REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 141 OF 2018

KENYA POWER & LIGHTING CO. LTD.....APPELLANT

VERSUS

SAMUEL KAMAU KUNG'U..... RESPONDENT

(Being an Appeal from the Ruling and Order of Ogot R.M. in Limuru Magistrate's Civil Case No. 59 of 2015)

R U L I N G

1. For determination is the Appellant's motion filed on 30.9.19 seeking stay of execution of the lower court judgment pending appeal. The application is supported by the affidavit of **Caroline C. Kimeto,** an officer of the Appellant.To the effect that the Appellant's goods have been attached in execution of the judgment of the lower court, that the Appellant is likely to suffer substantial loss if the goods are sold pursuant to the notification of sale and that no prejudice shall be visited upon the Respondent if stay sought is granted.

2. In an affidavit opposing the motion, the Respondent asserts that the prayer for stay of execution in the instant application is similar to those in an earlier motion argued before this Court and was declined; that the instant motion is therefore *res judicata;* that the motion is without substratum as no appeal has been filed in respect of the final judgment of the lower court by virtue of which, the ruling of the lower court of 29.11.17 and which is the subject of the filed appeal herein , stands overtaken. Finally the deponent deposes that the Appellant has acted in a tardy manner right from the subordinate and until this moment and that in any event the Respondent is capable of refunding the decretal sum should the appeal succeed.

3. The parties canvassed the motion through submissions. The Appellant's counsel reiterating the history of the matter urged the court to exercise its discretion in the Appellant's favor to prevent the appeal being defeated and asserted that the Appellant had duly complied with the court's order to deposit the sum of KShs.2million into court as condition for interim stay. He cited the case of **Butt v Rent Restriction Tribunal (1982) KLR 417** in support of his submissions.

4. On their part, the Respondent's advocates pointed out that no stay of execution of the lower court judgment can be granted as the substantive appeal herein relates to the ruling delivered by the lower court on 29th November 2017. That the Appellant has neither demonstrated likelihood of suffering substantial loss, nor complied with all the conditions for the grant of orders sought, as envisaged in Order 42 Rule 6 of the Civil Procedure Rule. The Respondent cited the delay in bringing this application as evidence of the Appellant's indolence. He relied on several decisions including the decision of the Court of Appeal in **Joseph Gachie t/a Joska Metal Works v Simon Ndeti Muema [2012] e KLR.**

5. The court has considered the material canvassed in respect of the instant application. The history of this matter is elaborately documented in the ruling of **Ngugi J** in **Miscellaneous Civil Application no.4 of 2018** delivered on 26th October 2018. The ruling sets out a catalogue of mis-steps and outright blunders on the part of the present Applicant. Ultimately however, the court did grant the Appellant's prayer for leave to file appeal out of time in respect of the lower court ruling of 29th November 2917.

6. More pertinent to the present application is the fact that by the same token, **Ngugi J** considered but declined a second prayer by the Appellants for stay of execution pending the intended appeal. Having considered the applicable law and the facts of the case, the learned Judge stated:

> **"26. Next I will dispose of the second objection. Has the Applicant demonstrated that it will suffer substantial loss if the stay not granted? I am not persuaded that it has. Indeed, the applicant has not – both in its Application and Submissions – attempted to demonstrate what substantial loss it will suffer if stay is not granted. The question is simply assumed. This is not good enough. A party is required to demonstrate what substantial it will suffer – enough to render the appeal nugatory or pyrrhic victory if the stay is not granted. The Applicant has made no such showing. On this score alone, the Application fails.**

27. There is another reason why the Application should fail: the Applicant has not given or pledged to give such security as the court may order for the due performance of the decree which may ultimately be binding on it. This, on its own, disentitles it from the discretionary relief of stay."

7. With that, the court disallowed the prayer for stay of execution. When the Appellant first approached this court with the instant application, it did not disclose that a similar prayer had been dismissed by **Ngugi J.** This court granted temporary stay on condition that the Appellant deposits a sum of KShs.2 million. The Appellant's counsel has asserted that this condition has been complied with but the payment remittance filed herein on the letterhead of Britam (Insurance) Company is not accompanied with this court's official receipt.

8. That said however, the court's view of the matter is that the Appellant's application filed on 30/9/19 is *res judicata*. The arguments and facts agitated before this court are similar to those argued before **Ngugi J** in the ruling earlier referred to**.** All that the Appellant has done in this instance is to attach some evidence of impending or ongoing execution. In its attempt to demonstrate the likelihood of suffering substantial loss , and effectively to fill the gaps pointed out in the ruling of **Ngugi J.** Also included is a pledge to furnish security, also missing in the previous application. I am surprised that the Respondent's counsel abandoned the *res judicata* objection raised in the Replying affidavit to the instant application, and proceeded to argue the same grounds placed before **Ngugi J** previously.

9. This court is *functus officio* so far as the prayer for stay of execution pending appeal is concerned. The attachment of the Appellant's goods subsequent to Ngugi J's ruling did not in any way raise a fresh cause of action in that regard so as to entitle the Appellant to bring a similar application. There is no difference between imminent or ongoing execution of the same decree. Moreover, the fact that execution has commenced is not of itself evidence of the likelihood of substantial loss or the fact that an appeal will be rendered nugatory. The Applicant ought to show that he will suffer hardship or be unable to recoup any monies paid over to the Respondent in the event the appeal succeeds. When a decree holder is executing a lawful decree, he cannot be said by that mere fact to be visiting substantial loss upon the judgment debtor.

10. One of the most enduring legal authorities on the issue of substantial loss is the case of **Kenya Shell Ltd V Kibiru & Another [1986] KLR 410**. Holdings 2,3 and 4 therein are particularly relevant. These are that:

"1. …..

2. In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.

3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.

4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid.

5. ….."

11. The ruling by **Platt Ag JA**, in the **Shell** case, in my humble view set out two different circumstances when substantial loss could arise, and therefore giving context to the 4th holding above. The Ag JA (as he then was) stated inter alia that:

"**The appeal is to be taken against a judgment in which it was held that the present respondents were entitled to claim damages…It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules was not met. <u>There was no evidence of substantial loss to the applicant, either in the matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the respondents would be unable to repay the decretal sum plus costs in two courts…</u>"**

12. The learned Judge continued to observe that:-

"It is usually a good rule to see if Order XLI Rule 4 of the civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. <u>Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money</u>." (emphasis added)

13. Earlier on, **Hancox JA** in his ruling observed that:

"**It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would,…… render the appeal nugatory.**

This is shown by the following passage of Cotton L J in Wilson -Vs- Church (No 2) (1879) 12ChD 454 at page 458 where he said:-

> **"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 rendered nugatory."**
>
> **As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause."**

14. As earlier observed, the Appellant's handling of this case right from the lower court to this moment is marked by a series of avoidable mis-steps and obvious indolence. The Appellant having been granted leave to appeal did file its appeal herein on 30th October 2018. Despite the fact that their prayer for stay of execution had been declined in the same ruling granting leave, the Appellant sat pretty until the execution process was activated. Almost one year since the ruling granting leave to appeal and the filing of its appeal, the Applicant, rushed to this court with the instant application to seek stay of execution, and without disclosing the fact that such stay had earlier been disallowed by a court of concurrent jurisdiction. The Appellant's application before me is therefore incompetent and borders on abuse of the court process. The same is dismissed with costs to the Respondent.

DELIVERED AND SIGNED AT KIAMBU THIS 6TH DAY OF FEBRUARY 2020

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C. MEOLI

JUDGE

In the Presence of:

Mr. Njehu holding brief for Mr. Mwangi for the Appellant

Mr. Khisa holding brief for Ms Muthoni for the Respondent

Court Assistant – Kevin/Nancy