



REPUBLIC OF KENYA



KENYA LAW
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Kenya Pipeline Company Limited v Paul T Gichuhi t/a Sapamo Consulting Engineers (Civil Case 928 of 2009) [2022] KEHC 12047 (KLR) (Commercial and Tax) (19 August 2022) (Ruling)

Neutral citation: [2022] KEHC 12047 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 928 OF 2009
A MABEYA, J
AUGUST 19, 2022

BETWEEN

KENYA PIPELINE COMPANY LIMITED APPLICANT

AND

PAUL T GICHUHI T/A SAPAMO CONSULTING ENGINEERS .. RESPONDENT

RULING

1. This is an application dated September 17, 2021. It was brought under article 159 of the *Constitution*, sections 1A, 1B, 3, 3A and 25 of the *Civil Procedure Act*, and orders 21 rule 2(3), 22 rule 18 and 22, and 51 rule 1 of the Civil Procedure Rules.
2. The same sought an order to set aside the proclamation dated September 14, 2021 and the warrants of attachment dated September 13, 2021 in execution of the decree dated April 30, 2020 to Humphrey Okuku t/a Okuku Agencies Auctioneers.
3. It also sought a declaration that the procurement of the warrants and the subsequent proclamation was in breach of the court order of July 22, 2021. It also sought an order that the respondent to bear the auctioneers charges.
4. The grounds for the application were set out on the face of it and on the supporting affidavit of Elizabeth Rop of even date. The applicant's case was that on April 30, 2020, this court entered judgment in favour of the respondent for kshs 10,547,318/50.
5. That the applicant obtained orders for stay vide an application dated June 30, 2021 pending Civil Appeal no E460 of 2021. That vide the court's ruling delivered on July 22, 2021, stay was granted on condition that the appeal be filed within 45 days.



6. That the applicant's advocate communicated the results of the ruling vide letter dated July 22, 2021. The applicant then filed the appeal on August 17, 2021, 25 days from the date of the ruling. That however, when the applicant obtained the written ruling on August 4, 2021, it discovered material inconsistencies with the oral ruling made in court.
7. That the condition for stay in clause 2 was that the applicant would not deposit security if the appeal was filed within 30 days from the date of the ruling. In clause 3, it provided that the applicant would provide a bank guarantee for kshs 10,547,318.50 from a reputable bank within 15 days after expiration of the period stipulated in clause 2. Thereafter, the stay would automatically lapse and the respondent would have been at liberty to execute.
8. The applicant's advocate then wrote a letter to the deputy registrar on August 16, 2021 requesting for the transcribed proceedings of July 22, 2021 as well as the audio clip to clarify the inconsistencies. The letter was marked ER5 and it remained un-responded to date.
9. The applicant contended that there was no basis for the inconsistencies, and even then, the applicants had complied with the written conditions. That since the appeal had been filed within 30 days, the condition for security through a bank guarantee did not apply.
10. It was further contended that the respondent obtained warrants of execution on September 13, 2021 one year after the decree was issued on April 30, 2020. Thus the respondent ought to have moved the court to issue a notice of show cause against the applicant to show why the decree should not be executed in accordance with order 22 rule 18(1) of the Civil Procedure Rules.
11. That going by the above, the respondent's proclamation of September 14, 2021 was illegal, unlawful and premature.
12. The respondent opposed the application vide the replying affidavit of Paul T Gichuhi sworn on September 29, 2021. That the respondent's advocate did not attend court when the ruling was delivered on July 22, 2021 and requested the applicant's advocate to hold his brief. That the applicant obtained the written ruling on August 4, 2021 but only sought for clarification on August 16, 2021. That the respondent did not object to the appeal provided a security of kshs 10,547,318.50 was deposited to a joint account as deponed in its replying affidavit dated August 20, 2020.
13. That the applicant complied by filing the appeal within 30 days, but ignored the condition to provide a bank guarantee as security, thus the respondent proceeded with execution after expiry of 45 days.
14. The applicant filed its submissions dated 29/10/2021, whereas the respondent's were dated November 8, 2021.
15. The court has considered the parties' contestations and the submissions on record. The issue for determination is whether the proclamation and warrants of attachment ought to be set aside.
16. The applicant contended that when the court orally delivered its ruling on July 22, 2021, it allowed the prayer for stay of execution pending appeal on condition that the appeal was filed within 30 days from the date of the hearing. The respondent contended that the applicant's advocate held brief for the respondent's advocate who was not in attendance. The applicant's advocate then communicated the outcome of the court's ruling to the respondent's advocate vide letter dated July 22, 2021 marked as ER2 which this court has seen.
17. The applicant filed the appeal on August 17, 2021, 25 days after delivery of the oral ruling. Up to that point, the applicant was in compliance.



18. However, the written ruling obtained by the applicant had different conditions. The applicant took initiative to seek clarification from the Deputy Registrar vide a letter dated August 16, 2021. The court has seen that letter. No such clarification was received.
19. Even at that juncture, the applicant could not have been blamed for complying with what to its' believe was delivered in court. Its' advocate communicated that fact to the respondent's advocate thus there is evidence that the applicant's version of the court's ruling was not an afterthought.
20. This court has seen the written ruling dated July 22, 2021. It provided that;
 1. An order be and is hereby issued for stay of execution of judgment and all consequential orders pending the hearing and determination of the intended appeal.
 2. The stay is conditional that the applicant will not deposit security if the appeal is filed within 30 days from the date of this ruling.
 3. The applicant shall however provide a bank guarantee for KShs 10,547,318.50 from a reputable bank within 15 days after expiration of the period stipulated in b above. Thereafter, the stay shall automatically lapse and the plaintiff/respondent shall be at liberty to execute without further reference to the court.
 4. Costs of this application shall abide the outcome of the appeal.
21. The simple interpretation of the above order is that if the applicant filed the appeal within 30 days from the date of the orders, it would not deposit any security. However, if the applicant failed to file the appeal within 30 days, it would need to provide a guarantee for the decree amount within 15 days from the expiry of the 30 days.
22. However, if the applicant failed to comply with both of those conditions, then the stay would automatically lapse. The applicant thus had 45 days to comply with either of the conditions.
23. The applicant filed the appeal on August 17, 2021, 25 days after the ruling was delivered, thus in compliance with clause 2 of the order. The condition to provide a bank guarantee as security did not therefore arise as the appeal was filed within time.
24. From the forgoing, the respondent's decision to proclaim the applicant's goods was therefore premature, illegal and unlawful. The applicant had complied with both the version of the ruling delivered orally on July 22, 2021 and with the written ruling dated July 22, 2021. In any event, it was imperative to issue a notice to show cause as the decree was order than one year.
25. Accordingly, the application dated September 17, 2021 is found to be meritorious and is allowed with costs to the applicant.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF AUGUST, 2022.

A MABEYA, FCI Arb

JUDGE

