



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 993 OF 2012

(Formerly Eldoret Hccc No. 8 of 2012)

JOSEPH MUNG'AYA MAKOTSI.....PLAINTIFF

VERSUS

KENYA POWER & LIGHTING COMPANY LTD.....1ST DEFENDANT

RURAL ELECTRIFICATION AUTHORITY.....2ND DEFENDANT

RULING

The 2nd defendant/applicant has applied for a stay of execution of judgment and decree herein and any consequential orders pending the hearing and determination of the appeal. The application is based on grounds that the applicant is aggrieved and dissatisfied with the judgment and decree herein and has appealed against it. The decretal dues awarded herein are colossal hence if the same is paid to the plaintiff, he will be unable to refund the same in the event that the appeal to the Court of Appeal is successful. That unless stay is granted, the appeal will be rendered nugatory and the applicants will suffer substantial loss. That the respondent shall not suffer any prejudice if the orders sought are granted.

According to the applicant, his application is made without delay and in good faith. The applicants are ready and willing to abide by any other conditions in terms of security as the Honourable court may deem fit. That it is just and fair that the application be allowed and the applicant accorded an opportunity of being heard on their appeal.

The application is supported by the affidavit of Lucy Rono who reiterates the grounds that the applicant is dissatisfied by the judgment and decree herein and has lodged a notice of appeal against the same and that unless formal orders of stay of execution are granted, the plaintiff is likely to initiate execution proceedings this rendering the appeal preferred and filed against the judgment herein nugatory.

That the sum awarded in this judgment is colossal and there is no proof that the plaintiff would be in a position to refund the same in the event that the appeal is successful. That in the premises unless the stay of execution order is granted, the 2nd defendant/applicant stands to suffer substantial loss as the intended appeal shall be rendered nugatory.

That the applicant/2nd defendant is ready and willing to abide by any conditions in terms of security as the Honourable court may deem fit.

That in the circumstances, it is just and fair to allow the application filed herein. That he believes that the plaintiff/respondent will suffer no prejudice if the instant application is allowed because the defendant is willing to give security for due performance of the decree.

In the reply, the plaintiff states that he has seen and read the applicant's application seeking stay of execution pending appeal, filed by the 1st and 2nd defendants/appellants herein. That the amount awarded is Kshs. 1,800,000 (read One Million Eight Hundred Thousand Shillings Only) which amount is not colossal.

That he is a man of means since he is a farmer. He has 13.985 acres of land and he harvest 167.82 bags of maize on a yearly basis, which converts to Kshs. 503,460 yearly since one bag is normally sold at Kshs.3000 (*Three Thousand Shillings Only*).

That he can easily refund Kshs. 1,800,000 (**One Million Eight Hundred Thousand Shillings Only**) if the applicant's appeal succeeds. That the applicant has not even offered any security, this shows that they are taking court matters for granted.

That from his amended plaint filed in court on 19th June 2012, he sued the defendants jointly and severally and he can elect which one to go for.

That the applicant ought to have made an application before the Judge requesting for apportionment on liability and they cannot use it to deny him the fruits of his judgment.

I have considered the application, rival submissions and do find that the application is based on Order 42, Rule 6 of the Civil Procedure Rules, 2010. This rule provides that:

(1) 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 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.

Judgment was delivered on 18.8.2017 whereas the application is made on the 11.10.2017 almost 53 days after the judgment and yet no satisfactory explanation has been made to explain why it took the applicant 53 days to apply for stay of execution. On substantial loss, the applicant has not explained satisfactorily how he is likely to suffer substantial loss. The plaintiff states that he can refund the defendants in case the appeal succeeds as he is a man of means as he is a prominent and successful maize farmer. However, this court finds that dependence on maize farming is not reliable and can sometimes let down a farmer and therefore I do order that there be stay of execution pending appeal and that the decretal sum be deposited in a joint interest earning account in a reputable bank to be agreed upon by the parties. Costs in the appeal.

Dated and delivered at Eldoret this 2nd day of November, 2018.

A. OMBWAYO

JUDGE