



Kenya Power and Lighting Co Ltd v Wanyonyi (Environment and Land Appeal E019 of 2024) [2024] KEELC 7436 (KLR) (24 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7436 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E019 OF 2024
EC CHERONO, J
OCTOBER 24, 2024**

BETWEEN

KENYA POWER AND LIGHTING CO LTD APPLICANT

AND

RACHAEL NELIMA WANYONYI RESPONDENT

RULING

1. Before me for determination is the Notice of Motion application brought under Sections 1A, 1B, 3A of the *Civil Procedure Act* (Cap 21), Order 10 Rule 11, Order 42 Rule 6, Order 51 Rule (1) Civil Procedure Rules of 2010, Article 159(20) (d) of *the Constitution* of Kenya 2010 and all other enabling Provisions of Law. In the said application, the applicant seeks the following orders;
 - a. Spent
 - b. Spent
 - c. That this Honourable Court be pleased to grant an Order for stay of execution of the ex parte judgment and a decree issued on 04.08.2023 together with the ruling delivered on 23.04.2024 pending hearing and determination of the Appellant/Applicant's Appeal.
 - d. That the costs of this application be provided for.
2. The Application is premised on grounds apparent on the face of the said application supported by the affidavit of Joseph Muchai sworn on 22nd May, 2004. In his supporting affidavit, the Applicant deposed that on 31/08/2021, he was served with summons to enter appearance together with pleadings by the Respondent dated 20/08/2021. Subsequently on 24/09/2021, he entered appearance via a Memorandum of Appearance dated 14/09/2021 and served the same upon the Respondent. That on 28/09/2023, he filed and served a Notice of Preliminary Objection challenging the jurisdiction of the trial court and a statement of Defence dated 27/09/2021. The Applicants stated that the said



- preliminary objection has never been set down for hearing and no directions have ever been given on the same. The Respondent is said to have proceeded to take an ex parte hearing date but failed to serve him leading to an ex parte judgment that was delivered on 04/08/2023 ordering the payment of Kshs. 700,000/= to the Respondent plus consequential costs leading to a decree of Kshs. 854,845/=.
3. It was further deposed that on 07/12/2023, the Respondents instructed Amork Auctioneers to execute the said judgment and decree passed on 04/08/2023. That on 08/12/2023, the Applicants sought for stay of execution and setting aside of the Ex-parte judgment/decree issued on 4/8/2023 and for leave to defend the suit. Further on 11/12/2023, the trial court issued a temporary order staying the execution of the Warrants of Attachment dated 16.11.2023 and proclamations dated 07/12/2023 pending hearing and determination of the Appellant/Applicant's application dated 08/12/2023. In a ruling delivered on 23/4/2024, the trial court struck out the Appellant/Applicant's Application dated 08/12/2023 with costs. Aggrieved by the said order/decree and/or judgment, the Appellant/Applicant preferred the present appeal against the said ruling/decree and/or judgment and consequently filed and served a Memorandum of appeal against the entire decision of the trial court upon the Respondent dated 29/04/2024. The Applicant contends that their appeal has high chances of success as it raises arguable issues.
 4. The Applicant stated that on 17/05/2024, Armok Auctioneers served upon them a proclamation and warrants of attachment dated 17/05/2024 and 06/05/2024 respectively notifying them of their intention to attach the Appellant/Applicant's assets listed in the referenced proclamations within seven (7) days from 17/05/2024 in satisfaction of the ex-parte judgment and decree issued on 04/08/2023 together with the ruling delivered on 23.04.2024. vide an application dated 17/05/2024, the Appellant/Applicant approached the trial court seeking temporary stay of execution orders pending hearing and determination of the appeal. The Trial court is said to have disallowed the orders sought and set down the application for inter parte hearing on 28/05/2024 despite the proclamation notice maturing on 24/05/2024. The Applicant argued that the application and appeal have been filed without unreasonable delay and that they were willing to deposit security for the due performance of the decree as may ultimately be binding on them.
 5. In opposition thereto, the Respondent filed a replying affidavit sworn by the Respondent, Edwin Simiyu Wamalwa on 3/6/2024. He deposed that the application is a delaying tactic since the Applicant had initially filed an application for stay before the trial court which was dismissed in the ruling dated 23/4/2024. He deposed that the application was misleading and urged the court not to allow the same.
 6. When the application came up for directions, the parties agreed to canvass the same by way of written submissions. The Applicant through their legal counsel Justus Ododa filed submissions dated 28/5/2024 while the Respondent through the firm of Wamalwa Simiyu & Company & Advocates filed their submissions dated 3/6/2024.
 7. The Applicant submitted on four issues. On the first issue, it was argued that the attachment of the Applicant's vehicles poses substantial loss to the Appellant/Applicant as the vehicles attached are the Appellant/Applicant tools of trade which are essential for their business operations. Their auction of the said vehicles will cause severe financial and operational disruption both to the Appellant/Applicant as well as the general public. They cited the case of James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR, Jason Ngumba Kagu & 2 Others v Intra Africa Assurance Co. Limited [2014] eKLR and f G. N. Muema P/A (sic) Mt. View Maternity & Nursing Home v Miriam Maalim Bishar & Another [2018] eKLR.
 8. On the second issue, it was submitted that the ruling forming the substance of the Appeal in the instant case was issued on 23.04.2024. The Applicant filed a memorandum of appeal on the 29.04.2024



and filed before the trial Court an application for stay of execution dated 17.05.2024. However, the Trial Court on the 20.05.2024 issued orders certifying the said application as urgent but did not issue any stay of execution orders. That following the orders issued by the trial court on 20.05.2024, the Appellant/Applicant immediately filed the present application before this Honourable Court dated 22;05;2024 seeking stay of execution. The Appellant/Applicant therefore submitted that the prompt filing of both the Memorandum of Appeal and the application for stay of execution demonstrates good faith on the part of the Applicant and the same was executed without undue delay.

9. On the third issue, it was submitted that an order for stay of execution only suspends the enforcement of the trial court's judgment but does not affect the execution of the said judgment. The Applicant submitted that it stands to suffer great prejudice in the event execution is preferred by the Respondent whereas the Respondent stands to suffer no prejudice at all. In the alternative and without prejudice, the applicant submitted that the only prejudice that will be occasioned on the part of the Respondent relates to the time of execution which can be remedied by the actual execution in the event that the Appellant/Applicant's appeal collapses.
10. In conclusion, the applicant submitted that he is willing to provide security by depositing the decretal sum in court or as the court deems fit to secure the interest of the Respondent during the pendency of the Appellant/Applicant's appeal. Reliance was placed on the case of; *Richard Muthusi v Patrick Gituma Ngomo & another* [2017] eKLR.
11. The Respondents on their part submitted on three issues. On the first issue, it was submitted that granting stay in this matter would lead to further delay and inconvenience to the Respondent who requires to enjoy the fruits of his judgment. Further, it was argued that litigation ought to come to an end and therefore it would be prejudicial to the Respondent if the application was allowed. Reliance was placed in the case of; *Chege vs. Gachora (Civil Appeal 265 of 2023)* {2004} KEHC 1994 (LR) which quoted the case of *Samir Trustee Limited vs. Guardian Bank Limited* (2007) eKLR.
12. On the second issue, it was submitted that the Applicant has not demonstrated substantial loss. Further, it was argued that the Applicant has not shown that the Respondent would be unable to refund the decretal sum in the event the appeal succeeds.
13. Lastly, the Respondent urged the Court to order for the release of half of the decretal sum to the Respondent's Advocate and the balance deposited in court as security for due performance.

Legal Analysis and Decision.

14. I have considered the Application, the affidavits on record, the submissions filed and the authorities cited. An application for stay of execution pending Appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules which provides as follows:

6(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 appealed 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 undue 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.
15. The relief is discretionary but the discretion must be exercised judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant to the satisfaction of the court. In determining whether sufficient cause has been shown, the Court is guided by the three conditions/pre-requisites under Order 42 Rule 6 of the Civil Procedure Rules. Firstly, the Application must be brought without undue delay; secondly, the court will satisfy itself that substantial loss may result to the Applicant unless stay of execution is granted; and thirdly, 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.
16. From the record, the order Appealed against was made on 23/4/2024. The Application herein was filed on 22/5/2024 which is 30days after the impugned order/ruling was delivered. The Application in my view was therefore made timeously.
17. Regarding the second pre-requisite under Order 42 Rule 6 of the Civil Procedure Rules, that is substantial loss occurring to the Applicant, I wish to refer to the case of Kenya Shell Limited –vs- Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) KAR 1018 where the Court of Appeal stated that:

“It is usually a good rule to see if Order 41 Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdiction for granting stay.”
18. It is clear that it is incumbent upon the Applicant to show the substantial loss he is likely to suffer if the application for stay is not granted. In this case, the Applicant has stated that the Respondents have begun executing the court’s judgment and decree having instructed Amork Auctioneers. The said firm of auctioneers has since proclaimed vehicles belonging to the appellant/applicant ready to attach the same which are special tools of trade essential for the Appellant/Applicant’s business operations and that they shall cause great prejudice if stay is not granted.
19. The Respondents on the other hand have urged that the Applicants should settle the decretal sum as they (the Respondents) are entitled to the fruits of their judgment. It was his argument that the Applicant has not demonstrated that he is incapable of refunding the decretal sum if the appeal succeeds.
20. From the materials placed before me, I am persuaded that if the said vehicles which are the appellant/ applicants essential tools of trade are attached and sold and given the sensitivity of the Applicants mandate, substantial loss will be caused.
21. My interpretation of the law is that Order 42 Rule 6 (2) (b) of the Civil Procedure Rules stipulate in mandatory terms that an applicant must satisfy the three condition sequentially before being granted the stay of execution pending Appeal. On the third condition, the Applicant has given his undertaking to deposit the title deed for the suit land with the Court as security for the due performance of the



judgment/decreed/order as may ultimately be binding on him. In the case of Aron C. Sharma vs. Ashana Raikundalia T/A Rairundalia & Co. Advocates the court held that:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”

22. The grant of stay remains a discretionary power that must also take into account the fact that the Court ought not to make a practice of denying a successful litigant the fruits of their judgment.
23. The upshot of my finding is that the application dated 22nd day of May, 2024 is merited and the same is hereby allowed on the following terms;
 - i. Stay of the execution of the judgment/decreed herein is granted pending hearing and determination of the Applicants' intended Appeal.
 - ii. The Applicant shall deposit half of the decretal sum and costs of Kshs 427,845/= (Four Hundred and Twenty Seven Thousand Eight Hundred and Forty Five shillings) in court within 21 (twenty one) days from the date of this ruling. In default, the stay orders shall automatically lapse.
 - iv. The Applicant shall prepare, file and serve his record of appeal within 45 days.
 - v. Costs in the cause.
24. It is so ordered.

DATED AND SIGNED BUNGOMA THIS 24TH DAY OF OCTOBER, 2024.

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HON.E.C CHERONO

JUDGE

In the presence of;

1. Mr. Ododa for the Applicant.
2. Mr. Wamalwa R. H/B for Mr. Wamalwa Simiyu for the Respondent.
3. Bett C/A.

