



No. 218

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 125 OF 2010

1. RICHARD BUDDY OKEMWA
2. ELIJAH OKEMWA PLAINTIFFS

VERSUS

THE KENYA POWER AND LIGHTING CO. LTD..... DEFENDANT

RULING

1. On 10th May, 2013, I delivered judgment in this matter in favour of the plaintiffs against the defendant. The judgment was for a total sum of kshs. 587,327.00 comprising of special and general damages. The said judgment was made without hearing the defendant who had filed a defence but failed to attend court for the hearing despite several notices to do so. After the defendant got notice of the said judgment, the defendant moved the court by way of an application dated 24th June, 2013 seeking the setting aside of the said judgment on several grounds which were set out in the said application. The defendant's application aforesaid was opposed by the plaintiffs. In a ruling delivered on 29th November, 2013, I allowed the defendant's application and set aside the judgment that had been entered herein on 10th May, 2013 on condition that the defendant deposits the decretal amount in the sum of kshs. 587,327.00 in an interest earning bank account in a reputable bank in Kisii in the joint names of the plaintiffs' and the defendant's advocates within 30 days pending the hearing and determination of this suit. In the said ruling, I gave my reasons why I felt that the judgment that had been entered herein should be set aside conditionally.
2. The defendant did not comply with the condition that was imposed by the court for setting aside the said judgment. Instead of doing so, the defendant moved the court through another application dated 18th December, 2013 seeking to vary the said condition that was imposed by the court so that the decretal amount is deposited in court instead of being put in a joint interest earning bank account in the joint names of the advocates for the parties. The defendant's application which was filed on 24th December, 2013 under certificate of urgency came up for hearing during the High Court vacation and was placed before E. N Maina J. on 30th December, 2013 who certified the application as urgent but declined to issue any interim orders. The effect of that order was that the 30 days period within which the defendant was to deposit the decretal amount in a joint bank account lapsed without the defendant making the deposit as ordered by the court. The effect of that failure was that the judgment entered herein on 10th May, 2013 was reinstated and the plaintiffs were at liberty to proceed with execution which they did.
3. On 22nd January, 2014 the defendant moved the court once again with an application seeking a stay of execution pending the hearing of its said application dated 18th December, 2013. I granted

- the defendant a temporary stay of execution until 11th February, 2014 when the defendant's said application dated 18th December, 2013 was scheduled for hearing.
4. On 11th February, 2014 only the defendant's application dated 18th December, 2013 was argued. The application for stay of execution dated 22nd January, 2014 was not argued because I indicated to the parties that I would extend the stay order that I had issued earlier until a ruling on the defendant's said application dated 18th December, 2013 is delivered. The defendant's application dated 18th December, 2013 was brought on the grounds that the defendant has had difficulties in retrieving the monies deposited in joint names of advocates and arising out of that, the defendant's board of directors had resolved that all monies ordered by the court to be deposited as security or otherwise shall be deposited in court and not in the joint account of advocates. It is on account of the foregoing that the defendant urged the court to vary its order of 29th November, 2013 and allow it to have the decretal amount herein deposited in court. In his submission in support of the application Mr. Mungao who appeared for the defendant argued that the defendant has had difficulties in getting back monies deposited in joint accounts of the advocates and as such the defendant had made it a policy not to have its funds deposited in such accounts but in court. It is for this reason that the defendant has sought to vary the condition that was imposed by the court on 29th November, 2013. On the plaintiffs' arguments that the court order of 29th November, 2013 cannot be varied because the 30 days period that had been granted to the defendant had lapsed, Mr. Mungao argued that the 30 days lapsed on Monday 30th December, 2013 by which time they had already moved the court to vary the order of 29th November, 2013.
 5. The defendant's application was opposed by the plaintiffs. Through a replying affidavit sworn by the 2nd plaintiff on 11th February, 2014 the plaintiffs contended that the orders sought to be varied by the defendant lapsed on 29th December, 2013 when the defendant failed to deposit the decretal amount in a joint bank account as ordered by the court. In the circumstances, the plaintiffs contended that this court cannot vary orders which have lapsed. The plaintiffs contended therefore that the defendant's application dated 18th December, 2003 has been overtaken by events. The plaintiffs argued that without an order extending the time within which the deposit was to be made, the court orders made on 29th November, 2013 are spent and cannot be a subject of review. The plaintiffs contended further that the defendant from its conduct is not deserving the exercise of this court's discretion. In his submission, Mr. Sagwe advocate who appeared for the plaintiffs relied entirely on the 2nd plaintiff's replying affidavit and urged the court to disallow the application. The plaintiffs counsel argued that monies deposited in court do not earn interest and it is for this reason that the court made a specific order that the decretal amount be deposited in an interest earning bank account. The plaintiffs' advocate argued further that the defendant has violated the order made on 29th November, 2013 by failing to deposit the decretal amount as ordered by the court and as such was not entitled to the orders sought.
 6. Counsel argued further that no good grounds have been advanced by the defendant to warrant the variation of the court order made on 29th November, 2013 and that even the defendant's policy on the issue of deposits would not suffice as a good reason to justify the order sought. In reply to the submissions by the plaintiffs' advocate, Mr. Mungao maintained that the defendant did not violate the order of 29th November, 2013 because it came to court for the variation of that order before the expiry of the date of compliance.
 7. I have considered the defendant's application and the affidavit filed in opposition thereto by the defendant. As I have stated earlier in this ruling, the condition sought to be reviewed herein was supposed to be complied with by the defendant within 30 days from 29th November, 2013 failure to which the judgment entered herein on 10th May, 2013 would be reinstated automatically. The 30 days period within which the defendant was to comply with the order of 29th November, 2013 lapsed on Sunday, 29th December, 2013 as submitted by the defendant. It follows from the foregoing that the last day on which the defendant should have complied with the said order that required the defendant to deposit the decretal amount in a joint interest earning account was Monday, 30th December, 2013. There is no dispute that the defendant failed to make the deposit as ordered by the court consequent to which the judgment that was entered against the defendant

- on 10th May, 2013 was reinstated.
8. I am fully in agreement with the submission by the plaintiffs that the defendant's application herein has been overtaken by events. The order requiring the defendant to deposit the decretal amount in a joint interest earning account was imposed by the court as a condition for setting aside the judgment that was entered against the defendant on 10th May, 2013. The said judgment having been reinstated by the defendant's failure to comply with the condition imposed by the court on 29th November, 2013, the conditions that were imposed while setting aside the said judgment were spent. It follows that there are no orders which this court can vary. The defendant's application has been made in vacuum as the judgment of the court has been reinstated and it is not necessary now to have the decretal amount deposited either in court or in a joint bank account. The defendant argued that since the defendant's application for review was made prior to the lapse of the 30 days period within which the defendant was supposed to comply with the order on deposit, the time somehow stopped to run and the defendant was not under any obligation to comply with the order that they sought to vary until their application was heard and determined.
 9. In my view, this argument has no basis. It is true that the defendant filed the application for review before the lapse of 30 days within which it was supposed to make the deposit aforesaid. The said application could not however act as a stay of the order of 29th November, 2013. As rightly pointed out by the plaintiff's in their replying affidavit, the defendant should have applied for extension of time within which to comply with the order of 29th November, 2013 as it sought a variation of the same. The defendant failed to do so.
 10. It is my finding therefore that to allow the present application would be in vain as it would not set aside the judgment that has already been reinstated due to the default on the part of the defendant to comply with the order sought to be reviewed. In my view, the other alternative for the defendant would have been for it to comply with the said court order and thereafter seek a review of the same. The defendant's application herein would fail on this ground alone. However, if I am wrong on the foregoing, I am of the view that even on merit, the defendant's application would still fail. The defendant's application for review is based on alleged difficulties that the defendant has had in retrieving monies deposited in joint accounts of advocates which has prompted the defendant's board of directors to pass a resolution that all monies ordered by the court to be furnished as security shall henceforth be deposited in court instead of joint accounts. The defendant in its affidavit in support of the application referred to instances where they had to file suits to retrieve such monies.
 11. The onus was upon the defendant to prove these facts on which its application was premised. The defendant failed completely to place any material before the court to prove the difficulties if any that it has had in retrieving monies deposited in joint accounts of advocates. No evidence whatsoever was availed of the alleged suits that they have had to file to retrieve such monies. The defendant did not even place before the court the alleged board resolution that stopped the defendant from depositing monies in joint account of advocates assuming that such resolution would bind the court. From the foregoing, the defendant placed no material of any kind before the court on the basis of which the court could have exercised its discretion in its favour.
 12. The upshot of the foregoing is that I have found no merit in the defendant's application dated 18th December, 2013. The application is dismissed accordingly with costs to the plaintiffs.

Delivered, dated and signed at KISII this 19th day of February 2014.

S. OKONG'O

JUDGE

In the presence of:

Mr. Bosire h/b for Minda for plaintiffs

Mr. Ochwang'i h/b for Okeyo for the defendants

Mr. Mobisa

Court clerk

S. OKONG'O

JUDGE