



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. E108 OF 2021

KENYA POWER AND LIGHTING CO. LIMITED.....APPELLANT/APPLICANT

VERSUS

IBRAHIM MBORI M'MWIRABUA

ANGELICA CIOMITHEA M'MWIRABUA (Suing as the Administrators of the estate of

EUNICE MAKENA (Deceased).....RESPONDENT

RULING

1. Before the Court is an application dated 11th August 2021 seeking stay of execution of the Judgment delivered on 12th July 2021 in Maua Civil Case No. 149 of 2016.

Applicant's Case

2. The application is premised on the grounds that the Applicant's appeal raises serious triable and arguable grounds as per the memorandum of appeal. It is urged that the stay of execution granted by the lower Court has lapsed and that the Respondent may commence execution. The Applicant urges that the amount involved is colossal and the Respondents may not be able to refund the same in the likely event that the appeal succeeds thereby occasioning the Applicant substantial loss. The Applicant urges that it is ready, willing and able to abide by any terms and/or conditions that the Court may impose for the due performance of the decree upon conclusion of the appeal. It is urged that the application has been brought without undue delay.

Respondent's Case

3. The application is opposed by the replying affidavit of Linus Thurania Gichunge, Advocate sworn on 22nd September 2021. The Respondent urges that no good reasons have been advanced by the Applicant to warrant a stay of the decree issued by the trial Court. He urges that the Applicant wants to frustrate the Respondents from realizing the fruits of their decree, eight years since they lost a wife and a daughter, who was at a prime age of 28 years. He urges that the learned magistrate applied the right principles of law in assessing damages. He urges that if the Court is persuaded to grant stay, then it will be in the interests of justice that an order is made for release of at least half of the decretal amount to the Respondents and that the other half be deposited in an escrow account.

Determination

Stay of Execution

4. An applicant seeking for stay of execution is required under Order 42 Rule 6 of the Civil Procedure Code to demonstrate that he is likely to suffer substantial loss should stay not be granted; that he is ready and willing to offer security for payment of any sums that may be found due to the other party after the appeal, and that he has come to Court without unreasonable delay.

Substantial Loss

5. In money decrees, substantial loss is demonstrated by the inability of the Respondent to pay the decretal sum should the appeal be successful. The Applicant has expressed fears that the Respondent may not be able to refund the decretal sum if the appeal is successful. Unfortunately, the Respondents have failed to confirm their financial capability to repay the decretal amount. In their replying affidavit, it is only claimed that it has been 8 years since the death of the deceased. The Respondent have thus failed to discharge the burden which shifted

to them once the Applicant expressed fears of their inability to pay. The Applicant has therefore demonstrated the likelihood of suffering substantial loss if stay is not granted.

Deposit of Security

6. The Applicant indicated willingness to comply with any conditions that the Court may impose. The Respondents have urged that should the Court be inclined to grant stay, then half the decretal amount should be paid to them and half be deposited in Court.

7. This Court observes that the intended appeal is one on quantum of damages. Liability is not raised as an issue in the memorandum of appeal. This Court thus finds that the Applicant will inevitably have to pay the Respondent some amount of money upon the conclusion of the appeal. The family of the deceased may be in need of the money as the deceased left behind young children who need provision. This Court finds that the interests of justice require for the payment of some portion of the decretal amount to the Respondents. The Court would have required the balance to be deposited in a joint account but this may not be necessary because the Applicant is a renown statutory body and its financial capability is not in question.

Unreasonable Delay

8. With respect to delay, the Court observes that the Judgment sought to be appealed was delivered on 12th July 2021 and the instant application was filed on 11th August 2021. This was one month later, which period cannot be termed as unreasonable delay.

ORDERS

9. Accordingly, this Court makes the following orders: -

i) The court grants an order for stay of execution of the Judgement and Decree delivered on 12th July 2021 by Hon C. K. Obara in Maua Civil Case No. 149 of 2016 pending the hearing and determination of the appeal.

ii) The Applicant shall within Thirty (30) days pay to the Respondent the sum of Ksh 720,000/= being approximately a third of the decretal sum.

iii) The Applicant shall within Thirty (30) days deposit with the Court a Bank Guarantee for the payment of the balance of Ksh 1,433,227/= as may be adjudged upon it upon unsuccessful appeal.

iv) In default of the payment and deposit as per orders ii) and iii) above, the stay of execution herein granted shall lapse and be of no effect.

v) The costs of this application shall abide the outcome of the appeal.

Order accordingly

DATED AND DELIVERED ON THIS 14TH DAY OF OCTOBER, 2021.

EDWARD M. MURIITHI

JUDGE

Appearances

M/S Mwenda, Mwarania, Akwalu & Co. Advocates for the Applicant

M/S Binyenya Thurania Advocates for the Respondent