



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GATEMBU, J. MOHAMMED & KANTAL, J.J.A)

CIVIL APPLICATION NO. 57 OF 2020

BETWEEN

KENYA POWER & LIGHTING COMPANY LTD.....APPLICANT

AND

JOSEPH NZYOKI MWANTHI.....RESPONDENT

(Being an application for stay of execution of the judgment of the High Court of Kenya at Nairobi (Ong'injo, J.) delivered on 21st January 2020

in

High Court Civil Appeal No. 257 of 2011)

RULING OF THE COURT

1. In its application dated 27th February 2020 under Rule 5(2)(b) of the Court of Appeal Rules, Kenya Power & Lighting Co. Ltd, the applicant seeks an order of stay of execution of the judgment of the High Court at Nairobi (***Ong'injo, J.***) given on 21st January 2020 in High Court Civil Appeal No. 257 of 2011 pending the hearing and determination of an intended appeal from that decision. By that judgment, the High Court partially allowed the applicant's appeal from a decision of the Magistrate's court awarding the respondent an amount of Kshs. 962,000.00 as damages for alleged loss of rent on account of alleged wrongful electricity disconnection at the respondent's business premises.

Arising from the judgment of the High Court, the applicant lodged a notice of appeal dated 23rd January 2020 on which the present application is based.

2. The applicant also seeks an order that the amount of Kshs.962,000.00 which it deposited in the High Court on 27th March 2002 as security for procuring an order of stay of execution in that court should continue to be held pending the determination of the intended second appeal.

3. Although the application was served on the respondent's advocates, no affidavit in opposition or submissions were filed on his behalf.

4. In an application of this nature, the applicant is required to demonstrate that the intended appeal is arguable and that if we decline to grant the orders sought, the intended appeal, if successful, will be rendered nugatory. As stated by the Court in ***Ishmael Kagunyi Thande vs. Housing Finance Company of Kenya Limited, Civil Application No. 157 of 2006 [2007]eKLR:***

“The jurisdiction of the Court under rule 5(2)(b) is not only original but also discretionary. Two principles guide the Court in the exercise of that jurisdiction. These principles are now well settled. For an applicant to succeed he must not only show his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of that appeal will be rendered nugatory.”

5. As to arguability of the intended appeal, Emily Kirui, the legal officer of the applicant deponed in her affidavit sworn on 27th February 2020 in support of the application that the learned Judge erred in failing to appreciate that the magistrate's court did not have jurisdiction to

entertain the respondent's claim; that under Section 4 and 61 of the Energy Act No. 12 of 2006 the mandate to determine such disputes is vested on the Energy Regulatory Commission. We think this, amongst other complaints set out in the draft memorandum of appeal, is arguable.

6. Regarding the second limb as to whether the intended appeal will be rendered nugatory if we do not grant the orders sought should the appeal succeed, the applicant has asserted, and this has not been controverted, that if the decree of the High Court is executed against the applicant, the respondent will not be in a position to refund or payback the decretal sum.

7. In the foregoing circumstances, we allow the application in terms of prayer 2 and 3 of the application dated 27th February 2020 with the result that the judgment of the High Court in HCCA No. 257 of 2011 delivered on 21st January 2020 is hereby stayed pending the hearing and determination of the intended appeal.

8. The costs of the application shall abide the outcome of the intended appeal.

Dated and delivered at Nairobi this 7th day of August, 2020.

S. GATEMBU KAIRU, (FCI Arb)

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR