



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 184 OF 2015

KENYA POWER & LIGHTING CO.LTDAPPELLANT/APPLICANT

VERSUS

WINFRED NDUNGE KATIWA & KAVATA MWANTHI MUNUVE (*Suing as the administrators of
the estate of the late*)

DOMINIC KATIWAMWANTHI).....RESPONDENTS

(Being an appeal from the Judgment of the Chief Magistrate's Court at

Machakos by Hon. C.A. Ocharo(PM) in Civil Case No. 597 of 2014

dated 11th November, 2015)

RULING OF THE COURT

Introduction

1. There are two Notice of Motion applications before the court dated **5th and 9th September, 2016** both filed by the appellant /applicant.
2. The first application prays for orders of stay of execution of the decree herein and enlargement of time to deposit the decretal sum in a joint interest earning account. The second application became necessary when the court issued stay orders in the first application which orders were ignored by the respondent who went ahead and attached the appellant's motor vehicle. So the only practical prayer in the second application is the release of the said motor vehicle and the issue of costs. The two applications were heard together by way of written submissions.

The applications

3. The two applications are premised on the grounds set out therein, and are supported by affidavit of **Paul Kariba** sworn on 2nd September, 2016 and 9th September, 2016 respectively. The appellant's case is that judgment in Machakos CMCC 597 of 2014 was delivered on the 11th day of November, 2015 in favour of the respondent herein. The appellant being aggrieved with the judgment filed the appeal herein together with an application in Machakos CMCC 597 of 2014 seeking stay of execution pending the appeal herein. Ruling to the said application was delivered on the 18th day of February, 2016. The court ordered that there be a stay of execution of the judgment delivered on the 11th day of August, 2015 on

condition that the decretal sum be deposited in an interest earning account in the joint name of the parties' advocate within 30 days from the 18th day February, 2015. The delay in depositing the decretal amount within time was due to a delay in obtaining copies of documents required by the bank, from the respondent's advocates herein, but the appellant has now deposited the decretal amount in an interest earning account on 1st September, 2016. However, the respondent has commenced execution and has served the appellant/applicant with a proclamation of attachment on the 30th day of August, 2016. The applicant filed an application in Machakos CMCC 597 of 2014 seeking stay of execution and enlargement of time to comply with the said court order which was heard by Hon. Kisiangani on the 2nd day of September, 2016, but the court declined to give any orders. The applicant's case is that it is in the interest of justice to grant the orders sought herein and that the respondent does not stand to suffer any prejudice.

4. On the second application the applicant's case is that the suit motor vehicle was unlawfully attached when the notice period had not expired and that the same should be forthwith released.

The response

5. The respondents oppose the two applications vide Replying affidavit sworn by **Winfred Ndunge Katiwa** on 15th and 19th September, 2016 respectively. The respondents' case is that the applicant and its advocates have conveniently misled this court to issue order after order which affect him without being given an opportunity to be heard. The Respondents are perplexed how the applicant managed to obtain the current temporary orders of stay of execution when execution had already taken place, through the auctioneers. That prayer two (2) in the application which is a substantive prayer was issued in error because the execution process was lawful and has not been challenged.

6. The respondent, just like the applicant, narrated in a blame game fashion, who was responsible for the delay of opening the account.

Submissions

7. With the leave of court parties filed submissions which I have considered. The issues I raise for consideration are;

i. Whether this court can enlarge time to enable the appellant comply with the order to deposit the cheque.

ii. Whether the auctioneer was right to attach the motor vehicle.

8. The said application is brought under **Order 50 rule 6, Order 51 rule 1, Order 42 rule 6(6)** of the **Civil Procedure Rules 2010, Sections 1A, 1B and 3A** of the **Civil Procedure Act Chapter 21 Laws of Kenya. Order 50 rule 6** of the **Civil Procedure Rules** provides;

"Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed;

9. The applicant urged the court to exercise its discretion and enlarge the time within which the Appellant/applicant should deposit the decretal sum in joint interest earning account, in the interest of justice. The appellant has filed the appeal herein against the decision of the lower court in Machakos CMCC No. 597 of 2014, and it is the apprehension of the appellant that if the decretal sum is paid to the respondent, the applicant's insurers will suffer substantial loss as the means of the respondent are unknown and the applicant's insurers will not be able to recover the said decretal sum. Supporting the application is an affidavit sworn by Paul Kariba dated 2nd September 2016. In the said affidavit at paragraph number 20, the deponent has confirmed that a joint interest earning amount has already been

opened, (although out of time, and the decretal sum has already been deposited in the said account. As proof of the same, the deponent has annexed annexure PK 12, a deposit initiation notification from I & M Bank. The applicant was forced to plead with the bank to open the account, and the bank agreed to open the account without all the documents by the Respondent's advocates on condition that the same be provided. The applicants alleged that they are yet to receive the current (2016) practicing certificate of the respondent's advocates despite requesting for the same. They urge the court to enlarge time for the applicant to deposit the decretal sum in a joint interest earning account and that the joint account already opened be deemed to have been opened within time.

10. In the case of ***ICDC & Ano Vs Hannah Moraa Buluma Civil Appeal 254 of 2007 HC Nrb***, the court in allowing an application for enlargement of time to deposit the decretal sum in court stated, "*this court is also empowered to grant such orders even in circumstances such as in the present case where the application for enlargement of time is made after the expiration of the time allowed or appointed for the doing of the act or complying with orders of court.*"

11. In my view, there is sufficient cause for allowing this application. A Memorandum of Appeal has been filed herein. If the orders of enlargement of time sought in this application are not granted, then there will be no order of stay of execution and the respondent will be at liberty to proceed with execution, defeating the appeal.

12. The application and opposition to it have been very incompetently argued. Both parties have provided rambling affidavit paragraphs, which are carelessly structured and hardly summarized, giving reasons causing the delay in opening the joint account. I have seen all the correspondence leading to the alleged delay. The appellant attributes the delay to the respondent's advocate. This court cannot understand how it can take more than nine (9) months to open a joint account. However, it is clear that whatever the problem was, the respondent's advocate was part of it and the respondent cannot entirely escape the blame. But more importantly, despite the said delay the applicant still deposited the amount in an interest earning account with its advocates to be rolled over to the joint account to be opened. The court cannot overlook this act which appears to have been in good faith.

13. The court is satisfied that there is an appeal pending, and that there exists sufficient reason to enlarge the period to enable the parties open the intended joint account.

14. On the second issue as to who should pay the auctioneers fees, it is noted that the proclamation was made on 30th August, 2016 and the attached property was removed on 7th September, 2016 after the notice of seven (7) days.

15. The proclamation was done on 30th August, 2016 giving the applicant seven (7) days notice. In computing time the first and last days are inclusive. So the seven (7) days notice ended on 5th September, 2016. The attachment was carried out on 6th September, 2016 after the said seven (7) days, which is legally correct. However, in the proclamation notice the auctioneers had indicated that they would remove the attached goods on 7th September, 2016. So it is clear that the decision to remove the goods on 6th September, 2016 was based on ulterior motive. Be that as it may, they still acted within the law. It is clear to me that both parties in this matter have not approached the court with clean hands. The applicant on its part failed to inform the court that they had filed another application in the lower court dated 2nd September, 2016 where it was denied stay. It then came to this court as though there was never a previous attempt in the lower court. This is acting in bad faith.

16. In the upshot the application before the court by the appellant are allowed in the following terms;

i. There is hereby issued a stay of execution of the judgment delivered on 11th November, 2015 in Machakos CMCC 597 of 2014 pending the appeal.

ii. Time is herewith enlarged by thirty (30) days from the date hereof for the appellant to deposit the decretal sum in joint interest earning account upon receiving all the documents to open the

account.

iii. Costs of this application shall be in the cause.

iv. The appellant/applicant shall pay the auctioneer's costs herein.

Orders accordingly

DATED AND DELIVERED AT MACHAKOS THIS 22ND DAY OF NOVEMBER, 2016.

E. OGOLA

JUDGE

In the presence of:

M/S Ombega for respondent

Mr. Kyalo holding brief for Ms. Kemunto for applicant

Court Assistant – Mr. Munyao