



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAMIRA**

**HIGH COURT CIVIL APPEAL NO.4 OF 2016**

**KENYA POWER & LIGHTING COMPANY LTD .....APPELLANT**

**-VERSUS-**

**DAVID OBARE OMWOYO**

**T/A OMWOYO AUCTIONEERS.....RESPONDENT**

**RULING**

**1. Introduction**

The respondent herein **David Obare Omwoyo t/a Auctioneers** a duly licenced auctioneer was instructed to levy execution against the movable properties of the appellant herein **Kenya Power & Lighting vide Keroka SRMCC NO.34 of 2013**. Upon being retained to levy execution the respondent procured and/obtained the warrants of Attachment and there after proceeded to and commenced execution: However upon attachment of the appellant's movable property the appellant mounted an application for setting aside the exparte proceedings. The respondent then proceeded to draw and file his Bill of costs for taxation purposes and payment debtor in the original proceedings. The trial court then ruled that the appellant was responsible for payments raised by the respondent on assessing and taxing the same at a sum of Kshs.80,000.

The appellant felt aggrieved and filed an appeal to this court simultaneously with a Notice of Motion application.

**2. The pleadings**

The appellant filed a Notice of Motion dated 11<sup>th</sup> February 2016 under **order 42 rule 6 (1) and order 51 Rule 4 of the Civil Procedure Rules 2010** seeking:-

1. Spent

2. Spent

3. That this Honourable Court be pleased to order stay of execution of the orders in **Misc. Application 1 of 2015** pending the outcome of the Appeal herein lodged by the Appellant.

4. That the monies held by the court; Kshs.80,000 deposited in court as security that is the subject of the appealed filing should not be released to the respondent and should remain with the trial court until the said court determines who is to pay the auctioneers fee in **Keroka SRMCC NO.34 of 2013**.

5. That the costs of this application be in the cause.

The above application was supported by the supporting affidavit of Susan Kairu an advocate of the High Court and Counsel representing the appellant in this matter deponing that a stay of execution was not granted by the lower court, that execution shall render the appeal nugatory as it shall be overtaken by events and that appellant will suffer irreparable pain if stay pending the outcome of the appeal is not granted and the appeal is successful.

She further deponed that the default judgment against the appellant was the result of the Auctioneers costs in **Keroka SRMCC NO.34 of 2013** and the result of the application by the respondent resulting in the ruling; was set aside in 13<sup>th</sup> November 2014 hence nullifying any consequent action that took place.

She further deponed that the Honourable magistrate in delivering its ruling in Keroka **SRMCC NO.34 of 2014** did not address the issue of who is to settle the auctioneers fees. She thus contends that the respondent stands to be greatly prejudiced if the amount deposited in court is paid to the respondent as the Honourable court in **SRMCC 34 of 2013** had already determined that the default judgment and execution process was flawed as the law was breached by the Plaintiff regarding service of summons. That the deposit of Auctioneers fees ought to be refunded to the appellant as the execution process was flawed and the process of attachment ought not to have taken place.

Lastly, she deponed that the court can only tax the respondent bill and make a ruling in favour of the respondent after the trial court in **SRMCC 34 of 2013** has made a determination as to who among the parties ought to bear the Auctioneer fee and storage charges.

The respondent in opposing the above application filed statement of grounds of opposition dated 23<sup>rd</sup> February 2016 stating that:

- 1. The instant Application is premature misconceived, incompetent and legally untenable.**
- 2. The orders and/ruling sought to be stayed relates to assessment and/or taxation of the respondents costs among and/or arising from execution proceedings, levied and/or carried out vide Keroka SRMCC NO.34 of 2013. Consequently the order of stay, do not lie.**
- 3.The instant Application does not meet/and or capture the requisite conditions provided for and/or established pursuant to the provisions of order 42 Rule 6 of the Civil procedure Rules 2010 whatsoever and/or howsoever.**
- 4. In any event, the Appellant has not evidenced/established substantial loss which is the cornerstone to granting the orders of stay of execution pending Appeal.**
- 5. Besides the supporting Affidavit for stay of execution.**
- 6. Notwithstanding the foregoing the instant Applicant does not raise and/or capture any reasonable cause of action whatsoever.**
- 7. In any event, the instant Application is an attempt by and/or the instance of the Appellant to delay obstruct and/otherwise defeat the due process of the Honourable court.**
- 8. In the premises, the Notice of Motion Application herein is devoid of merits whatsoever and/or howsoever.**

When the above matter came before me on 24<sup>th</sup> February 2016 it was agreed by consent that the above application be argued by way of written submissions

When the matter came before me again on 30<sup>th</sup> March 2016 parties had filed their written submissions.

### 3 Determination

Having considered the above application by the appellant for stay of execution and the supporting affidavit, the respondents grounds of opposition and the written submissions filed by the advocates representing each of the parties the following are the issues that present themselves before this court for determination: -

**1. Can an advocate swear an affidavit in place of his client?**

**2. Has the above application by the appellant met the conditions set for stay of execution as per order 42 rule 6?**

With regard to the first issue it is the respondents advocates contention that the appellants counsel is not an authorized officer to swear an affidavit on contested issues of evidence without disclosing sources of her information.

In **Jane Jowoko Omino - versus Blue Shield Insurance Co. Ltd HCC 359/2000 Tanui** —J held that:-

"An affidavit sworn by an advocate on matters which are not in dispute and supported by the court read is not defective.

Under Order 19 Rule 3 of the Civil procedure Rules the said order states 3 (i) affidavits shall be confined to facts as the deponent is able of his own knowledge to prove.

In **Kamlesh M.A. Pattni – versus - Masir Ibrahim Ali & 2 others CA 354/2004** the court of Appeal in dealing with a serious objection on the admissibility of an affidavit sworn by Senior Counsel Paul Muite held inter alia that:

**"..... There is otherwise no express prohibition against an advocate who of his own knowledge can prove some facts, to state them in an affidavit on behalf of his client, so too an advocate who cannot readily find his client but has information the sources of which he can disclose and state the grounds for believing the information."**

In my humble view therefore, there is no law expressingly prohibiting an advocate from swearing an affidavit on behalf of his client, in a client's cause, on matters which he an advocate has personal knowledge of, whether informed by his client or arising from the proceedings in the cause.

In the instant case, there is no contention that the facts deponed to by the advocate could not have been within the advocate's knowledge, being the advocate having the personal conduct of the suit on behalf of the appellant since its institution. Therefore the respondent's counsel's submission that the appellants counsel's affidavit should have been sworn by an authorized officer of the appellant company does not hold any water as the fact deponed by the appellants advocates were not contested and neither has he filed a replying affidavit to rebut the averments sworn by the appellant's advocates.

With regard to the second issue of whether the appellant's application has met the conditions for stay of execution, the conditions set for stay of execution are well stipulated under order **42 Rule 6 (2)** which are:-

**(a) Substantial loss may result to the applicant unless the order is made**

**(b) The application has been made without unreasonable delay**

**and,**

**(c) The applicant has furnished security for the due performance of the decree being appealed from.**

On application being brought without undue delay the court is satisfied that this application was made timeously, especially given the fact that it was filed the day after the ruling was delivered by the trial court.

On substantial loss in **Tropical commodity suppliers Limited & Others v International Trade Bank Limited (2004) 2 E.A 331 Ogola** -J held that:-

**“..... Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value or a loss that is of real worth or value as distinguished from a loss without value or loss that is merely nominal.....”**

Also in the case of **Bungoma HC Misc. Application No.42 of 2011 James Wangalwa & Another -versus Agnes Naliaka Cheseto** it was held:

**" the applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Application as the successful party in the appeal. This is what substantial loss would entail..."**

In **Machira t/a Machira & Co. Advocates -versus- East Africa Standard (No.2) [2002] KLR 63**, court held: - court held:-

**"In this kind of application for stay it is not enough for the application to merely state that substantial loss will result . He must prove specific debate and particulars.....where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay...."**

In **Antoine Ndiaje -versus- African virtual University [2015] e KLR Gikonyo J** observed:-

**"The legal burden does not shift to the respondent to prove he is possessed of means to make a refund. Except, whenever once the applicant has discharged his legal burden and has adduced such prima facie evidence such that the respondent will fail without calling evidence, the law says that evidential burden has been created on the respondent. And it is only where financial limitations or something of sort is established that the evidential burden is created on the shoulders of the respondent and he may be called upon to furnish an affidavit of means. See Halsbury's law of England in this subject. In my view substantial loss under order 42 Rule 6 is not in relation to the size of the amount of the decree or judgment because however large or small the judgment debt is liable to pay it the fact that the decree is of a colossal amount will only be useful material if the applicant shows that the respondent is not able to refund such colossal sum of money"**

On the basis of the above, the appellant has not established that substantial loss will occur unless stay of execution is made. The appellant's affidavit seems to rely on the success arguing the grounds of appeal to the extent of even arguing the grounds of appeal. In my humble view, the inquiry for purposes of stay pending appeal under order 42 rule 6 of the CPR is not really about merits of the appeal but rather the loss which will be occasioned by satisfaction of the appeal in the event the appeal succeeds.

In the case of **Jason Ngumba [2014] e KLR** Court held that:

**"Here, it is not really a question of measuring the prospects of the appeal itself but rather whether by issuing the applicant to do what the judgment requires, he will become a pious explorer in the judicial process"**

However what was stated in the case of **Absalom Dora –versus- Jaibo Transporters [2013] e KLR** is relevant, that: -

**"The discretionary relief for stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court, as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights, the appellant to this appeal which includes the prospects that the appeal will not be rendered nugatory and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination."**

How therefore, will the court balance the rights of parties in the circumstances of this case?

Despite my finding above, it is my view that the appellant is alive to the fact that even where stay is granted it must be on terms in the form of a security for the due performance of such decree or order as may ultimately be binding on the appellant. In the instant case, Money has already been deposited by the appellant and hence pending the appeal in this matter this court will not interfere with the already subsisting status quo. I will therefore allow the appellants Notice of Motion dated 11<sup>th</sup> February 2016 in terms of prayer No 3, 4 & 5.

Orders accordingly.

**Dated at Nyamira this 11<sup>th</sup> day of July, 2016.**

**C.B. NAGILLAH**

**JUDGE**

**In the presence of:-**

Ogari hold brief for Cambuni Advocate for Applicant

Ogari Hold brief Oguttu Mboya Respondent

Mercy- Court clerk