



**Kenya Electricity Transmission Co Ltd v Ndiema (Civil Appeal
78 of 2023) [2023] KEHC 24120 (KLR) (13 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24120 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL 78 OF 2023
M THANDE, J
OCTOBER 13, 2023**

BETWEEN

KENYA ELECTRICITY TRANSMISSION CO LTD APPELLANT

AND

PAUL MDONGO NDIEMA RESPONDENT

RULING

1. By a Notice of Motion dated 13.9.23, the Appellant/Applicant seeks stay of execution pending appeal of the judgement delivered in favour of the Respondent, on 2.5.23 in Malindi CMCC No. 81 of 2021. The Application is supported by the grounds on its face, the supporting affidavit of D. Muyaa, counsel for the Appellant/Applicant, sworn on even date.
2. The Respondent opposed the application through a replying affidavit sworn on 20.9.23 by his counsel, Geoffrey Kilonzo.
3. The Appellant/Applicant is aggrieved by the judgement of the trial court and has already filed an appeal against the said decision. In particular, the Appellant/Applicant is aggrieved that the trial court apportioned liability at 100% against it and a non-existent entity, over an accident in which the Appellant/Applicant denies its vehicle was involved. Further that the court awarded general damages of Kshs. 800,000/=, special damages of Kshs. 3,520/= and future medical expenses of Kshs. 70,000/= for what was pleaded as fractures of 3 upper teeth and blunt injury to the lips, nose, mouth elbows and chest. It is asserted that the appeal is not frivolous but arguable and was filed timeously and without delay. The Appellant/Applicant averred that the Respondent has made attempts to execute the decree emanating from the judgement. Further that the Respondent has no known means to repay the award and unless stay is granted, the Appellant/Applicant will suffer immense loss and prejudice and the appeal will be rendered nugatory. On the other hand, the Respondent will suffer no prejudice if the orders sought are granted. The Appellant/Applicant stated that it is willing to abide by such reasonable conditions as the Court may set and offers by way of security, a bank guarantee for the decretal sum.



4. The Respondent's reply is that the Application is brought in bad faith and lacks merit, is meant to deny the Respondent the fruit of litigation and is an abuse of the court process. Further that the Applicant has not demonstrated that the appeal would be rendered nugatory if stay is not granted. Additionally, that the award in question is within the range applied by most courts and that the right to appeal should be balanced with the right of a decree holder to enjoy the fruits of judgment. The Respondent asserted that it is in the interests of justice and fairness that the Application is dismissed with costs. However, that if the Court were to be inclined to allow the Application, then the Appellant/Applicant should be directed to pay the Respondent through his advocate half of the decretal sum and the other half be deposited in Court as security.
5. The jurisdiction of the Court to grant stay of execution is set out in Order 42 Rule 6 of the Civil Procedure Rules. Sub-rule 2 provides:
 - (2) No order for stay of execution shall be made under subrule (1) unless-
 - (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - (b) such security as the court order for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
6. The law requires that an application for stay of execution be filed without unreasonable delay. In the instant case, the decision of the lower court by which the Applicant is aggrieved, was made on 2.5.23 while the Application is dated 13.9.23, almost 4 months later. While there has been some delay, the same cannot be said to be inordinate.
7. On substantial loss, the Appellant/Applicant contends that the Respondent has no known source of income and may be unable to refund the decretal amount if the appeal succeeds, thereby occasioning substantial loss to the Appellant/Applicant. The Respondent did not rebut the assertion that he has no known source of income and has not demonstrated capacity to refund any moneys that may be paid in full or part satisfaction of the decree, were the appeal to succeed. It is therefore necessary to preserve the substratum of the appeal pending the hearing and determination thereof.
8. In the case of James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR, where Gikonyo, J. had this to say on substantial loss:

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. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein N. Chesoni [2002] 1KLR 867, and also in the case of Mukuma v Abuoga quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

“...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.”
9. I concur with the learned Judge and find that it is necessary to preserve the status quo to prevent substantial loss to the Appellant/Applicant, that would be irreparable. As such, I am persuaded that the appeal may be rendered nugatory if stay is not granted and that substantial loss may be occasioned



if the orders sought are not granted. The Court has also considered the willingness on the part of the Appellant/Applicant to offer security.

10. In the end I find that the Application succeeds. Stay of execution pending appeal is hereby granted on the following terms:

- i. The record of appeal shall be filed within 21 days.
- ii. The entire decretal amount shall be deposited in Court within 21 days.
- iii. In default, the stay granted herein shall lapse.
- iv. The costs of this application shall abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED IN MALINDI THIS 13TH DAY OF OCTOBER 2023.

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M. THANDE

JUDGE

