REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 278 OF 2017

KENYA POWER & LIGHTING COMPANY LIMITED.....PLAINTIFF/APPLICANT

VERSUS

GIMALU HEALTH ESTATE LIMITED .....DEFENDANT/ RESPONDENT

RULING

The matter for determination is the **Notice of Motion Application** dated **24th April 2020,** by the Plaintiff/Applicant brought under Order **42 Rules 6(1) of the Civil Procedure Rules, Sections 1A,1B ,3A and 95 of the Civil Procedure Act and Section 7 of the Appellate Jurisdiction Act** seeking for orders that**;**

1. That the Law Firm of M/s Muga Associates be granted leave to act for the Applicant/ proposed Appellant in place of Mwaure & Mwaure waihiga Advocates.

2. That the proposed Appellant be granted leave to appeal out of time against part of the Judgment of Hon. Justice O. A Angote delivered on 31st January 2020 in Machakos awarding the Plaintiff interest on compensation amount from 15th November 2002 until payment in full.

3. The Notice of Appeal dated 20th April 2020 annexed hereto be deemed as duly filed and served.

4. That there be a stay of Execution of the Judgment and Decree of the Honourable Court issued on 31st January 2020 and all consequential orders thereon pending the lodgement , hearing and determination of the proposed Appellant's intended Appeal.

5. That costs of this Application be provided for.

The Application is premised on the grounds that Judgment was delivered on **30th January 2020,** at **Machakos Land & Environment Court** in the absence of the parties and / or their Advocates. That the Applicant became aware of the said Judgment on **16th March 2020,** through a letter dated **11th March 2020,** from its erstwhile Advocates **M/s Mwaure & Mwaure Wahiga Advocates**, informing the Applicant that the Judgment had been delivered, Further that the Applicant/ Proposed Appellant was never informed of the date of delivery and/ or outcome by its Advocates.

That at the time the Applicant became aware of the said Judgment, the time allowed to lodge an Appeal against the Judgment had already lapsed. It was contended that the Applicant is dissatisfied with the Judgment and intends to appeal against part of the decision and order of the Honourable Court to award interest on the compensation amount from the date of filing of the suit until payment in full. Further that at the time the Applicant/Proposed Appellant gave instructions to the Advocates currently on record to Appeal against the Judgment, the Courts and registries had already been closed following the **COVID-19** global pandemic, and the said Advocate were unable to file the requisite letter to the Deputy Registrar, requesting for typed and certified proceedings, the Judgment and Decree.

Further that the delay in filing the **Notice of Appeal** and applying for typed proceedings were occasioned by unfortunate circumstances beyond the Applicant's/Proposed Appellant's knowledge, control and intervention. That the Applicant has an inherent right to a **fair trial** which includes exhausting all available judicial processes including appeal and that the grounds of appeal particularized in the draft **Memorandum of Appeal** dated **20th April 2020,** raise arguable Appeal with high chances of success. The Applicant further contended that it is apprehensive that the proposed Respondent shall commence execution proceedings for recovery of the decretal amount together with the interests which is the subject of the proposed Appeal, rendering the intended appeal nugatory. That pending the hearing and determination of the intended appeal, the Applicant is ready and willing to pay the proposed Respondent the decretal amount of **Kshs.3,852,000/=** exclusive of the awarded interest.

Further that the Proposed Respondent is unlikely to suffer any prejudice if the orders sought are granted as the Applicant shall abide by

the conditions set by the Court. It was further contended that the delay occasioned is not so inordinate or so great as to be inexcusable and the Application is made in good faith.

The Application is supported by the Affidavit of **Emily Kirui,** the **Legal Services Manager**, with the Applicant sworn on **24th April 2020.**She averred that the trial of the suit was conducted on **30th October 2018,** and Judgment delivered on **31st January 2020,** and reiterated the contents of the grounds in support pf the application.

The Application is opposed and the Defendant/ Respondent who filed a Replying Affidavit sworn by **Joan Njoki Ndungu** on **8th May 2020** and averred that the parties appeared before Court several times to file submissions and that from the Record, the Plaintiff/ Applicant is seen not to be interested in finalizing the suit from the several mentions and adjournments sought after the Applicant obtained an injunction, which allowed them to put high density electric poles. She further averred that she has been advised by her Advocates, which Advices she believes to be true that the Judgment was delivered after notices were posted in the **Court's Notice Board** and the **weekly cause list** and that the Applicant was represented at the time by a competent **Law Firm** and thus it is not clear why they did not file a Notice of Appeal on time.

She further averred that she has been advised by her Advocates, which advise she believes to be true that there cannot be stay of Execution of the Judgment of the Court in the absence of an Appeal, hence the said orders are not capable of being granted. Further that it has been more than **20 years** and the Respondent has been denied the right of compensation of use of its property which property was acquired by force . She further averred that the Chief Justice pronounced that there shall be no open Court proceedings due to the **Covid-19** Pandemic, but that the registries were never closed as claimed by the Applicant. She contended that the Respondent continues to suffer extreme loss and prejudice if the extension is granted, in the otherwise concluded litigation. It was her contention that the Court lacks jurisdiction to entertain the proceedings which should be dismissed as the delay to file the **Notice of Appeal** as prescribed by law is inordinate and inexcusable. Hence the Court should not be misused to sit as a trial Court and Appellate Court at the same time.

The Defendant/ Applicant further filed grounds of objection dated **8th May 2020,** and averred that the Application is **frivolous, vexatious incompetent** and **bad** in law. It was further averred that there cannot be **stay of execution** of the Court's Decree in the absence of an **Appeal** and that the orders sought in the Application are not capable of being granted. Further that there is no Appeal filed hence there is no basis upon which **stay of execution,** can issue and the Respondent has been denied compensation for more than 20 years and that there must be an end to litigation.

The Application was canvassed by way of written submissions which the Court has carefully read and considered and finds that the issues for determination are;

1. ***Whether the court has jurisdiction***

2. ***Whether the Defendant's/ Respondents Replying Affidavit should be struck out.***

3. ***Whether the Court should extend the time within which to file the Notice of Appeal.***

4. ***Whether the Plaintiff/ Applicant is entitled to the orders sought.***

1. ***<u>Whether the court has jurisdiction</u>***

It is the Respondent's submission that the Court lacks jurisdiction under **Rule 5(2)(b) of the Court of Appeal rules,** to grant the prayers sought by the Applicant as the **Appellate Jurisdiction Act** confers jurisdiction to the Court of Appeal, to hear Appeals from the High Court.

It is not in doubt that jurisdiction is everything and without it, the Court has no option but to down its tools. Further it is not in doubt that the Applicant is seeking for leave to file a **Notice of Appeal**, out of time and stay of execution.

Section 95 of the Civil procedure Act provides;

> ***"Enlargement of time Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired."***

Further **Section 7 of the Appellate Jurisdiction Act** states;

> ***"The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired."***

With the above provisions of law in mind, it is the Court's considered view that the Court is clothed with the requisite jurisdiction to hear and determines the Application.

2. ***<u>Whether the Defendant's/ Respondent's Replying Affidavit should be struck Out.</u>***

It is the Plaintiff's / Applicant's submission that a perusal of the Durant of the Relying Affidavit allegedly sworn by **Joan Njoki Ndungu** reveals that the same bears the stamp of **M/S Paul Ndungu & Associates Advocates** and further that a plain reading of **Section 2 of the Oaths & Statutory Declaration Act** reveal that only practicing Advocates may be appointed as Commissioners of Oaths by the Chief Justice. It was further submitted that **Section 9 of the Advocates Act,** outlines which person is qualified as a practising Advocates; That he has been admitted as an Advocate, his name is for the time being in the roll and that he has in force a practising certificate.

Though this issue was only brought up in the submissions, the Defendant/ Respondent did not submit on the same. However, it is the Court's considered view that the issue from the said stamp seems to be that it has indicated that & Associates Advocate. The Plaintiff/ Applicant has not alleged that the said **Paul Ndungu** is not a Commissioner of Oaths nor has the Plaintiff/ Applicant alleged that the said Affidavit was never sworn before him. In the case of **CMC Motors Group Lmited…Vs…Bengeria Arap Korir Trading as Marben School & Another (2013)** that has been relied upon by the Plaintiff/ Applicant the Court stated

> ***"bearing that definition, the question that needs to be answered is whether Wando took an oath before a commissioner of oaths…."***

The same would apply to this instant and the question would be whether the said **Paul Ndungu** is a Commissioner and whether the said **Joan Njoki Ndugi,** took oath before him. It is the Applicant who has alleged and the onus fell on it to prove. However, the Court has not seen any evidence to the effect that the said **Paul Ndungu** has not met the said requirements as provided by **Section 9 of the Advocates Act** or that the deponent did not swear the said Affidavit infront of him.

It is the Court's considered view that it will not be in the interest of justice to strike out the Affidavit just because the said stamp bear the words **…. & Associates Advocates.** It is trite that pleadings should only be struck out if they are so hopeless and cannot be salvaged. In the instant case, is it not so hopeless and the Court finds no reason to strike it out. Therefore, the Court finds and holds that the said Affidavit is properly before Court.

> ***3. Whether the Court should extend the time within which to file the Notice of Appeal***

It is the Applicant's contention that it has satisfied the conditions set out for the enlargement of time to file a Notice of Appeal. **Section 95** of the **Civil Procedure Act** provides;

> ***"Enlargement of time Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired."***

It is not in doubt that a Judgment was delivered on **30th January 2020**, and the time within which the Notice of Appeal ought to have been filed was **30 days** from the said date, which has since lapsed. However, the Court still has the powers to enlarge time. In the case of ***Vishva Stone Suppliers Company limited …Vs… RSR Stone [2006] Limited [2020]*** **eKLR** the Court of Appeal held that

> ***The above principles were restated by the Supreme Court of Kenya (M.K. Ibrahim & S.C. Wanjala SCJJ) in Nicholas Kiptoo Arap Korir Salat versus Independent Electoral and Boundaries Commission & 7 others (supra) as follows:-***
>
> > ***"(1) Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.***
> >
> > ***(2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.***
> >
> > ***(3) Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.***
> >
> > ***(4) Whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court.***
> >
> > ***(5) Whether there will be any prejudice suffered by the respondent of the extension is granted.***
> >
> > ***(6) Whether the application has been brought without undue delay; and***
> >
> > ***(7) Whether uncertain cases, like election petition, public interests should be a consideration for extending time."***

The Court has considered the above principles, and the submissions by the Defendant/ Respondent that there is **no** valid Notice of Appeal. The Plaintiff/ Applicant has averred that the Judgment was delivered in the absence of both parties and that she only became aware of the said Judgment on **16th March 2020,** through a letter dated **11th March 2020,** from their previous Advocates and therefore could not be able to file the Notice of Appeal within the requisite time. However, the Defendant's/ Respondent's contended that the Applicant has not satisfactorily explained why it did not file the Notice in time while it was represented by a competent Firm of Advocates.

The Court will take Judicial Notice that more often litigants usually come to Court when the case comes up for hearing and often during mentions and Judgment dates, the parties are usually represented by Advocates. It has not been denied that the said Judgment was delivered in the absence of both parties. While it is not clear when the Applicant's previous Advocates became aware of the said Judgment, the Applicant have contended that they only learnt of the Judgment on **16th March 2020**. Further Court takes **Judicial Notice** that the operations of the Courts had during that time been scaled down due to the **Covid-19 Pandemic**, and therefore failure to file the said **Notice** during that

time is excusable.

Therefore, the Court finds and holds that the Applicant has satisfied the prerequisite for granting the said relief being that the Respondent has not demonstrated what **prejudice** it will suffer if the time within which is allowed to file the Notice of Appeal is extended.

5. Whether the Plaintiff/ Applicant is entitled to the orders sought

The Plaintiff/ Applicant has sought for time to be extended within which to file the Notice of Appeal and that the same be deemed as duly filed. The Court has already held and founds that the Plaintiff/ Applicant has demonstrated that it warrants the Court's discretion to allow it file the Notice of Appeal out of time and therefore the Court finds an holds that the same is merited and is allowed upon the paying of the requisite fee.

The Plaintiff's Advocate had also sought for leave to be allowed to come on record and given that there was no objection the said prayer is merited.

Further the Plaintiff/ Applicant has sought for the stay of Execution pending the appeal. The Court has also considered the written submissions, the cited authorities and provisions of ***Order 42 Rule 6(2***).

The said provisions of law set out the principles that the court should consider while deciding whether to grant ***Stay of Execution Pending Appeal***. These are:-

> ***"No order for stay of execution shall be made under subrule (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.***"

There are also plethora of decided cases on the issue of grant of Stay of Execution pending Appeal. See ***Civil Appeal No.107 of 2015, Masisi Mwita..Vs…Damaris Wanjiku Njeri (2016) eKLR***, where the Court held that:-

> ***"The application must meet a criteria set out in precedents and the criteria is best captured in the case of Halal & Another..Vs… Thornton & Turpin Ltd, where the Court of Appeal (Gicheru JA, Chesoni and Cockar Ag. JA) held that:-***
>
> ***"The High Court's discretion to order stay of execution of its Order or Decree is fettered by three conditions, namely;- Sufficient Cause, substantial loss would ensue from a refusal to grant stay, the Applicant must furnish security, the application must be made without unreasonable delay.***
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> ***In addition, the Applicant must demonstrate that the intended Appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Wakalo…Vs…Straman EA Ltd (2013) as follows:-***
>
> ***"In addition the Applicant must prove that if the orders sought are not granted and his Appeal eventually succeeds, then the same shall have been rendered nugatory."***
>
> ***These twin principles go hand in hand and failure to prove one dislodges the other"***

It is not in doubt that firstly the Applicant must show that it will suffer substantial loss. It is evident from the above provisions of law that the Court has discretion to issue an Order of stay of execution. However, the said discretion must be exercised judicially. See the case of ***Canvass Manufacturers Ltd…Vs…Stephen Reuben Karunditu, Civil Application No.158 of 1994, (1994) LLR 4853,*** where the Court held that:-

> ***"Conditions for grant of stay of execution pending appeal, arguable appeal and whether the appeal would be rendered nugatory. The discretion must be judicially exercised".***

Further in the case of ***Stephen Wanjohi…Vs…Central Glass Industries Ltd, Nairobi HCC No.6726 of 1991***, the Court held that:-

> ***"For the court to order a stay of execution there must be:-***
>
> > **i.** ***Sufficient cause***
> >
> > **ii.** ***Substantial loss***
> >
> > **iii.** ***No unreasonable delay***

iv. *Security and the grant of stay is discretionary".*

The Court also takes into account that it is not the practice of Courts to deprive a successful litigant of the fruits of his/her litigation and that the purpose of stay of execution pending Appeal is to preserve the subject matter. See the case of ***Consolidated Marine...Vs...Nampijja & Another, Civil App.No.93 of 1989 (Nairobi***), where the Court held that:-

> ***"The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory."***

First, the Applicant must satisfy that he will ***suffer substantial loss,*** unless the orders sought are issued. It is not in doubt that the Applicant is appealing against part of the Judgment by the Court granting the Defendant/ Respondent interest from the date of filing of the suit. The Applicant in the Court's considered view has not demonstrated what loss it would suffer if the stay is no granted. This is so as the Applicant has submitted that the amount in interest from the year **2002,** until payment in full together with the sum awarded amounts to **Kshs. 8,000,000/=** is substantial and that the amount will result in substantial loss. It was further submitted that nothing on the record show that the Defendant/Respondent will be in a position to refund the money if the Applicant succeeds. In the case of **Kenya Shell Limited …Vs… Kibiru [1986] KLR 410**, the Court held that;

> ***"It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money".***

> ***"It is not sufficient by merely stating that the sum of Kshs.20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement."***

Equally in this case, the Court finds and holds that it is **not sufficient** to merely state that the Respondent are not in a position to refund the money. However, the Court must also balance with the fact that the Applicant is not in a position to know the financial muscle of the Defendant/Respondent and are not expected to know. See the case of **Civil Application No. 238 of 2005; National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike** in which the Court of Appeal held;:-

> ***"This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegations that an appeal would be rendered nugatory because the respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge."***

Whether or not the Application was filed without unreasonable delay, the Court has already held and found that the delay is excusable.

It is evident that this is a money decree and balancing the two facts, the Court cannot state with certainty that the Applicant will suffer substantial loss and that leads the Court to consider the issue of security for costs.

The Applicant has stated that it is willing to pay the **Kshs.3,852,000/=** awarded and it is only appealing part of the Judgment that relates to the interest. Therefore, the Court holds and finds that since the interest can be calculated and as already noted above, there is no certainty whether or not the Defendant are in a position to repay the money or whether the Applicant will suffer substantial loss, the only logical thing to do is to deposit the interest in a joint account held by both parties and that would be a condition for Stay of Execution being granted

The Upshot of the foregoing is that the Applicant's Application dated **24th April 2020** is found **merited** an the same is allowed on condition that the Plaintiff/ Applicant do pay to the Defendant/ Respondent a sum of **Kshs.3,852,000/=** forthwith**.** Further the Plaintiff/ Applicant to deposit in a joint interest earning Account the interest thereon from **2002** to the date of this Ruling. Further Costs of the Application shall be in the cause.

It is so ordered.

Dated, signed and Delivered at Thika this 12th day of November 2020

L. GACHERU

JUDGE

12/11/2020

Court Assistant - Lucy

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

No appearance for the Plaintiff/Applicant

M/s Wambui holding brief for Mr. Mbaabu for the Defendant/Respondent

L. GACHERU

JUDGE

12/11/2020