



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO 559 OF 1995

RYCE MOTORS LIMITED.....PLAINTIFF

Versus

JONATHAN KIPRONO RUTO.....DEFENDANT

RULING

Release of deposit in court

[1] The significant prayer sought herein is for:-

- a) ***Release the moneys deposited with NIC Bank Deposit Contract pursuant to advise No.3-210-000295 in the joint names of the advocates on record to the firm of Onsando, Ogonji & Tiego advocates forthwith***’.
- b) ***Costs of this application.***

[2] The application is by a Motion dated 30th April, 2014 expressed to be brought under Order Sections 1A, 1B and 3A of the Civil Procedure Act Cap 21 Laws of Kenya.

[3] The application is based on the following grounds:-

- i. The Plaintiff never preferred an Appeal against the judgment delivered on 29th May, 2002.
- ii. On 22nd May, 2009 Hon. Justice Lesiit granted stay of execution limited to a period of 6 months and gave the parties liberty to apply. There was also a rider that upon expiry of 6 months the stay would automatically lapse. It lapsed on or about 22nd November, 2009.
- iii. To date it is close to 5 years since the stay order lapsed without the plaintiff seeking the extension of the stay order.

[4] On 24th July, 2014 when the matter came up for hearing Mr. Onsando for the defendant submitted that the ruling dated 22/5/2009 by Lesiit J is relevant. Judgement was issued on 29/5/2002. No appeal was lodged against the judgment. Instead, the plaintiff lodged an application for review on 28/6/2007. On 31/10/2007 Warsame J dismissed the application for

review. The Plaintiff/respondent filed an appeal against the dismissal of the review application. Lesiit J in her ruling granted stay of execution for 6 (six) months. The six months have lapsed. It is 4 years now. Respondent/applicant should not be kept from fruits of his judgment.

[5] In reply Mr. Ohenga for the plaintiff submitted that their position is clear; that the orders sought turns on the interpretation of the ruling by Lesiit J. The six months given here was to lodge the appeal which they have lodged only that it is yet to be heard. This court then ordered Mr. Ohenga to provide it with the current status of the appeal herein to enable court to deliver a ruling on the issues raised. On 28/7/2014 when the matter came before court, Mr. Ohenga said that the appeal was pending and they were yet to be invited to take a hearing date.

[6] I agree the decision of the court herein will be based on what Lesiit J ordered in her ruling dated 22nd May 2009. I will reproduce the orders as granted by the learned judge below:

1. A stay of execution of the judgment and the decree of this court be and is hereby issued pending the hearing and determination of the intended appeal against the order of this court made on 31st October, 2007.

2. The decretal sum deposited in a joint account in the names of the decree holder's Advocate and the Judgment debtor's advocate should continue to be so held pending further orders of this court.

3. The stay in (1) above will be limited to a period of six months within which the Applicant is expected to have pursued its appeal in the court of appeal.

4. It is ordered that six (6) months from the date hereof the stay granted in this application will automatically lapse.

5. Either party has leave to apply.

[7] What I will say should not be mistaken for an appeal because this is not and can never be an appeal as this court is of concurrent jurisdiction. Therefore, what I will say is just inextricable to the nature of the application before me which I believe draws from Order No 2 and 5 above. Of great importance is order No 3 and 4 of the above ruling. According to order 3, the stay in (1) above was limited to six months within which the Applicant is expected to have pursued its appeal in the court of appeal. And as per Order 4, the stay order was to lapse automatically six months from 22nd May 2009. Either of the parties was at liberty to apply and I believe the learned judge allowed the liberty to apply given the nature of her orders-they were to lapse automatically six months from 22nd May 2009. The stay order was limited to only six months and a renewal was absolutely necessary upon expiration of the six months. It cannot be implied and is discussed elsewhere below. The learned judge was very clear on the orders she made and the tempo was set in Order No 2 which reads:

The decretal sum deposited in a joint account in the names of the decree holder's Advocate and the Judgment debtor's advocate should continue to be so held pending further orders of this court. [Underlining mine]

[8] Nobody should ask why that was the case because the learned judge was exercising her judicial discretion and according to her honour's impeccable appreciation of facts of the case, granted a stay in the terms the learned judge considered to be most apt. I hold, therefore, that there is no stay of execution subsisting in this matter which can hold the funds as security under Order 42 rule 6 of the CPR as none was applied for after the initial one lapsed. It should be understood that an appeal does not operate as stay of execution as a formal application has to be made and considered by the court. This is a position of the law that is in the plain eye-sight of the law in Order 42 rule 6 of the Civil Procedure Rules and there are ample judicial decisions on this subject.

Accordingly, I order that the entire sum of money deposited with NIC Bank Deposit Contract pursuant to advice No.3-210-000295 in the joint names of the advocates on record to be released to the firm of Onsando, Ogonji & Tiego advocates forthwith. The move by the Applicant to apply is laudable and one that is made pursuant to the order by Lesiit J. It is so ordered.

Dated, signed and delivered in court at Nairobi this 21st day of November, 2014

F. GIKONYO

JUDGE