



**Kenya Power & Lighting Company Limited v Scolia Company Limited (Civil Appeal E144 of 2023) [2023] KEHC 23527 (KLR) (13 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23527 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL APPEAL E144 OF 2023  
RE ABURILI, J  
OCTOBER 13, 2023**

**BETWEEN**

**KENYA POWER & LIGHTING COMPANY LIMITED ..... APPELLANT**

**AND**

**SCOLIA COMPANY LIMITED ..... RESPONDENT**

**RULING**

**Introduction**

1. This ruling determines two applications dated 15.8.2023 and 20.9.2023. In the application dated 15.8.2023, that was filed during the vacation period, the applicant sought orders to stay execution of the decree issued by the Hon. Cheruiyot on the 3<sup>rd</sup> July 2023 in Kisumu CMCC No. E346 of 2021 where the trial court awarded the respondent Kshs. 7,707,112.25, general damages of Kshs. 1,000,000 together with interest at court rates as well as the costs of the suit.
2. The applicant also sought for leave of court to file the memorandum of appeal out of time.
3. When the aforementioned matter was presented before the duty court during the recess period, the court observed that as there was no decree extracted in accordance with the law or any costs assessed, there was no imminent danger of execution and as such there was no need for grant of stay of execution. The court directed the applicant to serve the application on the respondent and seek a hearing date on the same before this court.
4. In the application dated 20.9.2023, the applicant sought the following orders:
  - i. Spent
  - ii. That pending the hearing and determination of the Notice of Motion dated 15.8.2023, this Honourable Court be pleased to grant stay of execution of warrants of proclamation and attachment by Victoria Blue Auctioneering Services dated the 15<sup>th</sup> September 2023 or any



execution against the applicant herein by the plaintiff either by itself or through agents or auctioneers.

- iii. That pending the hearing and determination of this application this Honourable Court be pleased to issue an order that the decretal sum of Kshs. 12,299,566.45 be deposited in a joint interest account.
  - iv. That the costs of this application be provided for.
5. The application was supported by the grounds therein as well as the supporting affidavit deposed by one Zachary Ombati, the applicant's Chief Security Officer.
  6. It was the applicant's case that the trial court entered judgement against it on the 3<sup>rd</sup> July 2023 for Kshs. 7,707,112.25, general damages of Kshs. 1,000,000 together with interest at court rates as well as the costs of the suit and that it was desirous to appeal against the judgement of the trial court.
  7. The applicant averred and deposed that it filed an application dated 15.8.2023 in which the court directed that it could not grant stay of execution as the respondent had not extracted the decree and commenced execution then directed that the application be mentioned on the 25.9.2023.
  8. The applicant deposed that immediately after the court directions, the respondent extracted the warrants of attachment and instructed Victoria Blues Auctioneering services to proclaim the applicant's property and that on the 18.9.2023, Victoria Blues Auctioneering served the applicant served the applicant with warrants of attachment and sale and proclamation notice for the sum of Kshs. 12,299,566.45.
  9. It was the applicant's case that it was willing and ready to deposit the decretal amount into a joint interest earning account and further that no prejudice would be suffered by the respondent if the prayers sought were granted but rather, substantial justice would be done as each of the parties would be afforded and opportunity to be heard.
  10. The applicant averred that that if stay was not granted, the appeal would be rendered nugatory as the respondent had no money to refund the applicant if it was paid all the decretal sum of over Kshs. 7,000,000.
  11. On the reasons for the delay in filing the appeal, it was asserted and deposed that the applicant's counsel applied for copies of proceedings and judgment the same day of the judgment delivery on 3/7/2023 in order for them to advise their client the applicant on the merits of the decision and whether an appeal would be preferable but that the court never supplied them with the said proceedings and judgment. Further, that upon inquiry, counsel was informed that the trial magistrate had proceeded on leave immediately upon delivering the judgment which is sought to be impugned and that the subject court file was locked up in his chambers hence the delay. The letter requesting for copies of proceedings and judgment was annexed to the affidavit sworn by Zachary Ombati on behalf of the applicant herein.
  12. The applicant also annexed other correspondence between the parties on proposals to deposit the decretal sum in a joint interest earning account, the pleadings filed in the lower court, exhibits produced and the draft memorandum of appeal. It was asserted in deposition that the respondent was not in apposition to repay the decretal sum if it is settled and the appeal is successful hence the appeal shall be rendered nugatory.
  13. Opposing the application, the respondent filed Grounds of Opposition dated 22.9.2023 in which it raised the following issues:



- i. The defendant's application is unknown in law and it is a duplicity of the application dated 15/8/2023.
  - ii. The application is an abuse of the court process.
  - iii. There is no appeal to warrant the grant of orders of stay of execution and the application is therefore premature.
  - iv. The application does not meet the threshold for grant of orders sought.
14. The applications were argued orally with each party's counsel reiterating their respective positions as per the grounds, supporting affidavit and the grounds of opposition respectively.
  15. On the part of the respondent, it was argued that the two applications are duplex, that there is no appeal for this court's consideration and that there was no evidence of the respondent's inability to refund the decretal sum which is 12, 299, 5. Further submission was that leave to appeal out of time had not been addressed hence the application should be dismissed.
  16. In a brief rejoinder, counsel for the applicant submitted that the application dated 15/8/2023 is for both leave to appeal out of time and stay pending appeal and that reasons had been advanced for the delay.

### **Analysis and Determination**

17. I have considered the applications herein and the corresponding pleadings and submissions.
18. This court observes and reiterates that the application dated 15th August 2023 was filed during the recess and that it sought for leave to appeal out of time and stay of execution of decree in the lower court pending appeal. However, the recess duty judge did not find it necessary to handle the application during the recess on account that there was no evidence of a decree obtained for execution process hence, he directed the applicant to serve the respondent with the application and appear before this court for the hearing of that application.
19. No sooner had the applicant served the application for interpartes consideration than the respondents put in motion the execution of decree process hence the applicant was compelled to file the application dated 20/9/2023 to stop the execution process. The recess duty court found that stay was not warranted as the respondent had not obtained a decree. The application dated 20<sup>th</sup> September 2023 was filed by the applicant after the respondent obtained warrants of attachment. That is how the two applications came to be.
20. The issue of the application dated 20/9/2023 being duplicitous of the previous application of 15.8.2023 does not therefore arise and the same is dismissed at this stage as it the latter application dated 20.9.2023 was necessitated by the threat of execution of the warrants of attachment and proclamation obtained by the respondent against the respondent's properties and was thus not duplicitous nor an abuse of the court process.
21. Turning to the main issues for determination, is whether the applicant has demonstrated that the orders of leave to appeal out of time and stay of execution pending appeal are merited.
22. On whether leave to appeal out of time is merited, section 79G of the *Civil Procedure Act* stipulates that an appeal from a decree or order of the magistrate's Court shall be filed in the High Court within 30 days of the date of decree or order.



23. However, the proviso thereto is clear that a party may apply for extension of time within which an appeal can be filed where the appeal was not lodged within the thirty days as stipulated in the main section. There are, however, conditions that must be fulfilled by an applicant who seeks for the discretion of the court to file an appeal out of time, which conditions have been settled through interpretation of the provisions that allow the filing of the appeal out of time.
24. In *Mombasa County Government v Kenya Ferry Services and another* [2019]e KLR the Supreme Court reiterated the guiding principles set out in the Nick Salat Case on extension of time and stated as follows:

“(25) Concerning extension of time, this Court has already set the guiding principles in the Nick Salat Case as follows:

“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

“... we derive the following as the underlying principles that a Court should consider in exercising such discretion:

1. extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the Court;
2. a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;
3. whether the Court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
4. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
5. whether there will be any prejudice suffered by the respondents, if extension is granted;
6. whether the application has been brought without undue delay; and
7. whether in certain cases, like election petitions, public interest should be a consideration for extending time” [emphasis supplied]

(26) Further, in the case of *County Executive of Kisumu v County Government of Kisumu & 8 others*, SC. Civil Appl. No. 3 of 2016; [2017] eKLR, this Court emphasized the need for the Applicant, in an application for extension of time,



to satisfactorily declare and explain the whole period of delay to the Court. On the issue of delay occasioned by typed proceedings, we stated as follows:

“[24] a ground of delay of getting typed proceedings is not a prima facie panacea for a case of delay whenever it is pleaded. Each case has to be determined on its own merit and all relevant circumstances considered.” [emphasis added]”

25. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(2) of the [Civil Procedure Rules](#) which provides:
  - “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 orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”
26. The time for filing of an appeal from the subordinate Court to the High Court is 30 days from the date of decree or order. However, Section 79G excludes from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.
27. Applying the principles set out in the above judicial pronouncements by the Supreme Court and section 7G of the [Civil Procedure Act](#) to this case, I observe that judgment was delivered on 3/7/2023 and this application was filed on 24<sup>th</sup> August 2023 which was 21 days out of the stipulated 30 days. The reason for the delay is that the applicant’s counsel applied for copies of proceedings and judgment on 3/7/2023 the same day of judgment but that the trial magistrate proceeded on leave immediately after delivering the judgment and locked the file in his chambers. Further, that they could not have filed an appeal without first perusing the judgment and advising their client.
28. There is no contrary position to that stated by the applicant on oath. Where the delay was occasioned by the court not availing the file for perusal or proceedings and judgment not being supplied to the party applying in good time, this court will not hesitate to grant the orders sought in the interest of justice as courts of law exists to do justice.
29. Further, the courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the [Civil Procedure Act](#) or in the interpretation of any of its provisions. Section 1A(2) of the [Civil Procedure Act](#) provides that: “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective” while under section 1B some of the aims of the said objectives are “the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.”
30. In the end, I find that the delay was not inordinate and was not occasioned by the applicant herein and neither was the delay deliberate on the part of the applicant. The reasons advanced for the delay are satisfactory.
31. I find the prayer for leave to appeal out of time merited. I grant it.



32. On the prayers for stay of execution of decree pending the hearing and determination of the pending appeal, the respondent submitted that there is no appeal filed. The applicant submitted that the appeal shall be rendered nugatory if stay is not granted and that it shall suffer substantial loss. Further, that it had filed the application without delay. In addition, the applicant argued that it was ready able and willing to deposit the entire decretal amount in a joint interest earning account to be held by both parties' advocates as security for the due performance of decree and had made such offer before the execution process was set in motion by the respondent.
33. An applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. See [Antoine Ndiaye v African Virtual University](#) [2015] eKLR.
34. As to what substantial loss is, it was observed in [James Wangalwa & Another v Agnes Naliaka Cheseto](#) [2012] eKLR, 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 execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the [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.”
35. In the instant case, the applicant avers that it stands to suffer substantial loss of over Kshs. 7,707,112.25, general damages of Kshs. 1,000,000 together with interest at court rates as well as the costs of the suit if stay of execution is not granted. They further aver that the respondent has not demonstrated that he is able to refund the sum if the appeal succeeds. The appellants have also pleaded that they are able to comply with any order as to security of costs.
36. On its part, the respondent states that the appellant has not met the threshold for grant of orders of stay.
37. The court, in [RWW v EKW](#) [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words:
- “The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.
9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”



38. In *Butt v Rent Restriction Tribunal* [1982] KLR 417, the Court of Appeal stated, Inter alia as follows regarding stay pending appeal:

“... If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings.

It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in *Wilson v Church (No 2)* 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p 458:

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”

39. In this case, the Respondent has not given any material as to its ability to repay the decretal sum in case the appeal succeeds and in light of the depositions by the applicant that it shall suffer substantial loss if stay is not granted, I am persuaded that substantial loss has been proved.
40. I am also satisfied that there has been no inordinate delay in bringing the instant application as the judgment and decree being appealed against was delivered on the 3.7.2023 and the application attaching a draft Memorandum of Appeal was filed on 24<sup>th</sup> August 2023 which delay was not inordinate and has been satisfactorily explained.
41. As to security of costs, the applicant has stated that it is able and willing to comply with that condition on security for the due performance of the decree appealed from.
42. This Court is not bound by the type of security offered by an applicant. It may make appropriate orders which serve the interest of justice taking into account the fact that money depreciates unless it is kept in an interest earning account for the period of the appeal.
43. I must however observe that the execution process undertaken by the respondent and auctioneers was premature as there is no evidence that a draft decree was drawn and served on the applicant’s counsel for approval as required under Order 21 Rules 8 of the Civil Procedure Rules.
44. Taking all the above factors into account and in order not to render the intended appeal nugatory as well as to give effect to the overriding objective of the *Civil Procedure Act*, I find and hold that the applicant has fulfilled the requirements for grant of stay of execution pending appeal as stipulated under Order 42 Rule 6 of the *Civil Procedure Rules*.
45. Accordingly, I hereby allow the applicant/appellant’s applications dated 15/8/2023 and 20.9.2023 and grant the applicant leave to appeal out of time from the judgment and decree in Kisumu CMCC No. E346 of 2021. The memorandum of Appeal shall be filed within seven Days of this ruling. I further order for stay of execution of the said decree pending hearing and determination of the intended appeal conditional upon the applicant depositing into a joint interest earning account the entire decretal sum as per decree, to be held by both counsel for the parties hereto namely, Ochieng Achach & Kaino Advocates and Otieno, Yogo, Ojuro & Associates within thirty(30) days of this ruling. The sums to



be deposited in the joint account shall not be withdrawn from the said account by any party without the authority of this court.

46. Each party to bear their own costs of the twin applications.

47. This file is closed. I so order.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 13<sup>TH</sup> DAY OF OCTOBER, 2023**

**R.E. ABURILI**

**JUDGE**

