



**Kenya Power & Lighting Company Limited v Green Power Generation Company Limited & another (Civil Application E056 of 2021) [2022] KECA 441 (KLR) (18 March 2022) (Ruling)**

Neutral citation: [2022] KECA 441 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MALINDI  
CIVIL APPLICATION E056 OF 2021  
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA  
MARCH 18, 2022**

**BETWEEN**

**KENYA POWER & LIGHTING COMPANY LIMITED ..... APPLICANT**

**AND**

**GREEN POWER GENERATION COMPANY LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

*(An application for stay of execution pending the appeal against the Judgment of the Environment and Land Court (Olola J), delivered on 6th May 2020 in Malindi ELC Case No 179 of 2013)*

**RULING**

1. The application before this Court for ruling is a Notice of Motion dated 27<sup>th</sup> September 2021, and is brought by the Applicant herein under Rule 5 (2) (b) of the Court of Appeal Rules. The Applicant seeks a stay of execution of the judgment of the Environment and Land Court (ELC) delivered on 6<sup>th</sup> May 2020 in Malindi ELC Case No 179 of 2013, pending the hearing and determination of the intended appeal, and that the costs of the application be provided for. The application is supported by an affidavit sworn on 27<sup>th</sup> September 2021 by Irene Walala, the Applicant's Legal Officer. The Applicant also annexed a copy of the impugned judgment delivered in Malindi ELC Case No 179 of 2013; a Notice of Appeal against the said judgment dated 18<sup>th</sup> May 2020 and lodged in the Court on 20<sup>th</sup> May 2020; and its draft memorandum of appeal.
2. The background to this application is that the 1<sup>st</sup> Respondent herein filed the subject suit in the ELC, and its claim was that it had purchased the land known as Lamu/Lake Kenyatta 1/3690 (hereinafter "the suit property"), and that the Applicant and 2<sup>nd</sup> Respondent had refused to vacate the said land and trespassed thereon as from 2<sup>nd</sup> July, 2010. The 1<sup>st</sup> Respondent sought a declaration that the Applicant's and the 2<sup>nd</sup> Respondent's continued use and occupation of the suit property is wrongful actionable



- trespass, that has occasioned environmental degradation and diminution in value of the said property. The 1<sup>st</sup> Respondent also sought exemplary and punitive damages, and an order that the Applicant and 2<sup>nd</sup> Respondent purchase the suit property at the current market value.
3. The Applicant and 2<sup>nd</sup> Respondent filed defences in the ELC challenging the legality of the 1<sup>st</sup> Respondent's acquisition of the suit property on the ground that the said land was excised from the original Plot Lamu/Lake Kenyatta 1/2834 that is wholly owned by the Government of Kenya. It was maintained that the suit property was used as an extension to the national electricity grid to the nearby Mpeketoni Settlement Scheme, and housed the Mpeketoni Diesel Power station, which was an overriding interest that could not be defeated by the 1<sup>st</sup> Respondent's acquisition.
  4. The ELC found in favour of the 1<sup>st</sup> Respondent in its judgment, and in particular, that there was no evidence that the subdivision of the suit property was tainted with fraud or illegality. Further, that upon subdivision, part of the suit property was allocated to Mpeketoni Electricity Project, a community based organization, and the 1<sup>st</sup> Respondent successfully bid and paid the purchase price of the suit property which was subsequently registered in its names as of 2<sup>nd</sup> July, 2010. The ELC was satisfied that the Applicant's continued stay on the suit property despite notice to vacate was trespass, and that the 1<sup>st</sup> Respondent had been unable to utilize the land which was likely to suffer more damage when the Applicant removed its plant and machinery thereon. The ELC therefore awarded the 1<sup>st</sup> Respondent Kshs 10 million as general damages.
  5. We heard the application on 8<sup>th</sup> December 2021, and learned counsel Mr. Makori urged the Applicant's case while relying on submissions dated 8<sup>th</sup> October 2021, while learned counsel Mr. S.M. Kimani canvassed the 1<sup>st</sup> Respondent's case and relied on written submissions dated 10<sup>th</sup> October 2021.
  6. The Applicant's case is that it is a statutory body funded by taxpayers and charged with supplying Kenyans with electricity, and that execution of the judgment intended to be appealed against would result in their eviction from the suit property. Further, that it is in occupation of the suit property as an agent of Government of Kenya, and had erected an electricity substation thereon for distribution of electricity to residents of Mpeketoni and surrounding environs, which was sustaining many businesses and livelihoods. Further, that the effects of the eviction would be irreversible because of the delicate and valuable power transmission equipment put up by the Applicant using the taxpayers money, that may be destroyed in the process, and failure to grant the stay of execution orders would result in execution of the award of Kshs.10,000,000.00/=. Lastly, that it is in the public interest that the stay orders are granted as the Applicant's funds and assets are held for the benefit of the Kenyan public.
  7. The 1<sup>st</sup> Respondent filed a replying affidavit in opposition to the application sworn on 12<sup>th</sup> October 2021 by its director, Dr. Njiiri Murachi. He averred that the jurisdiction of this Court has not been properly invoked, as there is no competent Notice of Appeal filed, and that the Government of Kenya or Mpeketoni Electricity Project cannot ride on the Notice of Appeal filed by the Applicant, nor rely on it to attack the judgment of the ELC. In addition, that the Applicant was guilty of material non-disclosure, as the said Notice of Appeal was the subject of challenge in Malindi CA Civil Application no 48 of 2020, which was pending before this Court. It was refuted that the Applicant has an arguable appeal or that the same will be rendered nugatory, as it has no interest over the suit land and can therefore not be reinstated as owner of the suit land, and it is only the Government of Kenya that can be reinstated if the intended appeal is successful.
  8. It was further averred that the suit land is no longer being used to generate diesel power or distribute electric power in Mpeketoni, and that the public good will be served by prevention of environmental pollution by the Applicant and their eviction and is greater than the public interest alleged. Lastly, that



- the 1<sup>st</sup> respondent is a company of means and will be able to refund the award of Kshs 10 million if the intended appeal succeeds.
9. The principles applicable in the exercise of the Court's unfettered discretion under Rule 5(2) (b) to grant an order of stay are as follows. First, this court is properly seized of an application for stay of execution where a notice of appeal has been lodged in accordance with Rule 75 of the Court of Appeal Rules, which rule requires the said Notice of Appeal to be lodged within 14 days of the judgment intended to be appealed against. This position was also confirmed by this Court in *Halai & Another vs Thornton & Turpin (1963) Ltd.* (1990) KLR 365.
  10. The 1<sup>st</sup> Respondent's counsel in this respect submitted that the Applicant's Notice of Appeal is incompetent and was in abuse of the court process, since the 2<sup>nd</sup> Respondent had not filed a Notice of Appeal, and the Notice of Appeal filed by the Applicant was challenged in Malindi CA Civil Application No 48 of 2020 pending for hearing before this Court. The counsel placed reliance on the holding in *Trade Bank Limited vs LZ Engineering Construction Ltd & others* [1995-8] 1 EA 317 that a joint notice of appeal is bad in law, to urge that by parity of reasoning, the probity and propriety of the Notice of Appeal filed by the Applicant required to be adjudicated on first. Further, that the Applicant, as a confessed agent of an apathetic principal who has no interest in the suit property, could not seek redress for its principal or for the benefit of an unserved 3<sup>rd</sup> party under rule 5 (2) (b), thus rendering the notice of appeal bad in law. The Applicant's counsel in reply submitted that no legal basis had been laid for striking out of its Notice of Appeal, that the Applicant has locus to file an appeal arising from the impugned judgments, and the 2<sup>nd</sup> Respondent still has time to file a cross appeal.
  11. Rule 75 of the *Court of Appeal Rules* provides as follows in this regard:
    1. Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.
    2. Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.
    3. Every notice of appeal shall state whether it is intended to appeal against the whole or part only of the decision and where it is intended to appeal against a part only of the decision, shall specify the part complained of, shall state the address for service of the appellant and shall state the names and addresses of all persons intended to be served with copies of the notice.
    4. When an appeal lies only with leave or on a certificate that a point of law of general public importance is involved, it shall not be necessary to obtain such leave or certificate before lodging the notice of appeal.
    5. Where it is intended to appeal against a decree or order, it shall not be necessary that the decree or order be extracted before lodging notice of appeal.
    6. A notice of appeal shall be substantially in the Form D in the First Schedule and shall be signed by or on behalf of the appellant.
  12. As acknowledged by the 1<sup>st</sup> Respondent's counsel, Rule 75 provides that any person minded of appealing to the Court of Appeal may lodge a notice of Appeal. It is notable in this respect that what the decision of this Court in *Trade Bank Limited vs LZ Engineering Construction Ltd & others (supra)* prohibited were joint notices of appeal, and required that every party seeking to appeal files a separate notice of appeal. The impugned judgment by the ELC was against the Applicant and 2<sup>nd</sup> Respondent



jointly and severally, and the Applicant is therefore a party affected and aggrieved by the said judgment and has a right to lodge a Notice of appeal under Rule 75. In addition, no evidence was placed before this Court that the Notice of Appeal against the said judgment annexed by the Applicant dated 18<sup>th</sup> May 2020 and lodged on 20<sup>th</sup> May 2020 has since been struck out. In any event, the 1<sup>st</sup> Respondent is not unduly prejudiced by this application being heard and determined before his pending application in Malindi CA Civil Application No 48 of 2020, as any orders granted in this application will abate in the event that that the pending application to strike out the Notice of Appeal succeeds.

13. It is also notable that Rule 80 of the Court of Appeal does not envisage a situation of several Notices of Appeal being on record by various aggrieved parties, and provides that the second and all subsequent notices to be lodged shall be deemed to be notices of address for service within the meaning of rule 79, and the party or parties giving those notices shall be respondents in the appeal. A purposive reading of Rule 75 and 80 of the Court of Appeal Rules therefore leads to the conclusion that any person affected by a decision can lodge a notice of Appeal in this Court. We cannot therefore make any finding at this stage that the 2<sup>nd</sup> Respondent has no interest in the intended appeal filed herein by the Applicant. In addition, the decision in *Trade Bank Limited vs LZ Engineering Construction Ltd & others (supra)* is distinguishable in this respect, as the holding therein was to the effect that a party who had not participated in the proceedings in the trial Court and had no legal interest in the outcome of an appeal could not participate in the hearing of the appeal even though served with the Notice and Record of Appeal. In the present application, it is notable from the impugned judgment that the 2<sup>nd</sup> Respondent opposed the 1<sup>st</sup> Respondent's claim by filing a Statement of Defence in the ELC dated 25<sup>th</sup> February 2014, and participated in the trial by calling a witness to testify, and cannot therefore be deemed to be an apathetic principal as urged by the 1<sup>st</sup> Respondent.
14. The second set of principles that apply in this application are the twin limbs that need to be satisfied by an applicant, namely that there in an arguable appeal and unless an order of stay is granted the appeal or intended appeal would be rendered nugatory. These principles have been restated and amplified by this Court in *Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others* [2013] eKLR. On the first limb, the Applicant's counsel referred us to the Applicant's draft memorandum of appeal and the grounds therein to demonstrate that it has an arguable appeal. The Applicant has in its grounds faulted the ELC for finding that the suit property belonged to the 1<sup>st</sup> Respondent was not government land; for ignoring evidence that the Applicant's occupation of the suit property; and for awarding excessive damages. The 1<sup>st</sup> Respondent's counsel on his part reiterated that the Applicant had no interest in the suit land and could not maintain any appeal touching on its interest over the suit land. In addition, that Mpeketoni Electricity Project, which is affected by the appeal had not been served or heard.
15. We are cognisant of the fact that in the first limb of an arguable appeal, the Applicant need only demonstrate one arguable ground, and further that an arguable appeal is not necessarily one that will succeed. The Applicant has raised concerns on the finding by the ELC on ownership of the suit property and the award of damages, which in our view merit consideration by this Court. To this extent we find that the Applicant's intended appeal is arguable. It is notable that Mpeketoni Electricity Project was not joined by the 1<sup>st</sup> Respondent in the suit he filed in the ELC, and no orders were granted against it in the impugned judgment.
16. On the second limb, the Applicant's counsel reiterated that the appeal will be rendered nugatory because the Applicant stands to be evicted from the suit property leading to loss of valuable power transmission equipment located thereon, and will be condemned to pay Kshs 10 million out of public funds that it may lose if the appeal is successful. Further, that the 1<sup>st</sup> Respondent will suffer no prejudice if the application is allowed as it will still have a chance to execute the judgement once the appeal is dismissed.



17. The 1<sup>st</sup> Respondent on is part submitted that execution of a money decree could not cause substantial loss or render the Applicant's intended appeal nugatory as it had no interest in the suit property, and that it would be the Mpeketoni Electricity Project that would be reinstated as owner and not the Government of Kenya or the Applicant should the intended appeal succeed.
18. On the nugatory aspect, it was stated by this Court in *Bank Limited vs Norlake Investments Ltd* [2002] 1 E.A. 227, that "the term 'nugatory' has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling." Likewise it was held in *Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others* [2013] eKLR that whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed or injuncted, if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved. In the present application it is not disputed that the Applicant is in occupation of the suit property, and has made substantial investments thereon. In addition, the decretal sum of Kshs 10 million awarded to the 1<sup>st</sup> Respondent is considerable, and likely to impact the Applicant negatively if the intended appeal succeeds and the sums is paid and not recovered. On the other hand, the 1<sup>st</sup> Respondent will not be prejudiced, as the suit property and damages awarded together with interest will be available to it in the event that the appeal does not succeed. We therefore find for the Applicant on the second limb for these reasons.
19. The Applicant's counsel also relied on a third principle upon which stay may be granted, namely the public interest. It was his submission that the public interest had been held by Court to be a paramount consideration in determining applications for stay, and that the instant litigation was between government bodies (the Applicant and the 2<sup>nd</sup> Respondent) and a private party (the 1<sup>st</sup> Respondent), and the non-parties that would be affected if the stay was not granted were the Kenyan citizens who relied on the substation on the suit property for supply of electricity for their social and economic activities. Reliance was in this regard placed on the case of *Gatirau Peter Munya vs Dickson Mwenda Kitbinji & 2 Others* (2014) eKLR.
20. The 1<sup>st</sup> Respondent's counsel's reply was that the Mpeketoni Electricity Project was decommissioned after Mpeketoni was connected to the National Grid over 10 years ago, and therefore the Applicant could not maintain any appeal touching on public interest. It was submitted that the public interest would be better served if environmental pollution of the suit property is mitigated and prevented under Article 70 of *the Constitution*.
21. The Supreme Court of Kenya in the case of *Gatirau Peter Munya v Dickson Mwenda Kitbinji & 2 others* [2014] eKLR stated as follows on the public interest as an element to be considered in stay applications:

[87] ..The principles to be considered before a Court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:

- i. the appeal or intended appeal is arguable and not frivolous; and that
- ii. unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.



[88] These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of *the Constitution* of Kenya, 2010, a third condition may be added, namely:

iii. that it is in the public interest that the order of stay be granted.

[89] This third condition is dictated by the expanded scope of the Bill of Rights, and the public-spiritedness that run through *the Constitution...*”

22. We are satisfied that there is a public interest element in this application, and it was indeed acknowledged by the ELC that the Applicant continues to use the suit property for generation of electricity which it supplies and sells to members of the public.

23. We accordingly find merit in the Applicant’s application for the foregoing reasons, and hereby order that execution of the judgment of the Environment and Land Court (ELC) delivered on 6<sup>th</sup> May 2020 in Malindi ELC Case No 179 of 2013 be stayed pending the hearing and determination of the intended appeal. The costs of the application dated 27<sup>th</sup> September 2021 shall abide the outcome of the intended appeal.

24. Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 18<sup>TH</sup> DAY OF MARCH 2022.**

**S. GATEMBU KAIRU (FCI Arb)**

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**JUDGE OF APPEAL**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

**J. LESIIT**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**

