



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 287 OF 2013

NOORLANDS LTD.....PLAINTIFF

VERSUS

KENYA POWER LIGHTING CO. LTD.....RESPONDENT

RULING

1. For this Court's determination is the Notice of Motion dated 22nd November 2016 and filed on the same date. The application is brought under the provisions of Order 42 rule 6. The defendant/applicant seeks orders;

(a) Spent;

(b) Spent;

(c) That the court does grant an order of stay of the judgment delivered on 4th November 2016 pending hearing and determination of the appeal;

(d) Costs of the application be provided for.

2. The motion is supported on the grounds listed on its face inter alia;

(i) The applicant has filed a notice of appeal;

(ii) Unless stay is given the appeal will be rendered nugatory;

(iii) The applicant is willing to provide security for the due performance of the decree;

(iv) The application has been made without undue delay.

3. The application is opposed by the plaintiff/respondent vide a replying affidavit sworn by Mohamed Khatib advocate on 1st February 2017. Mr Khatib deposed that he holds a power of attorney from the plaintiff. He deposed that the defendant was not restrained from supplying power to the 400 people connected hence it will not suffer loss if stay is not granted. That he is advised that stay of execution is only grantable where substantial loss is likely to be suffered. That the applicant is still connecting more squatters. He urged the court to dismiss the application.

4. The parties filed written submissions. The defendant submitted that since the decree passed is partially a monetary decree, if stay is not granted, the respondent may execute for the same. That the respondent may not be able to refund the monetary decree in case the appeal succeeds. That the actual location or bank details of the plaintiff is not known. They put reliance on the holding of the case of **Superior Homes (K) Ltd –versus- Musango Kithome (2018) eKLR**. He also submitted that the application has been brought without undue delay and they are willing to provide security.

5. In replying submissions the plaintiff submitted that the suit land measures 168 acres therefore it is capable of re-imbursing the defendant in case the appeal succeeds. That the defendant has not proved it will suffer substantial loss if it pays Kshs.3,395,383/= from its millions. The plaintiff blames the defendant for delay in prosecuting this application i.e from 22nd November 2016 until 24th July 2018 after the plaintiff took out the warrants of execution. Lastly that there is no evidence that the appeal will be negated.

6. The application was indeed filed the same month as the date of judgment thus it was filed without undue delay. Order 42 rule 6 discusses the time the application is brought to court not when it is listed for prosecution. In any event, I note from the court record that the matter went for taxation of costs before the Deputy Registrar on 13th of October 2017 and a ruling delivered on 1st February 2018. The court file could not thus proceed in the two courts at the same time i.e for taxation and prosecution of this application.

7. Will the defendant suffer substantial loss unless the stay orders are issued? The plaintiff pleaded that the defendant was not restrained from supplying power to the 400 people already connected. The stay however is sought in respect of payment for the monetary damages awarded as well as costs. The defendant submitted that the physical location and financial status of the plaintiff is unknown to enable them be able to recover their money in the event the appeal succeeds. The plaintiff however relies on the value of the suit land to prove its financial muscle. This court having visited the land is alive to the fact that the land is fully occupied by squatters. In fact the defendant was sued on account of their supply of power as the reason for increasing squatter population. The inference then drawn is that recovering any monies using the land will not be an easy task. In essence the defendant's fears of not recovering the decretal sum is not unfounded and which then makes a good ground for substantial loss.

8. The defendant is a going concern. They offered to provide security. I do therefore order that they shall have half of the decretal sum deposited in an escrow account to be opened in the joint names of the parties advocates to be held as security pending hearing and determination of the appeal. The deposit shall be made available within 45 days of delivery of this ruling. The application is thus allowed in terms of prayer 3 of the application on condition of provision of security. Costs of the application ordered in the cause.

Dated, Signed and Delivered at Mombasa this 27th day of June 2019.

A. OMOLLO

JUDGE.