



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CIVIL APPLICATION NO. 96 OF 2010**

**BETWEEN**

**GEORGE GIKUBU MBUTHIA ..... APPLICANT**

**AND**

**KENYA POWER AND LIGHTING COMPANY LTD. .... RESPONDENT**

*(Application for stay of execution and further proceedings in an intended appeal under Sections 3A and 3B of the Appellate Jurisdiction Act from the Ruling and Order of the High Court of Kenya at Nairobi (Mwera, J) dated 3<sup>rd</sup> May, 2010*

**In**

**H.C.C.C. No. 837 of 2000)**

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**RULING OF THE COURT**

On 30<sup>th</sup> May, 2000, **Palace Drycleaners Limited** and **George Gikubu Mbuthia**, the latter being the applicant before us, filed Civil Suit No. 837 of 2000 against Kenya Power & Lighting Company Ltd., the respondent herein, and among the orders the applicant sought against the respondent was a mandatory injunction to compel the respondent to reconnect electricity supply which the respondent had disconnected from the premises of Palace Drycleaners Ltd. On the very same day the suit was filed, summons to enter appearance were issued and on 23<sup>rd</sup> November, 2000 the superior court granted to the two plaintiffs in the suit an interlocutory order directing the respondents to reconnect the power supply. Once the reconnection order was obtained the plaintiffs went silent and they did not even serve the respondent with the summons to enter appearance. On 26<sup>th</sup> June, 2002, some two years after the suit had been filed, the respondent moved the superior court for the striking out of the suit for want of prosecution and by then, even the validity of the summons issued on 30<sup>th</sup> May, 2000 had long expired. Under **Order V Rules 1 and 2:-**

***“(1) A summons (other than a concurrent summons) shall be valid in the first instance for twelve months beginning with the date of its issue and a concurrent summons shall be valid in the first instance for the period of the validity of the original summons which is unexpired at the date of issue of the concurrent summons.***

***(2)Where a summons has not been served on a defendant the court may extend the validity of the summons from time to time if satisfied it is just to do so.”***

The application to strike out the suit for want of prosecution was heard by Mbiti, J, as he then was, and on 18<sup>th</sup> October, 2002, that Judge ordered the plaintiffs to make an application for extension of the summons within fourteen days of his order and if the plaintiffs failed to do so:-

***“The suit shall stand dismissed with costs without any further order of this court.”***

Of course, the plaintiffs did nothing of the kind and the suit, i.e. H.C.C.C. No. 837 of 2000 must have been dismissed on those terms.

The present applicant, as is his wont on such matters, had made various and numerous applications before different judges of the superior court. But in the end, the superior court issued two certificates of taxation; one dated 20<sup>th</sup> March, 2007 for the sum of K.Shs.123,985/- and the second one dated 18<sup>th</sup> November, 2009 for the sum of K.Shs.115,294/- all, totaling K.shs.239,279/-.

On 22<sup>nd</sup> February, 2010, the applicant alone filed a notice on motion purportedly under **section 51 (2)** of the Advocates Act, **Order XXI, Rule 18** of the Civil Procedure Rules and **sections 1A** and **3A** of the Civil Procedure Act. Three prayers were made in that motion and they were:-

***“A. THAT, there be a stay of execution of the Certificates of Taxation given on 18<sup>th</sup> November, 2009 and 20<sup>th</sup> March, 2007 pending inter-parties (sic) hearing.***

***B. THAT, there be stay of Notice to Show Cause given on 10<sup>th</sup> February, 2010.***

***C. THAT, there be stay of further proceedings until Civil Appeal No. 114 of 2006 is heard and determined.”***

The motion was heard by Mwera, J and by his order dated 3<sup>rd</sup> May, 2010, the Judge rejected all the prayers sought in his court. The applicant, on the very same day of the ruling filed a notice of appeal against the orders of Mwera, J. Pursuant to the notice of appeal, the applicant now comes before us, and he says he does so under **sections 3A** and **3B** of the Appellate Jurisdiction Act, for orders:-

***“A. THAT, stay of execution and further proceedings do issue to restrain the defendant/respondent and/or their servants/agents, from executing Certificates of Taxation dated 20<sup>th</sup> March, 2007 and 18<sup>th</sup> November, 2009 until the intended appeal to be filed and Civil Appeal No. 114 of 2006 are heard and determined.”***

We take it that the applicant is asking the Court for an order of stay of execution and stay of further proceedings under **Rule 5 (2) (b)** of the Court’s Rules; we do not know what **sections 3A** and **3B** have got to do with the matter. Those sections are meant to deal expeditiously and justly with matters before the court.

Under **Rule 5 (2) (b)** the applicant was obliged to satisfy the Court on two points, namely that his intended appeal from the decision of Mwera, J is an arguable one i.e. one which is not frivolous, and that if we do not grant the orders he is seeking before us and his intended appeal were to eventually succeed, that success would have been rendered nugatory by our refusal to grant him the orders.

On the question of the intended appeal being an arguable one, the applicant appears to contend that his Civil Case No. 837 of 2000 became a nullity when no summons were issued and served on the respondent and that by the time Mbiti, J was making his orders on 18<sup>th</sup> October, 2002, there was no valid case upon which such orders could have been made and those orders having been made on no case at all, the orders themselves were a nullity and a nullity cannot be enforced by anyone. All the subsequent proceedings were accordingly a nullity and the two certificates of taxation were equally a nullity. On this point, we

can only note that it was clearly the duty of the applicant and his co-plaintiff to have the summons served upon the respondent. They failed to do so and the applicant now relies on their failure to contend that their suit was a nullity. It is, with respect to the applicant, an ingenious way of avoiding one's obligation and we do not know, and we put it no higher than that, that it will be an arguable point in the intended appeal. We say nothing about Civil Appeal No. 114 of 2006 because we have not seen it and we do not know what it is about.

But even if we were to assume in favour of the applicant that his intended appeal is arguable, the applicant has totally failed to satisfy us that if we do not grant him the stay he seeks, the success of his intended appeal would have been rendered nugatory. The applicant himself told us that paying the taxed costs is not the problem; he can pay it. What he told us on this point was the same as what he told us on the issue of arguable appeal: all the proceedings from the orders of Mbiti, J to the numerous applications he has made thereafter, to the certificates of taxation and through to the orders of Mweru, J are a nullity and the applicant ought not to be asked to pay any moneys in respect of nullities. When we inquired of the applicant whether the respondent would not be in a position to refund the money if he paid it now and the Court were to agree with him in his intended appeal, his answer was the same: he ought not to be compelled to pay money based on a nullity. For our part, we are satisfied that the respondent, which is a large public company, will be able to refund any money which the applicant pays to them now and that being the view which we take of the matter the applicant's motion before us must fail. We accordingly order that the notice of motion dated and lodged in this Court on 6<sup>th</sup> May, 2010 be and is hereby dismissed with the costs thereof to the respondent.

Dated and delivered at Nairobi this 16<sup>th</sup> day of July, 2010.

**R.S.C. OMOLO**

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**JUDGE OF APPEAL**

**S.E.O. BOSIRE**

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**JUDGE OF APPEAL**

**P.N. WAKI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**