



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

MISC CIVIL APPLICATION NO. 1 OF 2020

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

VERSUS

NAFTAL NYAMWEYA OKEYO.....RESPONDENT

(Being an application arising from the judgement and decree of Hon. R. M. Oanda, PM, delivered on 18/10/2019 in the Principal Magistrate's court at Kilgoris, in Civil Suit No. 8 of 2017, Naftal Nyamweya Okeyo v 1. Kenya Power & Lighting Co Ltd and 2. John MoturiBikundo.)

RULING

The case for the applicant.

Pursuant to the provisions of Order 44 Rule 6 (1), Order 50 Rule 5 and Order 51 Rule 1 of the Civil Procedure Act (Cap 21) Laws of Kenya as read with sections 3A, 79A,95 and 63 (e) of the Civil Procedure Rules, the applicant seeks the following orders from this court.

- 1) Spent.
- 2) an order of stay of execution of the decree in the above matter pending the hearing and determination of this application and the intended appeal.
- 3) an order to grant leave and to extend time to the applicant to file its appeal out of time in respect of the above suit.
- 4) an order that the costs of this application to be costs in cause.

The application is supported by thirteen (13) grounds that are set out on the face of the notice of motion. The major grounds are as follows. The Respondent was awarded damages as a result of injuries sustained in the course of employment with the second defendant in the lower court. The appellant and the 2nd defendant in the lower court were jointly and severally held liable to the extent of 100% in negligence. Due to the internal workings of the applicant which involves deliberations and approvals, the decision to appeal was reached after the time for appealing had expired.

Furthermore, the applicant has stated that its memorandum of appeal shows that the applicant has an arguable appeal. For instance, the trial court found that the 1st respondent was employed by the 2nd defendant but still found the appellant equally liable without giving any reasons; which decision lacks both evidentiary and legal basis. The applicant additionally states that it is imperative that an order of stay of execution be granted pending the hearing of both the application and the intended appeal lest the appeal be rendered nugatory. It has also stated that it is willing to abide by any such conditions that the court may impose.

The applicant through its chief legal officer (Ms Jude Ochieng) has deponed to a sixteen (16) paragraphs supporting affidavit. The major averments are as follows. The trial court rendered its judgement on 28th October 2019 and that due to the internal workings of the applicant; which involves deliberations and approvals, it was unable to appeal within the prescribed period. The deponent has deposed that unless an order of stay of execution is granted and the time enlarged for appealing pending the hearing and determination of both this application and the intended appeal, the intended appeal might be rendered nugatory. Furthermore, the deponent has deposed that the applicant stands to suffer irreparable damage unless an order of stay of execution is granted.

The other averments are a replica of the grounds that have been set out on the face of the notice of motion and I find it unnecessary to reproduce them herein.

In addition to the affidavit of Ms Jude Ochieng, the applicant filed a fifteen paragraphs (15) supplementary affidavit through its advocates (Lucy NekesaCheloti). In the supplementary affidavit, the deponent has deponed to the following major matters. She has deponed that the trial court held in its judgement that the applicant/appellant was liable for the actions of the 2nd defendant, who was an independent contractor, when the respondent testified that he was an employee of the 2nd defendant in the lower court, a matter in regard to which she has annexed a copy of the judgement marked as “LNC 1.”

She has further deposed that it is not mandatory for a decree to be annexed to an application for extension of time to appeal out of time as averred to by the respondent. Finally, she has deposed that the respondent will not suffer any prejudice as the applicant is ready and willing to abide by any conditions which the court may impose as a condition for the grant of an order for stay of execution.

The submissions of the applicant

Messrs Wamaasa, Masese, Nyamwange & Co. Advocates have filed written submissions in support of the application. They have cited Order 42 Rule 6 of the 2010 Civil Procedure Rules, which sets out the conditions to be met before an order of stay of execution is granted. These conditions include a showing the applicant will suffer substantial loss and that an intended appeal will be rendered nugatory unless an order of stay of execution is granted. They have also submitted that there has not been an unreasonable delay in prosecuting this application and that they are able and willing to furnish security for the due performance of the decree or order that as may ultimately be binding upon the applicant.

They also have cited *Butt V Rent Restriction Tribunal [1982] KLR 417*, in which the Court of Appeal held that in considering an application for stay of execution, the court exercises a discretion power; which should be exercised in favour of granting it unless there are good grounds for refusing to grant it.

Based upon their submissions, counsel have submitted that the applicant has met the threshold for the grant of the orders sought.

The case for the respondent.

The respondent has deposed to a fourteen (14) paragraphs replying affidavit in opposition to the application. The major averments are as follows. First, the supporting affidavit of the applicant through Judy Ochieng is misleading and false and is intended to delay or block him from enjoying the fruits of his hard earned judgement. Second, the applicant has not demonstrated that substantial loss might result and that the application was not made timeously. Third, the applicant has not attached the decree or order appealed against and that it must meet the threshold of security which is mandatory for the due performance of the decree or order that may ultimately be binding upon it. He finally, has deposed that the application is not made in good faith and is an abuse of the court process and has therefore urged the court to dismiss it with costs.

The submissions of the respondent.

Messrs Moracha & Co. Advocates for the respondent have opposed the application citing a number of authorities including *Raball v Judicial Service Commission & Another, Civil Application No. 10 of 2015 (UR 10/2015)*, in which the Court of Appeal held that the extension of time is not a right of a party for it is an equitable remedy that is only available to a deserving party at the discretion of the court, being one of the holdings by that court. Counsel also cited *Rajesh Rughan v Fifty Investment Ltd & Another [2005] e-KLR*, in which the court held that: “It is not enough simply to accuse the advocate of failure to inform us if there is no duty on the client to pursue his matter. If the advocate was simply guilty of inaction that is not excusable mistake which the court may consider with sympathy.”

Counsel also cited Order 42 Rule 6 (2) of the 2010 Civil Procedure Rules, which directs the applicant to provide security for the due performance of the decree or order that may ultimately be binding upon it. Counsel therefore urged the court to dismiss the appeal with costs.

Issues for determination

I have considered the affidavit evidence of the parties, the submissions of both counsel and the authorities cited. As a result, I find the following to be the issues for determination.

- 1) Whether the applicant has made out a case for the extension of time to enable it to appeal out of time.
- 2) Whether the applicant has made out a case for the grant of an order of stay of execution.
- 3) Who bears the costs of this application?

Issue 1.

An application for the grant of an order to enlarge time within which to file an appeal out of time has to meet a number of conditions. The major conditions include, but they are not limited to, the following. First, the applicant has to show that the failure to file the appeal within the prescribed time of thirty days was due to the inability to obtain the proceedings and judgement and/or ruling including the decree or order that is intended to be appealed against. Second, the applicant has to demonstrate the existence of sufficient cause for failing to appeal within the prescribed time of thirty days within the meaning of section 79G of the Civil Procedure Act. Third, the applicant has to demonstrate that it has an arguable appeal. Fourth, the applicant has to offer a satisfactory explanation for the delay in filing the appeal within the prescribed time of thirty days.

The respondent has opposed the application on the basis that the application is intended to delay or block him from enjoying the fruits of his

hard earned judgement. Additionally, the respondent has opposed the application, since the applicant did not attach the decree appealed against.

In the instant application, the applicant has deponed that due to the internal workings of the applicant; which involves deliberations and approvals, it was unable to appeal within the prescribed period. I find this explanation to be sufficient cause given that the applicant, although it is a legal person is a corporate entity with a management board.

I find that the application is not intended to delay or block the respondent from enjoying the fruits of his hard earned judgement.

The trial court rendered its judgement on 28th October 2019 and the instant application was filed on 22nd January 2020. In the circumstances of the application I find that the delay in filing and prosecuting the application is not unreasonable.

I have perused the draft memorandum of appeal. As a result, I find that the application raises an arguable appeal. In other words, it is not a frivolous appeal. I find that it was not necessary to attach the decree sought to be appealed against at this stage.

In the premises, I find that the applicant has made out a case for the grant of the application for leave to appeal out of time.

Issue 2

The conditions that an applicant has to satisfy before being granted an order of stay of execution are set out in Order 42 Rule of the 2010 Civil Procedure Rules. The applicant has to demonstrate that he is likely to suffer substantial loss unless an order of stay of execution is granted. The applicant has also to demonstrate that the intended appeal might be rendered nugatory unless an order of stay is granted and that the application has been prosecuted without unreasonable delay.

I find that unless an order of stay of execution is granted the applicant is likely to suffer substantial loss and that the intended appeal might be rendered nugatory.

The applicant has to deposit in this court within 30 days the sum of Kshs 3,052,260/=, being the decretal sum as a condition of being granted the orders sought in the instant application; failing which these orders will lapse.

Issue 3.

I order that the costs of this application will be costs in cause as prayed.

In the premises, the application succeeds and is hereby allowed in terms of prayer 2,3 and 4 of the notice of motion dated 21st January 2020.

Judgment signed, dated and delivered at Narok this 7th day of **May, 2020** in absence of both counsel via posting through their E-mail addresses.

J. M. Bwonwong'a.

J U D G E

07/05/2020