that the applicant has not annexed a draft memorandum of appeal to enable the court determine the grounds of the appeal; that the burden of proof is on the Applicant to show that the Respondents are persons of unknown means and that they would be unable to refund the decretal sum. The Respondents relied *Samvir Trustee Limited v Guardian Bank Limited* Nairobi (Milimani) HCCC 795 of 1997 where it was held that:
 

“For an applicant to obtain stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss.”
16. It was submitted that appeals are to be filed within 14 days; that the Applicant had been granted 45 days stay of execution running from the date of judgement on 11<sup>th</sup> December 2023 but they filed this application for stay when they realized that the Respondent was preparing for execution, almost over 60 days later.
17. The Respondents opposed the proposal for furnishing security in the form of a bank guarantee. They argued that the bank guarantee does not achieve the due performance of the decree as per Order 42 Rule 6 of the *Civil Procedure Rules*. The relied on *Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 others* [2015] eKLR on this point where it was held that:
 

“The security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ‘ultimately be binding’ are deliberately used and are useful here, for



they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the *Civil Procedure Rules* includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick.”

### **Analysis and Determination**

18. Under Order 42 Rule 6 of the *Civil Procedure Rules*, a party seeking stay of execution pending an appeal must satisfy the court of that he will suffer substantial loss unless the order is made; that the application has been made without unreasonable delay and provide such security as the court may order for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

19. The Applicant has emphasized that it will suffer substantial monetary loss if stay is not granted because the Respondent is a person of unknown means and may be unable to refund the decretal sum if the appeal succeeds. In *James Wangalwa* cited above, it was held 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. Even when an execution has been levied and completed, that is to say, the attached properties have been sold, as it the case here, does not in itself amount to substantial loss under Order 42 Rule 6 *CPR*. This is so because execution is a lawful process, the applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

20. The Applicant has stated that they have an arguable case with high chances of success. They have argued that they have filed a Notice of Appeal and that it is not fatal for them to fail to attach the memorandum of appeal as alleged by the Respondents. In the case of *Somak Travels Limited v. Gladys Aganyo* (2016) eKLR the Court of Appeal held as follows:

“While it would have been desirable for the applicant to annex a draft proposed memorandum of appeal to its application, we are of the view that the omission to do so is not fatal, and is curable in so far as the applicant has sufficiently set out its grievances on the face of the application. That is the case in this application. The applicant set out what it considers to be arguable points that it intends to raise during the appeal and addressed at length on the same. This is sufficient to demonstrate its grievances against the orders that it seeks to be reversed.”

21. While I agree with the position in *Wangalwa* case above that execution is a legal process and it does not lead to substantial loss, and having noted that the Applicant has not filed memorandum of appeal to demonstrate the strength of the appeal, I take the view that the Applicant has demonstrated his grievance on the face of his application and also in his submissions alleging that the amount awarded by the trial court for the injuries sustained was excessive. I also find that there was no undue delay in filing the application

22. On the issue of security, I have noted that the Applicant is willing and ready to furnish security though in the form of bank guarantee which is contested by the Respondent. The purpose of providing



security is explained in *Arun C. Sharma v. Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 others* [2014] eKLR, where the court stated that:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.... Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the *Civil Procedure Rules* acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

23. I am persuaded that the Applicant has met the threshold for grant of stay pending the Appeal. However, I do not think a bank guarantee would be appropriate in this regard.
24. Consequently, I hereby allow the Notice of Motion dated 16<sup>th</sup> February 2024 in the following terms:
  - a. That this court be pleased to issue an order for stay of execution of the decree issued pending the hearing and determination of the intended appeal.
  - b. That the Applicant shall deposit the decretal sum in a joint interest earning account in both names of the advocates currently on record for the Applicant and the Respondent within 45 days from the date of this Ruling.
  - c. The Applicant shall file and serve a Record of Appeal within 60 days from the date of this Ruling.
  - d. Costs shall be in the cause.
25. Orders accordingly.

**DATED, SIGNED AND DELIVERED THIS 16<sup>TH</sup> DAY OF JULY 2024.**

**S. N. MUTUKU**

**JUDGE**

