



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
MISCELLANEOUS APPLICATION 608 OF 2011
IN THE MATTER OF THE ADVOCATES ACT CHAPTER 16 LAWS OF KENYA
AND
IN THE MATTER OF THE REMUNERATION ORDER
BETWEEN
KENYARIRI & ASSOCIATES ADVOCATES..... APPLICANT
VERSUS
KCA UNIVERSITY..... RESPONDENT

RULING

1. By an application dated 30th May, 2012 the defendant/applicant sought the following orders:

“1. THAT this application be certified as urgent and service of this application be dispensed with in the first instance.

2. THAT there be a stay of execution and/ or sale of the two buses (KAQ 559W and KBJ 173J) attached on 30th of May 2012 pending inter-parties hearing of the applicant’s application which is fixed for the 19th of June 2012.

3. THAT pending inter-parties hearing, the honorable court be pleased to order the immediate and unconditional release of the two attached buses (KAQ 559W and KBJ 173J).

4. THAT pending the inter-parties hearing, execution and intended sale of the buses by the respondent herein and the auctioneers, Eshikhoni agency be lifted fully.

5. THAT upon inter-parties hearing the honorable court be pleased to grant the respondent

leave to institute contempt proceedings against Christopher Kenyariri of Kenyariri & Associates Advocates.

6. THAT upon inter-parties hearing, there be a stay of all proceeding herein until the determination of the application dated 21st of February 2012 scheduled for the 19th June 2012.

7. THAT in any event the respondent herein be condemned to meet any or all costs of the auctioneers.

8. THAT the costs of this application be provided for.”

2. The application was brought under certificate of urgency as it was alleged that the intended buses were scheduled to be sold by public auction on 8th June, 2012.

3. The application came up for hearing on 7th June, 2012, just a day prior to the scheduled date of sale of the buses and upon hearing counsel the court gave summary orders and reserved the reasons thereof until a later date. The reasons are now contained in this ruling.

4. The summary orders that were issued on 7th June, 2012 are as follows:

“ 1. THAT the respondent’s buses registration number KAQ 559W and KBJ 173J to be released upon payment of the Auctioneer’s charges by the Respondent, K.C.A University.

2. THAT the Respondent to deposit the decretal sums in this Court’s Account at the Kenya Commercial Bank, High Court Branch, within the next 7 days from the date hereof, failing which the applicant shall be at liberty to proceed with execution.

3. THAT the issue of costs of this application shall await delivery of the ruling on 18th June 2012.”

5. On 6th June, 2012 this court delivered a ruling in respect of a preliminary objection filed by **Kenyariri & Associates**, the plaintiff/respondent seeking an order to strike out the application as being bad in law. The preliminary objection was overruled.

6. Following delivery of that ruling **Mr. Ligunya** for the applicant abandoned prayer 5 of the application cited hereinabove.

7. The reasons for the orders that were issued on 7th June 2012 are as stated hereunder:

8. In a ruling delivered on 10th May, 2012 this court set aside orders made on 2nd March, 2012 dismissing the defendant/applicant’s application dated 21st February, 2012.

9. The application dated 21st February, 2012 is seeking to set aside judgment entered in favour of the plaintiff/respondent and in the ruling of 10th May, 2012 the court directed that the application be set down for hearing within ten (10) day from the date of the ruling.

10. The defendant’s advocate did not seek an order to stay execution of judgment pending hearing and determination of the application dated 21st February, 2012. Perhaps he did not deem it necessary or overlooked to do so because on 24th April, 2012 the court, on its own motion, having heard the defendant’s application dated 2nd March, 2012 issued an order of stay of execution until 10th May, 2012 when a ruling on the application was to be delivered. However, in the ruling no stay of execution was ordered because there were only two substantive prayers:

“2. That the Honorable court be pleased to set aside the order of the Honorable Justice Musinga

made on 2nd day of March, 2012 dismissing the Respondent's Notice of Motion application dated the 21st of February 2012.

3. That the application so dismissed be reinstated and an early date be given for a hearing inter parties."

11. After delivery of the ruling on 10th May, 2012 there were discussions between Mr. Kenyariri and Mr. Ligunya regarding the application dated 21st February, 2012. Mr. Ligunya told the court that since a similar application in **Misc. Application number 692 of 2011** had been allowed, Mr. Kenyariri requested that they spare the court's time and instead set a date for the respondent's application dated 1st February, 2012 seeking entry of judgment in terms of the certificate of taxation. As a result, Mr. Ligunya took an ex parte date, 19th June, 2012 and served a hearing notice upon the respondent's firm.

12. Mr. Kenyariri's explanation was totally different from that of Mr. Ligunya and this is what he stated in paragraph 8 of his replying affidavit.

"The Deponent clearly told me that I should not waste my time resisting his application dated 21st February 2012 for which he had taken an ex-parte date for the 19th June 2012 without inviting for fixing a convenient date for both parties, and this, he did by writing to the Deputy Registrar on 14/5/2012 and obtained the hearing date on the same date after which he served upon us a hearing notice together with a copy of the said letter which indicated that it had been copied to us. Infact, I immediately called Mr. Stephen Ligunya and dissented and informed him that I will serve a hearing Notice upon the process server who was before me, for our application dated 1st February 2012 in miscellaneous application No. 692 of 2011, which was erroneously indicated as No. 608 of 2011. The reason for the error is that the two applications have always been handled together and I keep them in the same file and when the typing of the Hearing Notice dated 25th May 2012 was made, it erroneously referred to Misc. Application No. 608 of 2011 instead of Misc. Application No. 692 of 2011. In any event Misc. Application No. 608 of 2011 already had a date of 19th June 2012."

13. On 15th May, 2012 Mr. Ligunya was served with a hearing notice for the application dated 1st February 2012 showing that M/S Kenyariri & Associates had fixed it for hearing on 31st May, 2012. Mr. Ligunya was therefore surprised when his client's buses were attached on 30th May, 2012. In his view, the attachment was in bad faith.

14. Mr. Kenyariri submitted that the hearing notice was erroneously headed **Misc. Application No. 608 of 2011** instead of **Misc. Application No. 692 of 2011**. In his view, there was nothing wrong in proceeding with the attachment since there was no order of stay.

15. Mr. Kenyariri added that after the ruling of 10th May, 2012 he applied for renewal of the warrants of attachment that had been issued on 29th February, 2012 but had not been executed.

16. This court took into consideration the facts stated hereinabove in granting the orders of 7th June, 2012.

17. Mr. Ligunya was well aware that since 10th May, 2012 there was no order of stay of execution that was in force. Although he told the court that there was tacit understanding between counsel that execution was not to issue until the application dated 21st February, 2012 was heard and determined, Mr. Kenyariri said that was not so.

18. Strictly speaking, in an adversarial system of justice a party is at liberty to take such lawful steps as may be deemed appropriate to advance his cause or bring him an advantage over his adversary.

19. But having so stated, I think equity and fair play required Mr. Kenyariri not to proceed with execution without giving any notice to the other side, considering that:

(a) although warrants of attachment and sale of the defendant's property had been issued since 29th February, 2012, no attachment had been done.

(b) he had served a hearing notice for the application dated 21st February, 2012 and the attachment would have had the effect of rendering the hearing of the application an academic exercise.

20. In ordering conditional release of the defendant's buses, the court considered that if the same are sold before the pending application is heard and determined the application will have been rendered nugatory yet there is no telling the outcome of the application.

21. The reason for ordering the defendant to pay Auctioneer's charges is that in attaching the buses the Auctioneers were executing lawful warrants of attachment and sale and are therefore entitled to their lawful fees.

22. In granting stay of execution or release of attached of property, the court has power to impose appropriate conditions such as provision of security and that is why the defendant was ordered to deposit the decretal sum in court.

23. The costs of the application dated 30th May, 2012 shall be borne by the defendant/applicant.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JUNE, 2012.

D. MUSINGA

JUDGE

In the presence of:

Muriithi – Court Clerk

Mr. Kenyariri for the Applicant

Mr. Wananda for Mr. Ligunya for the Respondent