



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NYAHURURU**

**ELCA NO 21 OF 2018**

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

**VERSUS**

**KIGAITA NGARE UNDUTHU & 51 OTHERS.....RESPONDENT**

**RULING**

1. Before me for determination is the Notice of Motion dated 15<sup>th</sup> April 2019 brought under Sections 1A, 1B, 3A and 79G of the Civil Procedure Act, Order 42 Rule 6 and 7 of the Civil Procedure Rules, as and all other enabling provisions of the law where the Applicant seeks for orders of stay of execution of the Judgement and Decree in Nyahururu Chief Magistrate's Court in Civil Suit No. 256 of 2006 delivered on the 14<sup>th</sup> March, 2019, pending the hearing and determination of this Appeal as well as any other orders that the court may deem fit to grant.

2. The said application is supported by the grounds set on its face as well as on the supporting affidavit of Emily Kirui the Applicant/Appellant's chief Litigation officer.

3. An interim order of stay in terms of prayer 2 of the application was granted on the 17<sup>th</sup> April 2019 which orders were extended on several occasions. Subsequently, by consent, parties agreed to dispose of the application by way of written submissions wherein leave was granted to the parties to file and serve their respective written submissions with the highlighting of the same scheduled for the 30<sup>th</sup> July 2019.

4. I have considered the parties written submissions as well as the highlighted submissions herein.

**Applicant/Appellants submission.**

5. The Applicant's submission was to the effect that vide their application, they had sought for orders of stay of execution of the Judgement and Decree in Nyahururu Chief Magistrate's Court in Civil Suit No. 256 of 2006. That they had met the conditions as envisaged under order 42 of the Civil Procedure Rules and were willing to deposit security on the order of the court.

6. The Applicant's grievance is that upon the determination of the matter in the trial court, they had been ordered to pay each of the Respondent's a sum of Ksh 300,000/ which was an amount in excess of Ksh 10,000,000/= which amounts would most likely not be recoverable from the Respondents in case their Appeal succeeded.

7. That the law provides for making of the application for stay of execution pending the hearing and determination of an appeal filed. That the Applicant had met the conditions set down by order 42 Rule 6(2) of the Civil Procedure Rules.

8. That if the stay was not granted, they would suffer substantial loss keeping in mind that the Respondents totalled 36 in number. Thus in view of the colossal amount of money involved and the fact that the Respondents had not shown any source of income or financial stability that could be relied upon should the Appeal succeed, it was thus their prayer that the intended execution be stayed so as not to render the Appeal nugatory.

9. That the ownership of the parcels of land was not enough to demonstrate financial stability, the value being unknown. That the Respondents are under an obligation to prove their financial status and demonstrate an ability to refund the judgment sum should the appeal succeed. Failure to do so must be construed against them as is provided under section 112 of the Evidence Act.

10. On the second issue on security as the court orders for due performance, it was the Applicant's submission that they had undertaken to deposit reasonable security as shall be determined by the honourable court. This in turn would take care of the Respondents' concern that their interests would be taken care of by the Applicant depositing part of the decretal amount as ordered by a court.

11. The Applicant relied on the decision in the case of **Focin Motorcycle Co. Ltd vs Ann Wambui Wangui & Another [2018] eKLR** to

buttress their submissions.

12. On the last condition, it was the Applicant's submissions that their application had been made without unreasonable delay. That judgment was delivered on the 14<sup>th</sup> March 2019 wherein a 30 days stay was granted which lapsed on the 15<sup>th</sup> April 2019. The application was filed on the date when the stay by the lower court lapsed.

13. Their submission was that the application was proper before this court pursuant to the provisions of Order 42 Rule 6(1) of the Civil Procedure Rules. See the case of **Stanley Karanja Wainina & Another vs Ridon Anyangu Mutubwa [2016] eKLR**. Whether the application for stay was refused or granted by the trial court, this court was at liberty to consider such application and to make an order it deemed fit irrespective of whether the subject matter herein was a money decree see the case of **House Finance Company of Kenya vs Sharok Kher Mohamed Ali Hirji & Another [2015] eKLR**.

14. The Applicant also urged the court to be guided by the Court of Appeal decision in the case of **Amal Hauliers Limited vs Abdulnasir Abukar Hassan [2017] eKLR** while exercising its discretion on whether or not to grant stay of execution in their favour.

#### **Respondents' submission.**

15. The application was opposed by the Respondents who submitted that the three conditions that need to be satisfied for stay of execution had not been met by the Applicants as provide for under Order 42 Rule 6 of the Civil Procedure Rules. That the Applicant had not demonstrated what substantial loss they would suffer if the stay order was denied. That it was trite law that the monetary loss could not amount to substantial loss since it was capable of being quantified and could be recovered by the Applicant in the event that the Appeal succeeded.

16. That secondly, the Applicant had not offered any security for due performance of any decree that might ultimately be binding on it should the appeal fail.

17. That the Respondents parcels of land were no doubt valued more than the amount decreed to them by the subordinate court and therefore they were not impecunious men incapable of refunding the decretal sum in the event that the Appeal succeeded.

18. That the Applicant/Appellants had continued to use the Respondents parcels of land even without compensation which state of affair would continue pending the outcome of the Appeal. That the doctrine of proportionality as envisaged under section 1A of the Civil Procedure Act would not countenance such a situation.

19. That the Applicant was found guilty of trespass on the Respondents' parcels of land by the trial court where the impugned award of general damage was issued which award was proper in the circumstance and this court was unlikely to disturb it on Appeal. The court was referred to the case of **Hassan Mohamed Haji vs Mohamed Keynan & Another [2019] eKLR**.

#### **Determination.**

20. I have considered the application, the affidavit on record, and submissions by counsel as well as the law concerning stay of execution pending Appeal under Order 42 Rule 6 of the Civil Procedure Rules which stipulates as follows:

*No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.*

*(2) No order for stay of execution shall be made under sub rule (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.*

21. There are three conditions for granting of stay order pending appeal under Order 42 Rule (6) (2) of the Civil Procedure Rules to which :

- a) The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;
- b) The application is brought without undue delay and
- c) 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.

22. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the Act or in the interpretation of any of its provisions. According to section 1A(2) "the Court shall, in the exercise of its powers under this Act or the interpretation of any

of its provisions, seek to give effect to the overriding objective” while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.

23. It therefore follows that all the pre-overriding Objective decisions must now be looked at in the light of the said provisions. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing.

24. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice.

25. On the first condition of proving that substantial loss may result unless stay order is made. It was incumbent upon the applicant to demonstrate what kind of substantial loss he will suffer if the stay order was not made in his favour.

26. What amounts to substantial loss was expressed by the Court of Appeal in the case of **Mukuma V Abuoga (1988) KLR 645** where their Lordships stated that;

*“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”*

27. On the first principle, **Platt, Ag.JA** (as he then was) in **Kenya Shell Limited vs. Kibiru [1986] KLR 410**, at page 416 expressed himself as follows:

*“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”.*

On the part of **Gachuhi, Ag.JA** (as he then was) at 417 held:

*“It is not sufficient by merely stating that the sum of Shs 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.”*

28. In the application before me, the Applicant has pleaded that they would suffer substantial loss of Ksh 10,000,000/= which in my view and in agreement with submissions by the Respondent, is monetary loss which does not amount to substantial loss in the circumstance.

29. It must not be lost that this decretal amount is to be shared by 36 Respondents. What amounts to reasonable grounds for believing that the Respondent will not be able to refund the decretal sum is a matter of fact which depends on the facts of a particular case. In my view even if it were shown that the Respondents were persons of lesser means, that would not necessarily justify a stay of execution as poverty is not a ground for denial of a person’s right to enjoy the fruits of his success.

30. As was held in **Stephen Wanjohi vs. Central Glass Industries Ltd. Nairobi HCCC No. 6726 of 1991**, financial ability of a decree holder solely is not a reason for allowing stay; it is enough that the decree holder is not a dishonorable miscreant without any form of income. In the case at hand, the Respondents have disclosed that they own the suit land upon which the Applicant trespassed and therefore they are persons with sources of income and would therefore be in a position to refund the Applicant the decretal amount should the appeal succeed. It therefore follows that even without going to the merit of the Appeal, even if orders sought herein are not granted, there is no evidence that the Applicant/Appellant will suffer substantial loss. The Court makes this finding taking into account that it is not the duty of the Court to deny successful litigants the fruits of his/her Judgement.

31. On the second condition, upon perusal of the court record, this Court finds that the delivery of the Judgment, in the matter being appealed against, was on the 14<sup>th</sup> March 2019 wherein the Applicant applied for stay of execution in the trial court and was granted 45 days wherein the Applicant filed the present application on the 15<sup>th</sup> April 2019. I find that the said application is brought without undue delay.

32. On the last condition as to provision of security, although the Applicant in the present application has indicated their willingness to furnish security for a grant of the order for stay of execution, I find that in lieu of the above captioned sentiments by the court, the *Order* of stay of execution would not serve any purpose herein and as such the issue of provision of security is not applicable in the circumstance.

33. Section 3A of the Civil Procedure Act provides as follows:

*Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.*

34. Having found as herein above, this court is not inclined to grant the order of stay of execution so sought.

i. In the circumstance, the Appellant/Applicants’ Notice of Motion dated 15<sup>th</sup> April 2019 is hereby denied and dismissed with costs

to the Respondents.

ii. The Appellant/Applicant shall lodge his Appeal against the decree of the lower Court within 14 days from this date.

iii. That upon filing of the memorandum of Appeal in (ii) above, the Applicant shall prepare, file and serve his record of appeal within 45 days.

**Dated and delivered at Nyahururu this 15<sup>th</sup> day of October 2019**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**