REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CIVIL APPEAL NO.40 OF 2016

BETWEEN

KENYA POWER & LIGHTING CO. LTD.....APPELLANT

AND

NICODEMUS GAYA NYAGOL .....RESPONDENT

(Being an appeal from the Ruling of the Hon. SRM, J.P.Nandi delivered on 14/09/2016 in Oyugis PM's Court Civil Case No.150 of 2015)

RULING

1. By a Notice of Motion dated 23rd March 2017, the applicant seeks orders of stay of execution of the ruling and order issued on 14th September 2016 pending hearing and determination of the appeal on grounds that the stay orders which had been granted upon delivery of the ruling had lapsed, yet the intended appeal has overwhelming chances of success. The applicant is willing to abide by any conditions as regards security, which the court may impose.

2. In the supporting affidavit sworn by Peninah Kinyua (the Principal Legal Officer at Kenya Power and Lighting Co. Ltd (**KPLC**), she deposes that the applicant is dissatisfied with the ruling made on 14/09/2016 and has filed an appeal. The applicant is apprehensive that if execution takes place and the appeal succeeds, then the respondent will not be able to refund the decretal sum as he is a man of straw. The application is said to be made in good faith, and the respondent stands to suffer no prejudice.

3. In opposing the application, the respondent's counsel deposed in a replying affidavit that the application is premised in vacuo since the appeal under reference was non-existent as at 14/09/2016 when the orders were made.

4. The application was canvassed by way of written submissions.

The background to the matter is that the respondent had sued the applicant in the **SPMCC No.150 of 2015 (Oyugis)** seeking special damages of Kshs.4000/=, general damages and costs, arising from a Road Traffic Accident involving the respondent who was involved in a collision with a motor vehicle owned by the appellant. Judgment was entered in favour of the respondent in the sum of Kshs.2,204,000/= as general damages, and Kshs.4000/= for special damages.

5. Subsequently, the applicant applied for and obtained orders of stay of execution on 23/11/2016. The stay was allowed on condition that the applicant deposits security in the sum of Kshs.2,204,000/= (being the decretal sum awarded) in an interest earning account (with a reputable bank) in the joint names of the respective advocates within 45 (forty five) days from the date of the ruling. In default of this compliance, the stay would automatically lapse.

6. The stay lapsed with no compliance having been met and the applicant then moved to this court for similar orders saying the amount ordered is substantial and it will suffer loss were the appeal to lapse. It is pointed out that although the application did not specifically refer to the Oyugis SPMCC No.150 suit, there is no doubt it is the one whose orders are being contested. He urged the court to be guided by the observations made in the case of **LUCY BOSIRE –VS- KEHANCHA DIV. LAND DISPUTE TRIBUNAL & 2 OTHERS** to the effect that blunders will continue to be made from time to time but it does not follow that for every mistake made, a party should suffer the penalty of not having his case determined on the merits.

7. Counsel also urged this court to adhere to provisions of **Article 159 (2) (d)** of the **Constitution** which behoves the courts to administer justice without undue regard to procedural technicalities and also **Order 5 rule 10 (2)** which provides that no application shall be rejected in a technicality or for want of form that does not affect the substance of the application, to find that the defects alluded to by counsel are procedural and should not overshadow the primary object of dispensing substantive justice to parties.

8. In the written submissions, respondents maintain that there is no appeal pending in relation to the orders made on 14/09/2016 as those orders lapsed, and there is nothing to stay. Further that the applicant failed to comply with the orders thereto.

9. It is also pointed out that what is being appealed against are not the orders of 15/06/2016 which had the decree awarded in favour of the respondent. He urged the court to be guided by the decision in **DAVID KIBERIA & ANOTHER –VS- MERU CENTRAL FARMERS CO-OP – CIVIL APPLICATION NO.284 OF 1999 (NRB)** which held that no stay of execution of a decree could be issued if there was no appeal preferred against the decree.

10. It is further submitted that there has been unreasonable delay in filing the application – the orders having been issued on 14th September 2016 yet the application was only lodged on 23rd March 2017 – a whole six months.

It is also argued that the applicant has not demonstrated what loss it will suffer and cannot now be making offers when such security could not be met within 45 days of the order being issued.

11. There is no doubt in my mind that whether the order upon which stay is pegged is the one dated 14/09/17 or whether the applicant intended to refer to the decree dated 15/06/2016 – there has been a long unexplained delay, while six months may not be inordinately long, where one is referring to the order of 14/09/16, it certainly becomes very long if it is intended for the orders of 15/06/16.

12. But even if it is to be argued that there was the 45 day period given by the trial court, then the next question would be – what is the application then pegged to because the memorandum of appeal does not refer to the decree, and the orders sought to be stayed (if it is the orders of 14/09/17) have lapsed and there is nothing to stay.

I think this was the spirit of the decision in **DAVID KIBERIA & ANOTHER** (supra). It is not just want of form, it lacks substance and **Article 159 (2) (d)** of the **Constitution** does not aid the applicant.

13. The applicant has also alluded to the risk of suffering substantial loss in the event that the appeal succeeds and the orders are not granted, saying the respondent is not a man of substance. I do not think it is enough to simply lament that the amount awarded in the decree is substantial and that one is a person of straw without giving reason for making such an allegation" It is a sweeping statement that cannot just be taken at face value with not an iota forming its basis – I think a useful guide is **BENJAMIN KARUGA –VS- KENYA SHELL** where the court was able to discount claims of the inability to pay by examining the status of the decree holder.

14. I am persuaded that the application has no merit and is dismissed with costs to the respondent.

Delivered and dated this 13th day of November, 2017 at Homa Bay

H.A. OMONDI

JUDGE