



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL APPEAL NO. 45 OF 2013

BETWEEN

KENYA POWER & LIGHTING COMPANY LTD.....APPELLANT

AND

BRIGADIER(RTD) PETER NYANGWESO RAMOYA

(Suing on behalf of JARLATH RAMOYA).....1st RESPONDENT

EUSEBIUS BARASA RAMOYA.....2nd RESPONDENT

RULING

1. On 27th March 2018, the appellant/ respondent filed a Notice of Preliminary Objection dated 26th March 2018. The P.O raised the following issues:

- a) That this court lacks jurisdiction to hear and determine the present application. The same can only be handled by the Court of Appeal since it is brought under Rules 83 & 84 of the Court of Appeal Rules made under the Appellate jurisdiction Act Cap 9 of the Laws of Kenya.
- b) That the application is barred by the doctrine of Res judicata pursuant to section 7 of the Civil Procedure Act Cap 21 of the Laws of Kenya as the prayers sought by the applicant had already been dispensed with by the ruling that was delivered by this court on 18th October 2018.
- c) That even if the application would have been brought before the right court it is time barred as the same should have been filed within 30 days of service of the Notice of Appeal as provided for in under the proviso to Rule 84 of the Appellate Jurisdiction Act.
- d) That the application is vexatious and scandalous therefore amount to abuse of this Honourable Court.

2. On 9th May 2018 the parties herein agreed by consent to dispose of the P.O by way of written submissions. The second respondent sought to adopt the submissions by the appellant.

3. The application against which the preliminary objection was brought is dated 30th October 2017. The application was brought under rules 83 and 84 of the Appellate Jurisdiction Act, sections 3 & 3A of the civil Procedure Act, Articles 48,50, & 57 of the Constitution of Kenya. The orders sought therein were:

- a) The appeal filed herein be deemed to have been withdrawn and the money held in respect of this case be ordered released.
- b) In the alternative, this court makes an order to strike out the appeal.

4. A preliminary objection must only raise issues of law. The principles that the court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696**. At page 700 Law JA stated:

A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to

arbitration.

At page 701 Sir Charles Newbold, P added the following:

A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion....

In the instant application, the Preliminary Objection has raised issues of law.

5. I was urged to make a finding that this court is devoid of jurisdiction for the application was brought under the Appellate Jurisdiction Act rules. It was argued that this a preserve of the Court of Appeal. Rule 83 of the said rules states:

If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time he shall be deemed to have withdrawn his notice of appeal and the court may on its own motion or on application by any party make such order. The party in default shall be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served.

Whereas rule 84 provides:

A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.

Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of service of the notice of appeal or record of appeal as the case may be.

Rule 2 of the Court of Appeal Rules, 2010 defines Court in the following terms:

“Court” means the Court of Appeal and includes a division thereof and a single judge exercising any power vested in him sitting alone;

This therefore means that this court lacks jurisdiction to entertain the application dated 30th October 2017. Having made a finding on the issue of jurisdiction it would be purely academic for me to address my mind to the other issue of res judicata. I will comply with the directions given by Nyarangi JA in the case of **Owners of the Motor Vessel “Lillian S” vs. Caltex Oil (Kenya) Ltd [1989] KLR 1** as follows:

I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

6. I accordingly sustain the Preliminary Objection with costs.

DELIVERED and SIGNED at BUSIA this 27th day of November, 2018

KIARIE WAWERU KIARIE

JUDGE