



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 276 OF 2006

AJIT BHOGAR SINGH.....PLAINTIFF/RESPONDENT

VERSUS

KENYA POWER & LIGHTING

COMPANY.....DEFENDANT/APPLICANT

RULING

1. Before the Honorable Court is the Notice of Motion application by the Defendant/Respondent dated 14th December, 2020 and filed on 15th December, 2020. It is brought under the provisions of Section 1, 1A, 1B, 3 and 3A of the Civil Procedure Act Cap 21 and Order 42 Rule 6 (1) and (6) and Order 51 of the Civil Procedure Rules 2010. It seeks for the following orders:

(a) *Spend*

(b) *That this Hon. Court be pleased to order a stay of execution of the Judgment delivered on 23rd November 2020 in this suit and all the other consequential orders emanating there from pending the hearing and determination of the appeal.*

(c) *That the costs of this application be provided for.*

2. The said application is premised and supported by the grounds, annexures, testimony and the 12 Paragraphed Supporting Affidavit of Emily Kirui sworn and dated 14th December, 2020 filed in court on 15th December, 2020 (hereinafter called “The Supporting Affidavit”)

She deposed that she was a female adult of sound mind and understanding and working as a Legal Officer, employed by the Kenya Power & Lighting – the Defendant/Applicant hence duly competent to swear this affidavit.

3. She held that the Judgment in this case was delivered on 23rd November, 2020 by this court in favour of the Plaintiff/Respondent against the Defendant/Applicant for inter alia general damages of Kenya Shillings twenty Million (Kshs. 20,000,000/=) on account of trespass and costs of the suit, a copy of the judgement annexed thereof (Hereinafter referred to as “The Decretal amount”). She stated on being aggrieved by the said judgment the Defendant/Applicant filed a Notice of Appeal on 26th November, 2020 and applied to the Deputy Registrar for typed and certified copies of the proceedings and judgment for purposes of filing and use in the appeal. She argued that they had an arguable appeal with a high probability of success.

4. It was her deposition that unless the judgment and all other consequential orders were stayed pending the hearing and determination of the appeal, the Defendant/Applicant would suffer substantial loss and the appeal be rendered nugatory. She explained that the Defendant/Respondent was likely to suffer substantial loss as it would be forced to settle the decretal sum to the Plaintiff/Respondent who would not be in a position to refund the same if the appeal was to be successful to their favour.

5. She asserted that the Defendant/Applicant would be willing to abide by any order as to security that this court would make for the due performance of the decree. She deposed that the application was made without undue delay and that no prejudice stood to be suffered by the Plaintiff/Respondent if the application was to be allowed. She prayed for the orders to be granted as prayed.

II THE PLAINTIFF’S/RESPONDENT’S CASE

6. The Defendant/applicants application was opposed by the Plaintiff/Respondent. On 14th July, 2020, upon being served they filed a 12 Paragraphed Replying Affidavit sworn by Mr. Benjamin Osundwa Amani, the Advocate for the Plaintiff/Respondent. The Learned Counsel

confirmed that judgment had been delivered to the Plaintiff/Respondent's favour and against the Defendant/ Applicant on 23rd November, 2020. From the said judgment, he affirmed that the Defendant/Applicant was ordered to pay the decretal amount as general damages for trespass which was yet to be paid. The Learned Counsel also intimated being aware that the Defendant/Applicant had also been ordered to negotiate proper way leave agreement and the right of way with the Plaintiff/Respondent within 120 days which had equally not been done.

7. According to the Learned Advocate, the Defendant/Applicant had failed to demonstrate the urgency they had and/or deliberate expediency to prosecute the intended Appeal as they had failed to attach a Draft Memorandum of Appeal to the application. He pointed out from the commitment committed and admission by the Defendant/Applicant in their filed pleadings of being ready and willing to offer security of costs on condition of being granted the stay of execution pending the appeal, indicated the Plaintiff/Respondent had already to conceded.

9. The Learned Advocate proposed that taking that the ownership to the suit land was not in issue and the only sole matter for contention was quantum they proposed then if the Honorable Court was inclined to allow the Application, then the Defendant/Applicant should be ordered to pay the Plaintiff/Respondent half the decretal amount and the other half be deposited in a joint interest earning account. Furthermore, he observed that the Defendant/Appellant had continued being in occupation of the suit property which greatly prejudiced the Plaintiff/Respondent and which prejudice was ongoing to date.

10. The Advocate deposed the Defendant/Applicant was a public company listed in the stock market therefore was capable of releasing and depositing the decretal amount in the stated terms pending the appeal. The Learned Counsel for the Plaintiff/Respondent asserted that should the Defendant/ Applicant succeed in the appeal they would always recover the amounts released to the Plaintiff/Respondent by way of lieu on the property which they were currently in possession of. The upshot of all the foregoing, the Advocate urged Court to apply its unfettered discretion and order for the release of the decretal amount within the next 30 days.

III. THE SUBMISSIONS

11. On 29th July, 2021 when all the parties were present in court, directions were given to the effect that the notice of motion application dated 14th December 2020 be disposed off by way of written submissions. The Plaintiff/Respondent held they would not be filing any submission but would be relying on their Replying Affidavit hereof filed by the law firm of Messrs. Kadima & Co. Advocates.

THE SUBMISSIONS BY THE DEFENDANT/APPLICANT

12. On 12th August, 2021, the Learned Counsel for the Defendant/Applicant the Law firm of M/s. Kiarie, Kariuki & Co. Advocates filed their written submissions dated 10th August, 2021. They urged court to order for stay of judgment and decree delivered on 23rd November 2020 in this suit and all other consequential orders emanating therefrom pending the hearing and determination of the appeal. They submitted that granting of a stay of appeal was an exercise of discretion of the court on sufficient cause being shown by the Appellant. They cited the provisions of Order 42 Rule 6 (1) of the Civil Procedure Rules, and the three (3) conditions upon which the Court would consider while granting the stay of execution orders. According to them the Defendant/Applicant fully complied with the said three (3) conditions in that

(a) Being a money decree for an award of general damage for trespass for the decretal amount plus costs it would be substantial loss and that the Respondent would not be in a position to compensate them in case they were to succeed in the Appeal and that the Plaintiff/Respondent had filed to address the facts on how they would refund the money. They held that the financial status of the Plaintiff/Respondent had not been disclosed. Further, they refuted the fact that it would not be easy to recover afore stated sum by way of lien from the land as they were not holding a lien over the suit land. To buttress their point, they relied on the decision of **James Wangelwa & Another –VS- Agnes Naliaka [2022] eKLR** on what constituted a substantial loss.

(b) They submitted the Application was filed without undue delay and timeously – the judgment having been delivered on 23rd November, 2020 and the Memorandum of Appeal was filed on 15th December, 2020.

(c) On the security for costs the Defendant/Applicant reiterated their willingness to deposit such a security as this court would order for the performance of the decree as deponed at Paragraph 7 of the Supporting Affidavit.

13. They submitted that the general damage for afore stated sum formed the substratum of the appeal before the court of appeal and if a stay of execution pending appeal was not granted the appeal if the appeal was successful it would be rendered nugatory. On the other hand the Advocate submitted that if the decretal sum was to be paid to the Plaintiff/Respondent, It would negatively impact on its services and operations which were of public nature and may even paralyze its activities. On this point they relied in the decision of **Reliance Bank Ltd. – VS- Norlake Investments Ltd. [2020] E.A. 227** where court is granting a stay of execution court held:-

“A refusal to grant a stay would cause the Appellant such hardship as would be out of proportion to any Suffer the Respondent might undergo while awaiting the hearing and determination of the Applicant’s Appeal”

They submitted that they had an appeal which raised triable issues. The upshot of this they urged court to grant them the orders as prayed from the Notice of Motion application dated 14th December, 2020.

IV. ANALYSIS AND DETERMINATION

14. I have carefully read and put into account all the filed pleadings, the submissions, authorities relied on and the relevant provisions of the appropriate and enabling laws. In order to arrive at an informed decision, this honourable court has framed the following issues for its determination. These are:-

a) *Whether the Defendant/Applicant has fulfilled the fundamental requirements of being granted stay of execution as set out under Order 42 rule 6 (1) & (6) of the Civil Procedure Rules?*

b) *Who will bear the Costs of the application.*

ISSUE No. 1 - Whether the Defendant/Applicant has fulfilled the fundamental requirements of being granted stay of execution as set out under Order 42 rule 6 (1) & (6) of the Civil Procedure Rules?

15. Ideally, the purpose of an application for stay of execution by any applicant is with an aim to preserve the subject matter in dispute so that the right of the Defendant/Applicant is safeguarded. See the case of *Consolidated Marine – Versus - Namprijad & Ano. Civil Appeal No. 93 of 1989* Nairobi where court held that:-

“The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory.

In saying so, it is imperative to critically assess the legal spectrum of this aspect. The legal substratum for granting stay of execution is anchored in these provisions of law. These are:-

Order 42 Rule (6) (1) of the Civil Procedure Rules entitled **“Stay in Case of Appeal”** hold inter alia:

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order but the Court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on application being made to consider such an application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the Appellate Court to have such order set aside”.

17. While the provisions of Order 42 rule (6)(6) of the CPR which provides:-

“Notwithstanding anything contained in Sub-rule (1) of the rule the High Court shall have power in exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from the sub-ordinate Court or tribunal has been complied with.

Regarding the granting of stay of execution pending appeal, there are plethora of decided cases and hence a well set out principles based on precedents. For instance, below are the leading ones. In the Civil Appeal No. 107 of 2015 – *Masisi Mwita –VS_ Damaris Wanjiku Njeri [2016] eKLR* where the court held that:-

“The application must meet a criteria set out in precedents and the criteria is best captured in the case of “Halal & Another –VS- Thornton & Turpin Ltd. where the Court of Appeal Gicheru J.A., Chesoni & Coker AG 1A) held that: “The High Courts discretion to order stay of execution of its order or Decree is fettered by three (3) conditions namely:- Sufficient Cause, substantial loss would ensue from a refusal to grant stay the Applicant must furnish security, the application may be made without unreasonable delay. In addition the Applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Wakolo –VS- Straman E.A. Ltd.[2013] as follows:-

“In addition the Appellant must prove that if the orders sought are not granted and his Appeal eventually succeeded them the same shall have been rendered nugatory”. These twin principles go hand in hand and failure to prove one dislodges the other. The court notes with great humility the Plaintiff/Applicant agrees with it by citing the case of Vishram Rouji Halal –VS- Thornton & Turpour Civil Appeal No. 15 of [1990] KLR 365,

And in the *Canvass manufacturers Ltd. –VS- Stephen Reuben Korunditu Civil application No. 158 of 1994 [1994] LLR 4853 –* where the court held that:-

“Conditions for grant of stay of execution pending appeal, arguable appeal and whether the appeal would be rendered nugatory. The discretion must be judicially exercised” Further in the case of *“Stephen Wanjiku –VS- Central Glass Industries Ltd. Nbi) HCC No. 6726 of 1991* the court held that:-

For the court to order a stay of execution there MUST be:-

i. Sufficient cause;

ii. Substantial loss

iii. No unreasonable delay.

iv. Security and the grant of stay is discretionary.

18. It is evident from the above provisions of law that the court has discretion to issue an order of stay of execution. However, the said discretion must be exercised judicially and not capriciously. In exercising its discretion, court should therefore always opt for the lower rather than the highest risk of injustice. The court is to weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that the successful party is not impeded from enjoying the fruits of judgement. Always, there is need for equal level footing or playing ground.

Despite of these principles, courts have also argued that the four (4) principles above are not binding on this court in view of the overriding principles (or what has been termed as the Oxygen rule) being the courts inherent powers as founded under the provisions of Sections 1, 1A, 3, 3A of the CPA and Section 3 of the Environment and Land Court Act No. 19 of 2012. These inherent powers emphasise on having land dispute being justly, expeditiously, proportionately and assessible determination of dispute without impending on to undue technicalities. While considering whether to grant the orders for stay court has to weigh all these considerations without taking the risk of leading to undesirable or absurd outcome.

19. Furthermore, based on the above clear four (4) principles, this court will then proceed to determine whether the Defendant/Applicant herein has satisfied the required standard for granting of stay orders pending appeal as follows:-

Firstly, the Defendant/Applicant must show that they will suffer substantial loss. Apparently, this seem to be the main issue out of the four set out principles. There must be empirical or documentary evidence of the substantial loss to support the contention and not just in face value. As argued by the Defendant/Respondent and admitted by the Learned Counsel for the Plaintiff the Defendant is a reputable blue chip state corporation dealing on commercialization of electricity in the Country. They are likely to suffer substantial loss if courts operations are interfered with by not granting the orders.

20. On this case, I reiterate that it has taken into account that it is not the practice of this court to deprive the Plaintiff/Respondents, being the successful litigant of the fruits of their litigation from the judgment entered in their favour.

Additionally, through its Learned Advocates, it held that the filed Appeal ran the risk of being rendered nugatory and otiose unless the stay of execution orders were granted as prayed in the application. Therefore, the court not fully satisfied and convinced that the Applicant may suffer any substantial loss if the orders sought are not granted.

21. Secondly, the Defendant/Applicant must satisfy court that the notice of motion application was made without **undue and unreasonable delay**. This court has noted from the time the of delivery of Judgement on 23rd November, 2020, the Defendant/Applicant took only twenty one (21) days being three (3) weeks from the as on 14th December, 2020 it had filed this application. Therefore, this court finds that there has been no unreasonable and inordinate delay as envisaged in law in filing this application by the Defendant/Applicant.

22. Thirdly, on the issue of security for costs, it is noted that the bone of contention is that the general damage and the decretal amount that if a stay of execution pending appeal was not granted the appeal and the appeal became successful it would be rendered nugatory and the Plaintiff/Respondent would find it difficult to refund the said sum. Additionally, It would negatively impact on its services and operations which were of public nature and may even paralyze its activities. On the other hand the Plaintiff/Respondent Advocate submitted that in the unlikely event that the appeal succeeded, they would be compensated in lien by retaining a proportion of the suit land which they were in possession off at the moment.

In any case, Defendant/Applicant has confidently undertaken and deponed under its Paragraph 7 of the supporting affidavit thus:- ***“The Defendant/Applicant would be willing to abide by the orders of security due to performance of the decree.....”***. This is extremely encouraging coming from a reputable statutory corporation body. For this reason, applying its discretion, the court will consider to grant a reasonable sum to be deposited in a joint account of the Plaintiff/Respondents and Defendants/Applicants Advocates pending the hearing and determination of the appeal.

Determination

26. From the foregoing, therefore, and for avoidance of any doubts order:-

a) THAT the Notice of Motion application dated 14th December, 2020 by the Defendant/Applicant is meritorious and hence it is hereby allowed.

b) THAT the Appellant is granted a stay of execution of the Judgment delivered on 23rd November 2020 in this suit and all the other consequential orders emanating there from pending the hearing and determination of the appeal.

c) THAT the Appellant/Applicant is directed to pay as security a sum of Kenya Shillings Five Million (Kshs. 5, 000, 000.00) in a Joint interest earning bank account of the law firms of Messrs. Kadima & Company Advocates and Kiarie Kariuki & Company Advocates within the next 30 days from today until this appeal is heard and determined.

d) THAT failure to adhere with any of these orders the Notice of Motion application dated will stand dismissed.

e) THAT the costs of this application to be in the cause.

IT IS SO ORDERED.

RULING DELIVERED, DATED AND SIGNED IN OPEN COURT THIS 16TH DAY OF NOVEMBER 2021.

HON. JUSTICE L.L. NAIKUNI

JUDGE

(ELC- MOMBASA)

In the presence of:-

M/s. Yumna – the Court Assistant.

Mr. Amadi Advocate for the Plaintiff/Respondent.

M/s. Kabole Advocate for the Defendant/Applicant