



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CORAM: R. MWONGO, J

CIVIL CAUSE NO.66 OF 2018

KENYA POWER AND

LIGHTING COMPANY LTD.....APPLICANT/APELLANT

VERSUS

SAMUEL GATHIARI CHERERE.....RESPONDENT

RULING

1. The applicant/appellant is aggrieved by a judgment rendered in Naivasha CMCC No. 150 of 2013 entered on 29th November 2018 awarding the plaintiff/respondents a sum of Kshs 4,771,880/= plus costs and interest. Fearing that the properties of the applicant/ appellant could be proclaimed at any time, the appellant filed an appeal on the whole judgment of the lower court. The applicant argues that if stay of execution is not granted, the appeal will be rendered nugatory.

2. The application before the court was filed under a certificate of urgency dated 11th February 2019. It seeks the following orders:

1.Spent

2. Temporary stay of the judgment and decree issued on the 29th November, 2018 at Naivasha CMCC No. 150 of 2013 pending the hearing of this application interpartes.

3. Stay of the judgment and decree issued on the 29th November, 2018 at Naivasha CMCC No. 150 of 2013 pending the hearing and determination of the appeal filed in the High court at Naivasha being High Civil Appeal No. 66 of 2018.

4. That the appeal be heard and determined within 6 months and/or any other period the court may deem fit.

5. That the defendant/applicant be at liberty to apply for further orders and directions

3. The application is premised on various grounds and supported by the affidavit of Bernard O. Ombui dated 7th January 2019, a supplementary affidavit dated 25th February 2019 and a further affidavit dated 5th March 2019. The applicant urges that they have a good ground for appeal with high chances of success, and, to show goodwill, they have taken the step to initiate opening of a joint account between counsel for the parties for the entire decretal sum pending hearing and determination of the appeal. He attached account opening forms and cheques to support his application.

4. In reply, the Respondent filed a replying affidavit dated 15th February, 2019 and a further affidavit dated 8th March 2013. He states that he is a senior citizen aged 88 years, is ailing and will be prejudiced if the court was to grant the stay sought by the applicant. He states that the matter in the lower court took over fifteen years to conclude, and even then, that the appellant was compelled to close its case for not availing any witnesses. He also argues that the appeal is a ploy set up in bad faith to deny him the fruits of the judgment. In addition, he states that the applicant is a public limited company that enjoys monopoly and it cannot be prejudiced by payment of Kshs. 4,771,880/=.

5. Finally, the Respondent asserts that the application is res judicata as the appellant had filed a similar application in the lower court which was declined.

Issues

6. The only issue for determination is whether or not to grant the stay on the material availed.

Analysis and Determination

7. A stay of execution will not be granted unless the conditions in **Order 42 Rule 6** of the **Civil Procedure Rules** are satisfied. **Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010** provides that an applicant who is seeking a stay of execution pending appeal must demonstrate each of the following:

- 1. That substantial loss may result to the applicant unless the order is made;**
- 2. That the application has been made without unreasonable delay; and**
- 3. That 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.**

8. The question that arises in light of the provisions of **Order 42 Rule 6** is: what is substantial loss? This question was dealt with in the **cases of Kiplagat Kotut v Rose Jebor Kipngok [2015] eKLR** and **Kenya Commercial Bank Limited v Sun City Properties Limited & 5 Others [2012] eKLR**. In those cases, the court held that substantial loss does not have to be a lot of money. It is sufficient that an applicant seeking a stay of execution demonstrates that it would have to go through hardship such as instituting legal proceedings to re-cover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.

9. It is clear that the judgment in favour of the respondent is a partial money decree. It was the appellant's contention that its Appeal had high chances of success and that if a stay of execution was not granted, he would suffer greatly and his appeal rendered nugatory. The applicant further argued that if the decretal sum was paid to the Respondents and it succeeded in its Appeal, it would have to file another suit to recover the same from the Respondent.

10. The respondent on his part argued that he is a man of means and will be able to pay the decretal sum if he is so ordered and that he is ready to even surrender a title deed or a guarantor to the decretal amount as court would direct. He fears that on account of old age and ailing condition, the appeal is meant to deny him justice and that the appellant is trying to delay the matter until his demise. Hence, he argued, the reason the appellant had not been keen on proceeding with the lower court matter until the file was mandatorily closed and judgment given in favour of the respondent.

11. In **Kenya Hotel Properties Limited v Willesden Properties Limited Civil Application Nai. No. 322 of 2006 (UR 178/06)** the Court stated in relation to a money decree, as follows:

“The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not a “man of straw” but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant. However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree.”

12. With regard to the damages that the applicant must show he is likely to suffer if the application is not granted, Odunga J in the case of **Joseph Gachie t/a Joska Metal Works v Simon Ndeti Muema [2012] eKLR** stated 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 status quo should remain as it were before judgment and that would be denying a successful litigant of the fruits of judgment which should not be done if the applicant has not given to the court sufficient cause to enable it exercise its discretion in granting the order of stay.”

13. The court must be clear that whilst the exercise of its discretion to stay execution may be reversed, it must balance that discretion in such a way that the judgment creditor is not deprived of the fruit of its judgment. The court held as follows in the case of **Siegfried Busch v MCSK [2013] eKLR**,

“A superior court to which an application has been made must recognise and acknowledge the possibility that its decision for refusal to grant a stay of execution could be reversed on appeal. It would be best in those circumstances to preserve the status quo so as not to render an appeal nugatory. Even in doing so, the court should weigh this against the success of a litigant who should not be deprived of the fruits of his judgment...”

14. The other issue to deal with is whether the applicant has demonstrated that the application was made without unreasonable delay. The judgment was rendered on 29th November, 2018. The memorandum of appeal appears to have been filed and date stamped in the High Court registry on 5th December, 2018. Given that the judgment was rendered on 29th November, 2018, I consider that there was no unreasonable delay in the filing of the appeal, six days after the delivery of judgment. This is well within the thirty (30) day requirement for filing an appeal from the subordinate court under **Section 79G** of the **Civil Procedure Act**.

15. With regard to the issue of a security deposit, it is clear that the applicant states in paragraph(f) of the grounds in the notice of motion as follows:

“(f) That defendant and applicant are willing and able to abide by any reasonable terms including furnishing security as the Honourable court may deem just to order for the due performance of the decree as may ultimately be binding on them.

(g) That the Defendant’s insurers are willing to offer a bank guarantee and or deposit the decretal amount on fixed deposit in the joint names of the counsels for the defendant/applicant and plaintiff/respondent.”

16. Accordingly, the applicant has satisfied the requirements of **Order 42 Rule 6(2)**.

17. The respondent has stated in paragraph 9 of his replying affidavit that he is eighty eight years old, and is ailing. He states that he is not a pauper and can refund the deposit, but is not in favour of continued and ceaseless litigation. In my view, if the stay is not granted, it would be apt to ensure that the litigation does not drag along in the corridors of the courts. This can be remedied by fast-tracking the appeal.

18. I also note that one of the grounds of appeal is that the quantum of the award is excessive and was not justified by the evidence availed. In that regard, I find that the applicant has an arguable appeal.

Disposition

19. In light of all the foregoing, the application succeeds. In my view, the orders that would be just in this case are as follows, and I hereby so direct:

a. The applicant is granted stay of execution on the following terms:

i. The Applicant shall, forthwith and in any event within fourteen (14) days from the date hereof, deposit the full decretal sum into a joint interest earning deposit account opened and operated by the counsel for the parties;

ii. In default of compliance by the applicant with the above requirement, the respondent shall be free to execute;

iii. The respondent shall fully, expeditiously and effectively co-operate in the opening and operation of the said joint account;

b. The applicant’s record of appeal filed on 22nd March 2019, shall and is hereby admitted for hearing without amendment or supplementation provided that the appellant in conjunction with the Registry shall number and paginate the same;

c. The said appeal shall be disposed of by way of written submissions to be filed and served as follows:

i. By the appellant within twenty one days from the date hereof;

ii. By the respondent within twenty one days of being served

d. Written submissions shall not exceed five typed pages in font size 12 and spacing of 1.5. Parties shall attach authorities duly highlighted, to their submissions;

e. Written submissions shall be highlighted on a date to be fixed in the Registry by the respondent not later than seventy (70) days from the date hereof.

20. Costs shall abide the outcome of the appeal.

21. Orders accordingly.

Dated and Delivered at Naivasha this 3rd Day of May, 2019

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Ombui for the Applicant

2. G. Kimani for the Respondent

