



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

MISC.CIVIL APPL. NO.60 OF 2019

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

V E R S U S

JOHN PETER MBUE MWANGI.....RESPONDENT

R U L I N G

Kenya Power & Lighting Co. Ltd, the applicant, filed the Notice of Motion dated 18/6/2019 seeking:

(1)

(2) *An order of stay of execution of the judgment and/or decree of pending hearing and determination of the application and appeal herein;*

(3) *That the court do grant the applicant leave to lodge its appeal out of time;*

(4) *Costs of the application be provided for.*

The application is expressed to be brought pursuant to Order 42, Rule 6, Order 51 Rule 1 Civil Procedure Rule, Sections 799, 1A, 2A and 3A of the Civil Procedure Rule.

The application is supported by grounds found on the face of the application and the affidavit of Jude Ochieng', Chief Legal Officer of the 'respondent', I believe this is an error because counsel represents the applicant not the respondent. The applicant's complaint is that they were the defendants in NKU.CMCC.76/2011; that judgment was entered in the said case on 18/1/2019 without notice to the applicant; that the judgment had been slated for delivery on 7/12/2018 but was deferred to 19/12/2018 when the court indicated that it would be delivered on notice; that the applicant was not aware of the delivery of Judgment till 7/5/2019 when the respondent's counsel wrote to the applicant attaching the court's decree and certificate of costs (JO 1A, B & C).

Upon confirming that indeed judgment had been delivered, the applicant instructed their advocate to file an appeal against the whole judgment as a result of which a draft memorandum of appeal was filed; that the applicant is willing to provide security as the court may direct and that if stay is not granted, irreparable loss will be occasioned to the applicant as the respondent will not be able to repay the decretal sum if it is released to him.

The respondent filed a replying affidavit dated 11/7/2018 to the motion. He deponed that the application is an abuse of the court process as it is meant to delay the respondent's right to enjoy fruits of his judgment, whereas the applicant continues to benefit from the disputed land where the applicant erected a power line. The respondent is unable to utilize his land and the applicant has not shown sufficient cause for grant of stay; that the applicant was granted 30 days stay at the time of delivery of judgment but did nothing; that the applicant has not met the principles for a grant of an order of stay in that he has not demonstrated that substantial loss will be suffered nor has security been offered for the due performance of the above; that he is a prosperous businessman with several businesses in Nairobi and Mombasa and in the event the appeal succeeds, he is able to refund the decretal sum; that he has no intention of selling the subject land; that the applicant delayed in bringing this application and the court should not grant an order of stay or extension of time to file appeal. The respondent also urged that the application is fatally defective as this is a miscellaneous application which seeks orders against judgment of the court.

Both counsel filed submissions which they highlighted Ms. Kiumbuku, counsel for the applicant, urged that they have fulfilled the pre-requisites for grant of stay under Order 42 Rule 6 Civil Procedure Rule, 2010.

On the issue of substantial loss, counsel submitted that the applicant intends to appeal the whole judgment; that because the sum is large, that

is, Kshs.1,067,620/= and the respondent has not shown his source of income, if paid to him, he may not be able to refund; that the public are likely to be adversely affected if execution proceeds as it will interfere with supply of electricity to the local residents and that if stay is not granted, the appeal will be rendered nugatory. Counsel relied on the decision of Kiunjuri Muguta v Wotuku Muguta (2013) eKLR and Butt v Rent Restriction Tribunal C.App. (NRB) 6/1979.

On security, the applicant has offered to avail any security that the court may impose. Counsel also relied on Focin Motor Cycle v Ann Wambui Wangui (2018) C.App.22/2017 where the court observed that provision of security is a sign of good faith.

In his submissions, Mr. Mwangi, counsel for the respondent submitted that the application is defective as it refers to Nakuru CMCC.76/2011 yet the matter arises from Nyahururu CMCC.76/2011; that the lower court proceedings are not annexed to the application for the court to ascertain whether or not the advocate had no notice of delivery of judgment; that there is no memorandum of appeal filed but an annexure; that the notice dated 8/5/2019 is not required under Section 79G of Civil Procedure Act.

Counsel further urged that the applicant has not met the threshold for grant of the orders sought. As to substantial loss, counsel urged that the respondent has stated an oath that he is a businessman and able to refund the decretal sum. He relied on Joseph Gachie t/a Joska Metal Works v Simon Ndeti Mwema (2012) eKLR where the court said that it is not enough to merely state that the decretal sum is a lot of money and the applicant will suffer if it is paid. He also relied on Kenya Shell Ltd v Benjamin Karunga (1986) KLR 410 where the court observed that it is not normal for money decrees to be rendered nugatory.

As regards delay, counsel submitted that on 5/12/2018, counsel for the applicant was supposed to make his submissions but did not show up; that the judgment was fixed for 19/12/2018 but it was not ready nor was it ready on 16/1/2019 when it was deferred to 19/1/2019 when it was delivered; that it took the applicant 116 days to file this application; that the delay is not explained and hence inexcusable and the court cannot exercise its discretion in the applicant's favour. Counsel relied on the decision in Jaber Mohsen Ali & Another v Priscillah Boit & another E & L.200/2012 where the court held that what amounts to delay depends on the circumstances of each case.

As to whether leave to file appeal out of time should be granted;

Counsel, relying on the decision of Leo Sila Mutiso v Rose Hellen Wangari Mwangi CA.LAR.255/1997 urged the court not to exercise its discretion to grant leave if the applicant has not followed due process in coming to court and for failure by the applicant explain the delay.

In Leo Sila's Case (Supra), the court said:

"It is now well settled that the decision whether or not to extend time for appealing essentially is discretionary. It is also well settled that in general, the matters which this court takes into account in deciding to grant an extension of time are; first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; fourthly, the degree of prejudice to the respondent if the application is granted."

It is unfortunate that this court has not had access to the proceedings in the lower court to ascertain exactly what transpired when the judgment was delivered and whether the application's counsel had notice of the delivery of judgment. Mr. Mwangi submitted that the applicants failed to attend court on 5/12/2018 the date set aside for submissions and a date for judgment was given. I wish to observe that if that is the position, the applicant's counsel, having failed to attend court to make his submissions, he had a duty to follow up with the matter to find out what had transpired and when the matter was next coming up.

On the other hand, since the applicant's counsel was absent on 5/12/2018 and a different date was given for 19/12/2018 then, a further date of 16/12/2018 and 19/1/2019, the applicant's counsel should have been notified by the court of the change of dates and the court should have ensured that the applicants had notice of the new dates. Whereas the applicant's counsel did not act prudently yet the blame in the delay cannot wholly be loaded on them because the applicant may not have been aware of the judgment. If the respondent was aware of the notice of delivery of Judgment to the applicant, nothing would have been easier than the respondent annexing it to their reply.

As to whether the appeal is arguable, this court has not had the advantage to seeing the lower court file or even the judgment save for the proposed memorandum of appeal which seems to raise arguable issues.

For the above reasons, this court would not deny the applicant an opportunity to exercise its right of appeal. The applicant has shown its keenness and good faith in prosecuting the appeal by depositing the decretal sum in court.

Whether the applicant has attained the threshold for grant of an order of stay;

On the issue of delay, I have already addressed the same earlier. Though there was inordinate delay in bringing this application, there seems to be good reason for the delay and blame may not be all imposed on the applicant. The same has been explained and is excusable.

On the question of substantial loss:

In Joseph Gachie's case (Supra), Odunga J, said as follows:

"It is not sufficient merely to state that the decretal amount is a lot of money and the applicant would suffer if the money is paid. In an application of this nature, the applicant should show the damages it will suffer if the order for stay is not granted since by granting stay would mean that the status quo should remain as it were before judgment and that would be denying a successful litigant. The fruit of judgment which should not be done if the applicant has not given the court sufficient cause to enable it

exercise its discretion in granting the order of stay.”

Again in this case of Kenya Shell Ltd (Supra) the court stated:

“Where the allegation is that the respondent will not be able to refund the decretal sum, the burden is upon the applicant to prove that the respondent will not be able to refund to the defendants any sums paid in satisfaction of the decree.”

The decretal sum herein is over one million which is quite substantial. In Lucy Njeri Kimani v Lawrence Mburu Muthoga (2006) eKLR the court said:

“An applicant demonstrates substantial loss by showing that the respondent is not a person of means and payment of the decretal sum prior to appeal would put the same beyond reach of the applicant.”

In Socfinac Co. Ltd v Nelphat Kimotho Muturi (2013) eKLR, the court held that the applicant has the legal burden to prove that the decree holder is a man of straw who cannot refund the decretal sum and the evidential burden shifts to the respondent to prove that he is a person of means.

In this case, the applicant has alleged that if the sum is paid they are unlikely to get a refund upon the appeal succeeding and secondly that many members of public who benefit from power might suffer substantial loss. Having said that, the evidential burden shifted to the respondent to prove his means but in reply, the respondent only told the court that he has many businesses and is a man of substance but he did not demonstrate it to the court by way of evidence. It therefore follows that the applicant has discharged its legal onus to show that the respondent will not be able to refund the decretal sum if it is paid to him, and the applicant will suffer substantial loss.

The applicant was ready and willing to provide whatever security that the court would impose. As held in Focin case (Supra), offering of security is a sign of good faith if the applicant intends to challenge the judgment of the lower court. The court said:

“Where the applicant proposes to provide security as the applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose what kind of security but it is the discretion of the court to determine the security. The applicant has offered to provide security and has therefore satisfied this ground for stay....”

I agree with the above proposition. In the end, I find that the applicant has met all the grounds necessary for grant of an order of stay.

I wish to note that ideally, an application should be made in an appeal. The circumstances herein are however different because the applicant needed the leave of court first in order to file appeal.

In the end, the court allows the application and grants the following orders:

- 1. Leave is hereby granted to the applicant to file an appeal; out of time and the appeal to be filed and served within 30 days of this order;***
- 2. An order of stay is granted. The decretal sum that was deposited in court be deposited in an interest earning account of both advocates for the applicant and the respondent within 21 days hereof;***
- 3. The costs of this application to abide the appeal.***

Dated, Signed and Delivered at NYAHURURU this 7th day of May, 2020.

R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Kiumbuku for applicant

Eric – Court Assistant