

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI
CIVIL APPEAL NO. 11 OF 2024

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

VERSUS

SUSSY MBAKA REUBEN
T/A GOD THE FATHER CENTRE FOR NEEDY CHILDREN.....
RESPONDENT

RULING

1. By a Notice of Motion dated 7.5.24, the Appellant seeks the following orders:

1. ***Spent.***
2. ***THAT there be a Stay of Execution of the Orders issued herein on the 17th January 2024 by HON E. K USUI in CMCC NO 318 of 2018 SUSSY MBAKA VS KENYA POWER & LIGHTING COMPANY pending the hearing and determination of this Application.***
3. ***THAT there be a Stay of Execution of the Orders issued herein on the 17th January 2024 by HON E. K USUI in CMCC NO 318 of 2018 SUSSY MBAKA VS KENYA POWER & LIGHTING COMPANY pending the hearing and determination of the appeal.***
4. ***There be a Temporary Stay of Execution or attachment of the Defendants proclaimed goods pending the inter-partes hearing and determination of the application herein.***
5. ***The warrants of attachment of movable property in execution of a decree of money dated 7th February, 2024 and the warrants of sale be canceled, set aside, recalled and/or lifted unconditionally for being a nullity having been issued irregularly.***
6. ***Costs of the Application be paid by the Plaintiff.***

2. The Respondent opposed the application through a replying affidavit sworn on 10.12.24. The replying affidavit together with submissions however, relate to the appeal and not the Application.

3. The Appellant is aggrieved by the judgement of the trial court delivered on 17.1.24 and has already filed an appeal against the said decision. The Appellant contends that it has an arguable appeal with overwhelming prospects of success as the trial court misapprehended the

facts and the law and arrived at a wrong decision. The Appellant averred that the Respondent has made attempts to execute the decree emanating from the judgement. Further that unless stay is granted, the Appellant will suffer irreparable damage as the amount is colossal and the respondent's ability to repay is unknown and the appeal will be rendered nugatory. On the other hand, the Respondent will suffer no prejudice if the orders sought are granted. The Appellant Applicant further stated that the Application has been made without unreasonable delay and that it is ready to comply with such conditions/terms as the Court may set.

4. The jurisdiction of the Court to grant stay of execution is set out in Order 42 Rule 6 of the Civil Procedure Rules. Sub-rule 2 provides:

(2) 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 order for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

5. The law requires that an application for stay of execution be filed without unreasonable delay. In the instant case, the decision of the lower court by which the Appellant is aggrieved, was made on 17.1.24 while the Application is dated 7.5.24, almost 4 months later. While there has been some delay, the same cannot be said to be inordinate.

6. On substantial loss, the Appellant contends that the Respondent has no known source of income and may be unable to refund the decretal amount if the appeal succeeds, thereby occasioning substantial loss to the Appellant.

7. In **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR**, Gikonyo, J. had this to say on substantial loss:

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 Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein N. Chesoni [2002] 1KLR 867, and also in the case of Mukuma V Abuoga quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

“...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

8. I associate with the sentiments expressed by the learned Judge. In the present case, the Respondent did not rebut the assertion that she has no known source of income and has not demonstrated capacity to refund any moneys that may be paid in full or part satisfaction of the decree, were the appeal to succeed. It is therefore necessary to preserve the substratum of the appeal, pending the hearing and determination thereof, to prevent substantial loss to the Appellant which would render the appeal nugatory. The Court has also considered the willingness on the part of the Appellant to abide by such conditions as may be imposed.
9. In light of the foregoing, the Application succeeds and I grant the following orders:
 - i) Stay of execution of the judgment of 17.1.24 and all consequential orders and the warrants of attachment of the proclaimed goods, pursuant thereto is hereby granted.
 - ii) The record of appeal shall be filed and served by 19.12.25.
 - iii) The entire decretal amount shall be deposited in Court by 19.12.25.
 - iv) In default of order ii) and iii) above, the stay granted herein shall lapse.
 - v) The costs of this application shall abide the outcome of the appeal.

DATED, SIGNED and DELIVERED in MALINDI this 5th day of December 2025

M. THANDE
JUDGE