REPUBLIC OF KENYA

IN THE HIGH COURT

AT KISUMU

CIVIL SUIT NO. 119 OF 2007

BETWEEN

MUNICIPAL COUNCIL OF KISUMU.....PLAINTIFF

AND

KENYA POWER & LIGHTING COMPANY LIMITED.....DEFENDANT

RULING NO. 2

1. The defendant has moved this court by way of Notice of Motion dated 14th December, 2016 brought under **Order 42 Rule 6(1)** & **(2)** of the ***Civil Procedure Rules*** and **Section 3A** and **63(e)** of the ***Civil Procedure Act (Chapter 21 of the Laws of Kenya)*** seeking the following main reliefs:

> *[4] THAT this Honourable Court be pleased to stay the execution of the judgment and decree of the Honourable Justice Hilary Chemitei delivered on 27th May 2016 pending the hearing and determination of the intended appeal*
>
> *[5] THAT costs of this application be provided for.*
>
> *[6] THAT such other and/or further relief be granted as this Honourable Court might deem fit and just to grant in the unique circumstances of this matter.*

2. A summary of the facts leading up to this application are as follows. By a judgment dated 27th May 2016, Chemitei J., allowed the plaintiff's claim against the defendant for wayleave charges amounting to Kshs. 48,781,000/- together with costs and interest. After the judgment, the defendant filed an application seeking review and or setting aside the judgment, inter alia, because the court did not have jurisdiction as the matter was of and concerning land within the meaning of **Article 162(2)(b)** of the Constitution and **section 13** of the ***Land and Environment Act, 2011*** and that the failure by its advocate to attend court for the hearing was excusable. I heard and dismissed the application on 5th December 2016 prompting the application that is now under consideration.

3. The grounds and reasons for the application are set out on the face of the application and in the deposition sworn by Owiti Owuor, the defendant's Manager, Legal Services, on 14th December 2016. In addition, counsel for the defendant, Mr Odera and assisted by Mr Atudo made oral submissions in support of the application. The defendant has preferred an appeal against the ruling and order of 5th December 2016 and it argues that unless the stay order is granted, it will not only have been condemned unheard but it will also be exposed to massive financial loss as the judgment amount will result in an immediate rise in

electricity tariffs which it cannot unilaterally impose on the public without the sanction of the Energy Regulatory Commission if the decree is executed.

4. The defendant contends that the decretal amount, inclusive of interests, exceeds Kshs. 101,000,000/- is substantial and that the plaintiff has not shown that it can refund the money should the appeal succeed. It further submits that the application was filed without delay and that it is ready and willing to deposit any security that the court may order.

5. The plaintiff opposes the application through the deposition of Amos Omolo, the County Attorney for the County Government of Kisumu, sworn on 11th January 2017. He contends that since the appeal is against the ruling of 5th December 2016 and not the judgment of 27th May 2016, this court cannot order stay of the judgment and decree which has not been appealed against. Counsel for the respondent, Mr Otieno, argued that the ruling of 5th December 2016 only dismissed the application to set aside the judgment and that therefore there was nothing to stay and as such the application is incompetent.

6. Counsel for the plaintiff submits that defendant has not demonstrated that it is likely to suffer substantial loss and neither has it proved that the plaintiff is incapable of refunding the decretal sum should the appeal be successful. The plaintiff further submits that the grounds raised by the defendant are frivolous and it is out to deny it the fruits of the judgment.

7. In response to the plaintiff's argument that application is incompetent, Mr Odera submits that the both the judgment and the ruling appealed against were so intertwined and once the application for review was dismissed, the inescapable result is that the judgment and decree will be executed thus removing the substratum of the appeal. Thus, he argues, this court has jurisdiction to determine the application as prayed in prayer 6 of the Motion which covers the defendant's plea in the matter.

8. Two issues fall for determination. First, whether the application for stay is incompetent as there is no appeal against the judgment and decree sought to be executed. Second, whether the applicant has established a case to warrant the grant an order for stay.

9. The authority of the court to grant orders of stay of execution under the ***Civil Procedure Rules*** is to be found at ***Order 42 rule 6(1)*** and ***(2)*** which provides as follows*:*

> *6.(1) No appeal or second appeal shall operate as a stay of a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.*
>
> *(2) No order for stay of execution shall be made under sub-rule (1) unless—*
>
> > *(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and*
> >
> > *(b) 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.* [Emphasis mine]

10. The provisions of **Order 42 rule 6(1)** of the ***Civil Procedure Rules*** proceed from the basis that the stay of execution is from the order or decree appealed from. The defendant has not appealed against the judgment and decree of 27th May 2016 which is now the subject of execution. It appeals against the ruling and order dismissing the application for review as evidenced by the Notice of Appeal filed and which is deemed to be the appeal for purposes of stay in terms of **Order 42 rule 6(4)**. The dismissal of

the application for review did not result in any positive order capable of being stayed. Simply stated the order appealed against is the one dismissing the application for review and since it did not give rise to any positive enforceable order, it is not capable of **being stayed.** As the Court of Appeal observed in ***Western College of Arts and Applied Sciences v Oranga*** **[1976] KLR 63, 66** that:

In the instant case the High Court has not ordered any of the parties to do anything, or refrain from doing anything or to pay any sum. There is nothing arising out of the High Court judgment for this court, in an application for a stay, to enforce or restrain by injunction.

I adopt the sentiments of Makhandia J., in *Raymond M Omboga vs. Austine Pyan Maranga* Kisii HCCA No. 15 of 2010 (UR) where he held that:

> ***It is trite law that stay of execution pending appeal can only be granted against the order being appealed against. Put differently, an order for stay of execution pending appeal cannot be granted if the intended appeal is not against the order sought to be stayed; yet this is what obtains in this application where the applicant's appeal is against the order of dismissal of his application, yet the stay sought is against the subordinate court's judgement or decree***

11. I therefore find and hold that the application for stay under ***Order 46 rule 6(1)*** of the ***Civil Procedure Rules*** is incompetent. But this is not the end of the matter. Mr Odera submitted the court could still grant the order of stay as prayed in prayer 6 of the Motion. I understood counsel to be invoking the overriding objective contained in **sections 1A** and **1B** of the ***Civil Procedure Act*** which provide as follows;

> ***1A(1) the overriding objective of this Act and the rules made hereunder is to facilitate, the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act;***
>
> ***(2) the court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in sub-section (1);***
>
> ***(3) A party to civil proceedings or an Advocate for such a party is under a duty to assist the court to further the overriding objective of the Act, and to that effect, to participate in the process of the court and to comply with the directions and orders of the court.***
>
> ***1B(1) For the purposes of furthering the overriding objective specified in Section 1A, the court shall handle all matters presented before it for the purpose of attaining the following aims –***
>
> *a.* ***the just determination of proceedings;***
>
> *b.* ***the efficient disposal of the business of the court;***
>
> *c.* ***the efficient use of the available judicial and administrative resources;***
>
> *e.* ***the timely disposal of the proceedings, and all the proceedings in the court, at a cost affordable by the respective parties; and***
>
> *f.* ***the use of suitable technology.***

12. The Court of Appeal encapsulated the overriding objective ("O_2 principle") in the ***Hunker Trading Company Limited v Elf Oil Company Limited*** **NRB CA Civil Appl. No. 6 of 2010 [2010]eKLR** thus;

> *The advent of the* ***"O_2 principle****" in our opinion, ushers in a new management culture of cases and appeals in a manner aimed at achieving the just determination of the proceedings; ensures the efficient use of the available judicial and administrative resources of the courts; and results in the timely disposal of the proceeding at a cost affordable by the respective parties. That culture must include where appropriate the use of suitable technology. It follows therefore that all provisions and rules in the relevant Acts must be "O_2 compliant because they exist for no other purpose. The*

> ***"O_2 principle"*** *poses a great challenge to the courts in both the exercise of the powers conferred on them by the two Acts and rules and in interpreting them in a manner that best promotes good management practices in all the processes of the delivery of justice. In our view this challenge may involve the use of an appropriate summary procedure where it was not previously provided for in the rules but the circumstances of the case call for it so that the ends of justice are met. It may also entail our redesigning approaches to the management of the court processes so that finality and justice are attained and decisions that ought to be made today are not postponed to another day.*

13. In light of this dicta, does the O_2 principle empower this court to grant a stay of execution where the applicant has not appealed against the order or decree sought to be stayed? The defendant's argument that the decree and order declining review are so intertwined that it was in the interests of justice to consider them together and ensure that the substratum of the appeal is not dissipated by execution of the decree flies in the face of the direct provisions of **Order 42** of the ***Civil Procedure Rules*** which contemplate a stay of execution of the order or decree appealed from. Furthermore, the power to grant stay pending appeal to the Court of Appeal being a jurisdictional matter cannot be overlooked by application of the O_2 principle (see ***Nguruman Ltd v Shompole Group Ranch and Another*** **CA Civil Application No. NAI 18 of 2012 [2014]eKLR**).

14. Notwithstanding my finding, I now turn to consider whether the applicant has satisfied the conditions for grant of stay. An order of stay is generally granted if the applicant demonstrates that substantial loss may result unless the order is made, that the application is made without unreasonable delay and that the applicant has offered security for due performance of such decree.

15. In making a case for substantial loss, the applicant through the affidavit of Owiti Owuor deponed that the plaintiff had ceased to exist thereby casting doubt on the possibility that it would refund the money should be the appeal be successful. The defendant also made the case that payment of the decretal sum will require review of electricity tariffs by the Energy Regulatory Commission which is unlikely to be granted and that increasing tariff merely on the ground of a pending appeal will result in uncertainty and discomfort in the energy markets thus reducing the ability of the defendant to provide electricity at competitive rates.

16. The plaintiff denies that the defendant has demonstrated that it will suffer substantial loss. It has annexed to the deposition of Amos Omolo a copy of the defendant's financial statement for the year ended 30th June 2017 which show that it is grew its asset base and revenues from the sale of electric power from Kshs. 272 billion to Kshs. 297 billion and Kshs. 78 billion to Kshs. 87 billion respectively from the previous financial year ending June 2015 to the financial year ending June 2017. The plaintiff avers that from this and other data including after tax profits at the end of year 2017 of about Kshs. 7 billion, it is inconceivable that the payment of the decretal sum would make a difference in its operations.

17. The plaintiff also denied the defendant's contention that it had ceased to exist. It averred that by operation of law resulting from the promulgation of the Constitution that the County Government of Kisumu succeeded the Municipal Council of Kisumu hence it had the mandate and authority to prosecute the matter and receive the proceeds of the decree.

18. Substantial loss as a basis for grant of orders of stay must be proved. It is not enough to allege the fact alone and although I agree with Mr Odera's assertion, supported by the case of ***ABN Amro Bank NV v Le Monde Foods Ltd*** **CA Civil Application No. Nai 15 of 2002 (UR)**, that there may be instances where due to the personal knowledge of the respondent disclosure may be necessary, it is only upon meeting an evidential threshold that the respondent can be called upon to disprove the applicant's assertions. In that case the Court of Appeal stated that:

> *In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then have shifted to the respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal was to succeed. The evidential burden would be very easy for the respondent to discharge. He can simply show what assets he has –such as land, cash in the bank and so on.*

19. As I understand, the defendant's argument was that the plaintiff ceased to exist hence it could not refund the money if it was paid. Although the defendant never raised this issue during the earlier proceedings, its position is clearly rebutted by the decisions cited by counsel for the plaintiff. The cases of ***Dr J A S Kumenda and Another v The Clerk*** **Municipal Council of Kisii and Others, Kisii ELC Misc. App. No. 3 of 2013 [2013]eKLR** and ***Republic v Town Clerk Webuye County Council exp. Kakai*** **NRB Misc JR No. 448 of 2006 [2014]eKLR** confirm that County Governments established under the Constitution and the ***County Government Act, 2012*** are the legal successors of Local Authorities established under the ***Local Government Act (Repealed)***. Thus, by operation of law, Kisumu County Government is the successor of Kisumu Municipal Council. I do not find any merit in this contention.

20. I have read and re-read the defendant's deposition and I have not heard it say the County Government cannot refund the decretal sum if it succeeds in the appeal. Such a fact cannot, in my view, presumed particularly where an organ of State is the judgment-creditor. The plaintiff has, on the other hand, demonstrated that the defendant has a healthy balance sheet which can absorb a lawful judgment of the court. My reasoning is further fortified by the fact that the defendant is offering security for the decretal sum costs and interest, wouldn't this put the defendant in the same position as paying out the same money?

21. Even if I were to hold that the application was competent, I am not convinced that the defendant has made out a case for the grant of stay of execution as prayed.

22. I dismiss the Notice of Motion dated 14th December 2016 with costs to the plaintiff.

DATED and **DELIVERED** at **KISUMU** this 6th day of **February 2017**.

D.S. MAJANJA

JUDGE

Mr Odera with him Mr Atudo instructed by Mbugwa, Atudo & Macharia Advocates for the defendant/applicant.

Mr Otieno instructed by Otieno Ragot & Company Advocates for the plaintiff/respondent.