



Nucon Switchgears PVT Limited v Kenya Power & Lighting Co Limited (Commercial Case 166 of 2016) [2024] KEHC 910 (KLR) (Commercial and Tax) (30 January 2024) (Ruling)

Neutral citation: [2024] KEHC 910 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 166 OF 2016
A MABEYA, J
JANUARY 30, 2024**

BETWEEN

NUCON SWITCHGEARS PVT LIMITED PLAINTIFF

AND

KENYA POWER & LIGHTING CO LIMITED DEFENDANT

RULING

1. This ruling determines the application dated 14/6/2023. The same was brought under sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 42 rule 6 and Order 51 rule 1 of the *Civil Procedure Rules 2010*. The application sought to stay the judgment delivered on 26/5/2023.
2. In support of the application, the applicant relied on the grounds on the face of it and the supporting affidavit of Jude Ochieng sworn on 14/6/2023. The applicant contended that it intends to appeal against the said judgment. That it filed a notice of appeal on 29/5/2023. That the appeal raises triable issues and the applicant stands to suffer substantial loss if the respondent executes the judgment and decree. Finally, that the application was brought without undue delay.
3. The respondent opposed the application vide a replying affidavit of Tarun Kumar sworn on 14/7/2023. He deposed that the application was an abuse of the court process as it sought to impede the respondent from enjoying the fruits of its judgment. That the judgment had restored the supply contracts between the parties and the respondent was in need of the transformers and granting stay would create a shortage of the same and ultimately affect the general public. That the court had already granted a stay of execution on condition that a formal application be filed within 21 days. The respondent averred that the stay order expired on 16/06/2023.
4. It was the respondent's position that the applicant had not enumerated the grounds for appeal to determine whether or not the appeal was arguable. On substantial loss it was averred that the execution



- was not imminent as the respondent was yet to file a party and party bill of costs to ascertain the total amount of costs.
5. It was further contended that the respondent was a reputable international organization in the business of manufacturing and supplying power distribution transformers. That the applicant was aware of the respondent's financial position and that's why it awarded the applicants contracts worth USD 32,349,697.20. It was stated that the applicant did not meet the requirement for security for the due performance of the decree.
 6. In its supplementary affidavit sworn by Justus Ododa on 25/7/2023, the applicant contended that the respondent had admitted to having offices outside the jurisdiction of the Court. He further deposed that failing to file a draft memorandum of appeal was not fatal in an application for stay of execution pending appeal.
 7. The application was canvassed by written submissions which I have considered. The parties in their submissions reiterated the facts set out in the application and the responses.
 8. The main issue for determination is whether the applicant has met the threshold for stay of execution. Order 42 Rule 6(1) and (2) of the [Civil Procedure Rules](#) sets out the principles to be considered in an application for stay of execution. The same are that the application should be made timeously, the applicant must demonstrate that he will suffer substantial loss if a stay is not granted and he must offer security for the due performance of the order that might ultimately be binding on him.
 9. In *Butt v Rent Restriction Tribunal* [1982] KLR 417, the Court of Appeal enumerated how the Court's discretion is to be exercised in an application for stay thus: -
 - a) The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 - b) The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.
 - c) A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the plaintiffs at the end of the proceedings.
 - d) The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal."
 10. Further, in *Absalom Dova vs. Tarbo Transporters* [2013] eKLR,, it was stated: -

"The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation..."
 11. The application before Court is a consequence of the judgment delivered on 26/5/2023 in favour of the respondent where the applicant was ordered to pay USD 1,521,970 and USD 1,032,765.



12. The judgment being appealed against was delivered on 26/5/2023. The present application was lodged on 14/6/2023. That was about 19 days from the date of delivery. In my view, the application was made timeously.
13. On substantial loss, the applicant contended that there was a danger of the respondent commencing execution proceedings against it. That in the event it paid over to the respondent, it would not be able to recover the decretal amount in the event the appeal is successful. The applicant further contended that the respondent was a foreign company with its registered offices in India and has no known assets in Kenya.
14. In rebuttal, the respondent contended that its financial position was not in question and that was evident when the applicant awarded it the tender for transformers. That it had not commenced the execution process and therefore, there was no imminent threat.
15. In *James Wangalwa & Another v Agnes Naliaka Cheseto [2012]* eKLR, it was held: -

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”
16. In an application for stay, the Court is usually called upon to balance two competing interests of the parties, the decree holder’s right to enjoy the fruits of his judgment, and the judgment-debtor’s undoubted right to appeal the impugned decision.
17. In the present case, the applicant contended that its appeal will be rendered nugatory if it paid over the decretal sum as the respondent was a foreign entity. This is a fact that was not denied. The response was that the respondent has financial ability. That ability was never demonstrated. The Court was only urged to infer from the fact that respondent had been granted some hefty contract by the applicant.
18. With greatest due respect, a respondent is required to demonstrate to the Court that if the decretal sum is paid over to him, he will be able to refund the same if the appeal succeeds. The respondent did not do that in this case. It is a foreign company. If the funds are released to it and the appeal succeeds, it will be nowhere within jurisdiction to refund the same. Accordingly, the aspect of nugatory and substantial loss has been proven.
19. On security, applicant submitted that it was willing to abide by any conditions that the Court may give with respect to security.
20. In this regard, I find and hold that the applicant has fulfilled the requirements for grant of stay of execution pending appeal. I allow the application and order that there shall be a stay on condition that the applicant lodges with the Court a bank guarantee for the decretal sum within 30 days of the date of this ruling. Costs shall be in the cause.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JANUARY, 2024.



A. MABEYA, FCI Arb

JUDGE

