



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kenya Power and Lighting Co. Ltd & another v Mbugua (Civil Appeal  
4 of 2020) [2023] KEHC 3334 (KLR) (20 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3334 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
CIVIL APPEAL 4 OF 2020  
AC MRIMA, J  
APRIL 20, 2023**

**BETWEEN**

**KENYA POWER AND LIGHTING CO. LTD ..... 1<sup>ST</sup> APPELLANT**

**MATHEW OMONDI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**LIVINGSTON MBUGUA ..... RESPONDENT**

**RULING**

**Introduction**

1. This is a consolidated ruling in respect of two applications. The applications are the Notice of Motion dated June 20, 2021 filed by the Respondent herein, Livingstone Mbugua. The other application is also a Notice of Motion jointly taken out by the Appellants herein Kenya Power and Lighting Co Ltd and Mathew Omondi. It is dated July 16, 2022.
2. The substantive appeal in this matter was on the May 24, 2022 dismissed with costs.
3. Before then, the Appellants were on February 16, 2020 vide Kitale High Court Misc Application No 15 of 2020 directed to deposit Kshs 2,000,000/= (Read: Kenya Shillings Two Million Only) in a joint interest earning account as a condition for stay of execution pending appeal.
4. The Appellants duly complied with the order and deposited the said sum at the Mayfair Bank CIF No Cxxxxxxxxx in Account No 0xxxxxxxxx in the joint names of the parties' Counsel that is Messrs. Onyinkwa & Company Advocates and Messrs. Kiarie & Company Advocates.

**The Applications:**

5. Both applications are premised on the determination of the appeal. On the part of the Respondent, the following reliefs were sought: -



1. .... Spent;
  2. That the sum of Kshs 2,000,000.00 deposited in a fixed deposit account in Mayfair Bank CIF No Cxxxxxxxxxxx in account No 0xxxxxxxxxxx together with the accrued interest thereon be forthwith paid to M/s Kiarie & Company Advocates through Standard Chartered Bank Kitale Brach account No 0xxxxxxxxxxx.
6. The Appellants also sought some orders in their application. They are as follows: -
1. .... Spent;
  2. .... Spent;
  3. That there be a temporary stay of execution of the judgment and/or decree issued on May 24, 2022 by the High Court in Kitale HCCA No 4 of 2022 pending the hearing and determination of the preferred Appeal before the Court of Appeal;
  4. That the sum of Kshs 2,000,000.00 initially deposited in the joint interest earning account as half of the decretal sum do remain deposited as security for costs pending the hearing and determination of the preferred Appeal before the Court of Appeal;
  5. That costs of the Application be provided for.
7. Both applications were opposed by the rival party(ies). By an order of this Court, the applications were heard by way of written submissions. Parties complied with the filing of respective submissions.
8. In urging this Court to allow their application, the Appellants explained that they abided by the conditions precedent for grant of stay as ordered and deposited the sums. Thereafter, their appeal was dismissed. They pointed out that following the judgment, they filed a Notice of Appeal challenging the whole decision of this Court. They annexed copies of the Notice of Appeal dated May 26, 2022 and a Letter to the Deputy Registrar evenly dated.
9. The Appellants argued that their application was merited as the Respondent's financial muscle was unknown. As such, they submitted that the Respondent was unlikely to refund the decretal sum in the event their bid to appeal is successful. They urged this Court to grant a stay of execution on condition that the sum held in the joint interest earning account be retained pending the determination of the preferred appeal.
10. On whether they were likely to suffer substantial loss, the Appellants submitted in the affirmative since they risked facing imminent execution. They posited that the Respondent's means was unknown and were thus trepidatious that the decretal sum would not be recovered in the event their appeal is upheld. They submitted affirmatively that the application was filed timeously. They computed that after delivery of judgment, they filed their Notice of Appeal 6 days later. The present application was thereafter filed on July 16, 2022.
11. In yielding to abide by the conditions of the Court, the Appellants urged this Court to order the deposited sum per the ruling of July 16, 2020 be retained as security for due performance.
12. Commenting on the Respondent's application, the Appellants avowed that the Respondent failed to demonstrate that he will suffer irreparable harm if the orders sought were not granted. They were adamant that the Respondent had failed to establish that the estate was of means. Ultimately, he urged this Court to consider that the dispute remains alive. By virtue of that fact, it is only feasible and lawful that the decretal sum be retained until conclusion of the dispute.



13. Further, the Appellants were apprehensive that the Respondent would commence the execution process since the import of the Court's judgment was to revert back to the judgment of the subordinate Court. In fact, they noted that the Respondent had commenced the execution process.
14. It was urged that the Appellants had met the threshold for grant of stay of execution orders and should thus be protected. They informed that they had since obtained the proceedings to enable them prepare the Record of Appeal. They urged this Court to grant the reliefs sought.
15. The Respondent filed a Replying Affidavit sworn on October 3, 2022 in response to the Appellant's application. The deponent disclosed that she was substituted as the Respondent to take the place of her deceased husband.
16. She was of the view that following the judgment of the Court, the stay orders automatically lapsed and none ought to issue.
17. In response to the Appellant's averment of the Respondent's inability to repay the decretal sum in the event the appeal succeeds, the Respondent enlightened that the estate owned 2 parcels of land free of any encumbrances namely Kitale Municipality Block 15/Koitogos 89 valued at Kshs 7.5 million and Kamara/Mau Summit Block 1/520. Their Search Certificates were annexed to the affidavit. It was thus argued that in the event of a merited appeal, the Respondent would be in a position to refund the decretal sum.
18. The deponent added that the estate of the deceased was entitled to the fruits of its judgment. She urged this Court to release the funds in the fixed deposit account and dismiss the Appellants' application with costs.

**Analysis:**

19. Execution is a lawful process. An Applicant must, therefore, furnish cogent reasons justifying its interruption. The Appellants seek to stay execution of the judgment of this Court. Conversely, the Respondent has asked this Court to release the sums deposited as security for the due performance since the appeal was determined.
20. With a view to appreciate this matter accordingly, it is imperative to note that the Respondent's cause of action was plainly down in the pleadings. Having been opposed, the matter was heard by the lower Court. A judgment in favour of the Respondent was rendered.
21. Being dissatisfied with the decision, the Appellants lodged the instant appeal. Again, the matter was heard and this Court [Kimaru, J. (as he then was)] and in a well-thought rendition, disallowed the Appellants' plea.
22. Undeterred, the Appellants are on their way to the second appellate Court. Whereas they have such a right in law, it does not, however, follow that the status quo must automatically be maintained. For a party to so succeed in staying execution, it has to satisfy a Court of such a need.
23. The Appellants main concern is the alleged inability to recover the judgment sums from the Respondent in the event execution proceeds and eventually the appeal succeeds.
24. The Respondent has on the other side rendered how the sums will be available to the Appellants if the appeal is successful. It pleaded with this Court to be allowed to enjoy the fruits of the judgment in its favour given that the cause of action arose in 2010 and the dispute has been in Court since 2013.
25. The appeal to the Court of Appeal from the High Court against the judgment and decree of the subordinate Court is a second appeal. It is, therefore, only limited to points of law.



26. In this matter, the Appellants stated that they had long received the proceedings and judgment of this Court and that they were about to lodge the Record of Appeal in the Court of Appeal. Unfortunately, the Appellants did not, at the minimum, state what issues of law, if any, they were intending to raise on appeal.
27. The Respondent has sufficiently explained how the sums will be refunded in the event the appeal succeeds. There is no suggestion that the parcels of land are encumbered in any way. There is, as well, no allegation that the Respondent's estate is in a state of pauperism. Therefore, the fear by the Appellants was clearly allayed.
28. Being satisfied that there is no loss on the part of the Appellants incapable of reparation in this matter, the Appellants' application suffers a false start. Conversely, the Respondent's application is merited.
29. In the end, the following orders hereby issue: -
  1. The Notice of Motion dated July 16, 2022 lacks merit and is hereby dismissed with costs.
  2. The Notice of Motion dated June 20, 2022 is hereby allowed in terms of prayer 2 thereof.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KITALE THIS 20<sup>TH</sup> DAY OF APRIL, 2023.**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered virtually in the presence of: -**

**Miss. Tuwei**, Learned Counsel for the Appellants/Applicants.

**Mr. Kiarie**, Learned Counsel for the Respondent.

**Regina/Chemutai** – Court Assistants.

