



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
CIVIL APPEAL NO. 45 OF 2013

KENYA POWER & LIGHTING CO. LTD.....APPLICANT

VERSUS

BRIGADIER (RTD) PETER NYANGWESO

(Suing on behalf of Jalath Ramoya).....1ST RESPONDENT

EUSEBIUS BARASA RAMOYA.....2ND RESPONDENT

RULING

1. On 21st June, 2016, this Court in granting the Applicant (Kenya Power & Lighting Company Ltd) stay of execution pending appeal made the following order:

“In view of what I have stated, I order stay of execution on condition that the Applicant deposits the entire decretal amount, assessed costs and interest in an interest earning account in a reputable bank in the names of the advocates on record for the parties within 30 days from today’s date. Failure to comply will lead to the automatic termination of the stay herein.”

2. On 3rd August, 2016 the advocate acting for the respondents (Brigadier (Rtd) Peter Nyangweso Ramoya (suing on behalf of Jalath Ramoya) and Eusebius Barasa Ramoya applied to the Busia Chief Magistrate’s Court for the reissuance of warrants of attachment and sale to Nyaluoyo Auctioneers. The said letter was copied to the Applicant’s advocate who in turn responded on 4th August, 2016 indicating that the bank had been instructed to move the requisite amount from a current account to a fixed deposit account in compliance with the court order and there would therefore be no basis for reissuance of the warrants.

3. Equipped with the information that the funds had been deposited in a joint account, counsel for the respondents thereafter requested the Busia Chief Magistrate’s Court to have the funds transferred to his account as the Applicant was in breach of the orders of the Court to have the funds deposited within 30 days from the date of the order of stay. The order was granted by the Chief Magistrate’s Court but the same was arrested through an order issued by the High Court in Kisumu during this Court’s recess.

4. The Applicant has now filed the notice of motion dated 6th August, 2016 seeking, among other orders, a review of the order releasing the deposited funds to the respondents.

5. After this matter was heard on 17th August, 2016, this Court directed the Applicant to avail documentation from the bank to show that a deposit had indeed been made in a joint interest earning

account in the names of the advocates for both parties. The document availed shows that the deposit was made on 3rd August, 2016. This was over thirty days from the day the stay was issued on 21st June, 2016. The Applicant was thus in breach of the orders of this Court.

6. It is noted that the Applicant's advocate through a letter dated 19th July, 2016 addressed to the respondents' advocate forwarded copies of cheques in the names of both advocates together with account opening forms for the joint account for execution. This was one day shy of the prescribed period. The said letter was received on 20th July, 2016 and dispatched on the same day by the respondents' counsel.

7. It is noted that the orders of stay granted to the Applicant were conditional. The action of the respondents' counsel and the magistrate's court were within the law as the stay orders were no longer in force as from 21st July, 2016. The magistrate cannot be faulted for issuing the orders of 5th August, 2016.

8. In **Clarke and Other v Chadburn and others [1985] 1 All ER 211**, it was held that:

“An act done in willful disobedience of an injunction or court order was not only a contempt of court but also an illegal and invalid act which could not, therefore, effect any change in the rights and liabilities of others.”

The respondents were therefore no longer bound by the stay orders as they had lapsed. The application herein would appear to be one for dismissal.

9. However, it is clear from the uncontroverted affidavit of Mitchell J. B. Menezes that the process of transferring the funds commenced on 19th July, 2016 within the thirty days given to the Applicant. The delay between 20th July, 2016 and 3rd August, 2016 has been attributed, by the Applicant's counsel, to procedural impediments within the banking system.

10. It is also noted that in granting stay of execution, this Court had formed the opinion that there was no guarantee that the respondents were in a position to refund the decretal amount if the Applicant's appeal before the Court of Appeal were to succeed. Rejecting the application at hand may result in rendering nugatory the appeal filed by the Applicant against the decision of this Court.

11. In a nutshell, it is in the interests of justice that this application should succeed. However, the Applicant's conduct of acting on the last day of the time extended to it to avail funds should not go unpunished. For that reason the respondents will have the costs of this application from the Applicant.

12. One of the Applicant's prayers is for the issuance of an order that is appropriate in the circumstances of this case. In my view, the order that recommends itself for issuance in this matter is a declaration that the deposit of the decretal amount, costs and interest in a joint account in the names of the advocates for the parties herein is deemed to have been done in compliance with the Court order of 21st June, 2016. That then shall be the order of this Court.

Delivered, dated and signed at Busia this 15th day of Sept, 2016.

W. KORIR,

JUDGE OF THE HIGH COURT