



**Biashara Masters Saw Mills Limited v Kenya Power & Lightining Company Limited
(Tribunal Case E028 of 2022) [2024] KEET 395 (KLR) (14 March 2024) (Ruling)**

Neutral citation: [2024] KEET 395 (KLR)

**REPUBLIC OF KENYA
IN THE ENERGY & PETROLEUM TRIBUNAL
TRIBUNAL CASE E028 OF 2022
KIOKO KILUKUMI, CHAIR, D.K MWIRIGI, VICE
CHAIR, B.H WASIOYA & F.S IBRAHIM, MEMBERS
MARCH 14, 2024**

BETWEEN
BIASHARA MASTERS SAW MILLS LIMITED APPLICANT
AND
KENYA POWER & LIGHTINING COMPANY LIMITED DEFENDANT

RULING

Introduction

1. Kenya Power and Lighting Company Limited, the Applicant, moved the Tribunal on 7th February 2024, through an application brought under Notice of Motion filed under Certificate of Urgency.
2. The Applicant at the inter-parties' stage seeks an order "...to stay execution of its judgment pending the hearing and determination of the intended appeal."

The Applicant's Case

3. In a nutshell, the application is premised on the grounds that the Applicant intends to file an appeal; the intended appeal is arguable; execution will expose the Applicant to "an injustice and further cause substantial loss" and that the Applicant "will suffer irreparable loss, harm and damage..."
4. It will be recalled that the Tribunal delivered its judgment on 1st February 2024. The Tribunal issued the following orders:
 - a. The Defendant, its agents, employees, representatives or otherwise are restrained from cutting off or disconnecting the supply of electricity to meter number 040010111664.



- b. The Defendant's demand for payment of electricity purportedly consumed and not billed for from August 2020 to January 2021 is illegal, unlawful and in violation of section 159(1) of the Energy Act.
 - (c) The Defendant to refund the sum of KShs. 3,980,000 paid by the Plaintiff in respect of the impugned bill.
 - (d) Each party to bear its own costs."
5. By the time the Applicant filed an appeal on 8th March 2024, thirty-five (35) days had lapsed since the delivery of the judgment.

The Respondent's Response

- 6. Biashara Masters Saw Mills Limited, the Respondent in opposition to the application for stay filed a replying affidavit sworn on 6th March 2024. This precipitated the Applicant to file a Further Supporting Affidavit sworn on 8th March 2024, in which the Applicant pleads an additional ground that her appeal will be rendered nugatory. It is apparent on the face of the record, that the appeal was filed on 8th March 2024, a day after filing the application seeking stay of execution.
- 7. The Respondent was therefore justified in her response in asserting that the Applicant had not filed an appeal within the stipulated statutory timelines. Similarly, at the time of moving the Tribunal, no draft Memorandum of Appeal was exhibited for the very sufficient reason, that none existed at the time of moving the Tribunal.
- 8. It was the Respondent's further response that the Applicant did not satisfy the legal criteria for the grant of orders staying execution.

Issues for Determination

- 9. Having considered the application; the supporting affidavit and the Further affidavit and thereplying affidavit together with the submissions filed by the Applicant and the Respondent, it is our considered view that the issues that fall for determination are:
 - (a) Whether the application for stay of execution is merited; and
 - (b) Who should bear the costs of the application.
- 10. It is admitted by the Applicant that her appeal was filed out of the prescribed statutory timelines. However, it is contended that Section 37 (4) of the Energy Act will by necessary implication import the provisions of Section 79G of the Civil Procedure Act to enable the Applicant to seek for her appeal to be admitted out of time.
- 11. This argument is not plausible. The literal reading of Section 37 (4) of the Energy Act confirms that it is restricted to "applications for reviews". The Applicant has not lodged an application for review. It has lodged an appeal. It is described in the heading as "Being an appeal from the Judgment and Decree of... the Tribunal..." The Amended Memorandum of Appeal states that "...the Kenya Power and Lighting Company Limited wishes to appeal against..." It is therefore beyond contestation that the Applicant lodged an appeal and not an application for review.
- 12. The Applicant's appeal has not been admitted out of time. Indeed, there is no application seeking admission of the appeal out of time.



13. It is our finding that the Applicant does not have a viable appeal, having filed its purported appeal out of the prescribed statutory timelines fixed by Section 37(3) of the Energy Act. In any event, the appeal has not been admitted out of time.
14. By parity of reasoning, the Applicant has no appeal capable of being rendered nugatory in the absence of stay orders.
15. The Energy Tribunal Rules, 2008 which regulates the procedure of the Tribunal do not expressly apply the provisions of the Civil Procedure Act and the rules made thereunder. However, the Tribunal is guided by the legal criteria and principles developed by the courts in either granting or refusing to grant stay of execution.
16. In the absence of an appeal valid in law, it would be unnecessary to address the legal principles governing grant of stay of execution. We are however alive to the fact that our view on the validity of the appeal may be erroneous, hence the need to address the legal criteria for grant of such orders.
17. In addition to the existence of an arguable appeal, the Tribunal will consider whether an Applicant will suffer substantial loss incapable of being compensated or refunded in the event of an appeal being successful. In other words, whether the appeal could probably be rendered nugatory. We will also consider whether taking a deposit of a security from the judgment holder conditional to the grant of stay orders will ensure that an appeal is not rendered nugatory. It is also essential that the application for stay be filed without unreasonable delay.
18. There is no doubt, the Applicant moved the Tribunal promptly. It was the obligation of the Applicant to produce evidence to prove that the Respondent cannot in all likelihood refund the monies in question in the event of the intended appeal being successful. They did not do so. The Applicant has not demonstrated through evidence that the Respondent is so to speak “a man of straw”. Taking into account all the circumstances and the tenor of our judgment, we do not consider this to be a proper case to order deposit of security from the Applicant. It is about time that the Respondent enjoys the fruits of her judgement.

Disposition

19. Accordingly, the application brought under the Notice of Motion dated 7th February 2024 is hereby dismissed with costs to the Respondent.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF MARCH, 2024.

MR. KIOKO KILUKUMI SC - CHAIRPERSON

MS. DORIS KINYA MWIRIGI - VICE CHAIRPERSON

ENG. BUGE HATIBU WASIOYA - MEMBER

MR. FEISAL SHARIFF IBRAHIM - MEMBER

SIGNED BY: KIOKO KILUKUMI

THE JUDICIARY OF KENYA.

ENERGY AND PETROLEUM TRIBUNAL

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Doc IDENTITY: 214618613331805375151915177219 Tracking Number: OOKKE942024

