REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CASE NO. 87 OF 2012

EVANSON WAITIKI.....PLAINTIFF

VERSUS

KENYA POWER & LIGHTING CO. LTD.....DEFENDANT

R U L I N G

1. By a ruling delivered on 17th December, 2018, this court dismissed the defendant's Application dated 13th October, 2015 which sought to join the National Land Commission and the Honourable Attorney General, as parties to this suit. Being aggrieved by that ruling, the defendant has filed a Notice of Appeal dated 23rd January, 2019 and an Application for extension of time before the Court of Appeal dated 21st February 2019. That Application pending before the Court of Appeal is yet to be heard.

2. The Defendant/Applicant has now filed the Notice of Motion dated 4th May, 2019 seeking for a stay of proceedings in this suit pending the hearing and determination of the Application pending before the Court of Appeal. The Application is premised on the grounds on the body of the Application and the supporting affidavit of Fredrick Mariga sworn on 6th May, 2019.

3. According to the Applicant the ruling of 17th December 2018 was delivered in the absence of Counsel for the Applicant as no Notice for that ruling had been issued. That the Applicant became aware of the ruling on 16th January 2019 after a period of more than 14 days from the date the ruling was delivered, as a result the defendant could not file a Notice of Appeal to the Court of Appeal since it was already outside the mandatory 14 days period allowed.

4. It is the Applicant's contention that to proceed further before this court would defeat the purpose of the Notice of Appeal dated 23rd January 2019 and the Application pending before the Court of Appeal. Further, that if the Applicant's Application in the Court of Appeal is allowed and the Applicant is allowed to proceed on appeal against the orders of this court of 17th December, 2018, the scenario will change as the Court of Appeal will have acquired jurisdiction to hear an appeal challenging that ruling. The Applicant is further apprehensive that by proceeding before this court before the determination of the Application pending before the Court of Appeal, the fate of the intended appeal would be sealed. It is argued that the Applicant will suffer substantial loss and damage which has an effect on the Applicant's right to a fair hearing as enshrined in Article 50 of the Constitution. The main suit was due for hearing on 14th and 15th May 2019 but could not proceed because of this Application.

5. Mr. Munyithya, learned counsel for the Applicant submitted that the Application before the Court of Appeal is not frivolous. He argued that if this court proceeds before the intended appeal is heard and determined, that appeal will be rendered nugatory as the substratum will have been heard. Secondly, that the Applicant will suffer substantial loss if the respondent is awarded the sum claimed, which counsel submitted is in excess of Kshs.200 million.

6. The Application was opposed by the Plaintiff/respondent. Mr. Gacheru, learned counsel for the Respondent relied on the grounds of opposition dated 13th May, 2019. The Application was challenged for having been brought prematurely as there is no appeal pending. Relying on the case of **Kenya Power & Lighting Co. Ltd –v- Esther Wanjiru Wokabi (2014)eKLR**, Counsel submitted that the provisions of Order 42 Rule 6 of the Civil Procedure Rules only apply to Applications for stay of execution of a decree or order issued by a court pending hearing of an appeal but the same do not apply to Applications for stay of proceedings such as the Application now before me. Counsel further submitted that the Applicant has brought three Applications in the past, all to scuttle the hearing of this suit. He argued that there is no memorandum of Appeal or Record of Appeal filed, hence there is no appeal on merit. Counsel submitted that the Application has not been brought expeditiously, arguing that there is a delay of about five months. The Respondent cited the case of **Fidelity Shield Insurance Co. Ltd & 4 Others –v- Rafia Bags (K) Ltd (2010) eKLR.** It was the respondent's submission that no prejudice will be suffered by the Applicant as the Applicant has an opportunity to challenge the final decision in the event the matter is heard and concluded. Counsel relied on case of **Solace Hotel Ltd –v- Catering & Tourism Development Levy Trustees (2010) eKLR**. The respondent submitted that he is the one to suffer prejudice due to his age and failing health, adding that the matter before court is very old having been filed in year 2012.

7. I have considered the Application, the affidavit on record, the submissions made by counsel for both parties as well as the authorities cited. I note that the Application is premised on Order 42 Rule 6 of the Civil Procedure Rules. That provision only applies to Applications for stay of execution of a decree or order issued by a court pending hearing of an appeal. The Application herein is for stay of proceedings. I do not think Order 42 Rule 6 applies to Applications for stay of proceedings such as the Application now before me.

8. I note however, that this Application invokes the provisions of Article 159 of the Constitution. Article 159 (2) (d) provides that in exercising its authority, the court shall administer justice without undue regard to procedural technicalities. In deciding the Application, therefore I will exercise this court's inherent jurisdiction to do justice under Section 3A of the Civil Procedure Act. It was stated in the case of Fidelity Shield Insurance Co. Ltd (supra) '…***judicial discretion gives the court flexibility to provide definitions according to the dictates of justice. This must be done judiciously based on facts and law and to promote fair and expeditious disposal of cases'***. In that case, Koome, J (as she then was) stated:

> **"In considering whether the order will serve the interest of justice certain factors ought to be brought to bear. Such factors are whether the order will hinder the expeditious disposal of the matter, whether the appeal has merit on the face of it, and whether the Application has been brought expeditiously."**

9. The ruling that the Applicant seeks to appeal against was delivered on 17th December, 2018. The Applicant states that it became aware of the said ruling on 16th January, 2019. The Application for extension of time to file Notice of Appeal was filed in the Court of Appeal on 22nd February, 2019. That was more than one month after the Applicant became aware of the ruling that was delivered by this court. This Application was filed more than three months after the Applicant became aware of the ruling delivered on 17th December, 2018. In my view, this Application cannot meet the threshold of having been filed within a reasonable time. This is more so considering that by 5th February, 2019, the Applicant was already aware that the matter was scheduled for hearing on 14th and 15th May 2019. There was no explanation given why the Applicant decided to bring this Application only a few days to the hearing. I agree with the submission by the respondent that the only reason for filing this Application belatedly was to scuttle the hearing.

10. Counsel for the Applicant submitted that the intended appeal is not frivolous. What is pending before the Court of Appeal is an Application for extension of time to file a Notice of Appeal. At this stage therefore it is not possible for the court to make any finding on the merits of the intended appeal.

11. But having said that, I think the most important consideration that this court should bear in mind in determining this Application is whether the Applicant has established sufficient cause to convince the court that it would be in the interest of justice to allow the Application. In other words, has the Applicant demonstrated that if the court were to decline granting the orders of stay as sought it will suffer prejudice which will expose it to injustice? I am of the view that the intended appeal will not be rendered nugatory in the event a stay is not granted as the Applicant could still make an Application to set aside the proceedings in the event its intended appeal is successful. Further, the Applicant still has the opportunity to apply for stay of execution if any decree was passed against it in the end. If the proceedings are stayed at this point and while considering an appeal has not been filed, there will be delay which will not serve the interest of justice considering that this suit was filed in 2012, nearly seven years ago. I find that allowing the Application in the circumstances of this case would not only be against the interests of justice but will also frustrate the court's overriding objective of facilitating affordable and expeditious resolution of civil disputes.

12. In the result, I dismiss the notice of motion dated 4th May, 2019 with costs to the respondent

DATED, SIGNED and DELIVERED at MOMBASA this 27th day of May 2019.

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C.K. YANO

JUDGE

IN THE PRESENCE OF:

Gacheru for Plaintiff/Respondent

Munyithya for Defendant/Applicant

Muganda for 3rd parties.

Yumna Court Assistant

C.K. YANO

JUDGE