



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO. 93 OF 2014

NATIONAL BANK OF KENYA LTD.....APPELLANT

VERSUS

ALFRED OWINO BALA.....RESPONDENT

RULING

1. This application- Notice of Motion- is dated 19th January, 2015. It is supported by an affidavit of Caleb Owuonda of the same date. The gist of this application on various grounds, the first of which was that this court on 16.01.2015 granted the applicant in their application dated 15th January, 2015, on interim basis, an order of stay of execution of the judgment and decree of the subordinate court then issued on 31.07.2014 in Kisii Chief Magistrate's court civil case Number 210 of 2012.
2. This order dated 16th January, 2015 was duly and promptly served upon the auctioneer, being the agent or acting as an agent in execution of the decree of the subordinate court issued on 31.07.2014 in Kisii. The service was effected while the said auctioneer was still at the applicant's Kisii Branch premises, carting away the applicant's items, the auctioneer with intent to defeat and frustrate the application of the said order took, removed and drove away with and kept possession of the applicant's items listed under prayer 2 as: 3 plastic seats, 8 office seats, 4 HP computer mouses, 4 Computer Keyboards, and 1 Getezen GT-885 12 Digit calculator.
3. The said auctioneer duly and promptly served with the court order at 9.45a.m. at the applicant's premises as per affidavit of service dated 19th January, 2015. The process server, Isaac Nyangena Kemari says in paragraph 3 thereof says:

“That on the same day at around 9.42a.m I entered the Bank where I found Mr. Oscar recording a list of items in the presence of the Bank's Branch Operations Manager, where I served him with court order but he proceeded listing the items, then he moved out with the goods and entered into his vehicle without signing my copy. I followed him to his office where he deliberately indicated on the copy of the order that he received the order at 10.42a.m, instead of 9.42a.m.

That service was witnessed by the Branch Operational Manager, and the several policemen and other people in the company of the said auctioneer”.

4. The applicant submissions, he says:

1. *The interim stay orders- granted by this court on 16th January, 2015 was duly and promptly served*

upon the auctioneers, and the respondent despite service, in deliberate defeat of the court's order, the auctioneer proceeded with execution by taking away the applicant's items as named above in the affidavit.

2. *The said execution is therefore unlawful as the same was executed in defiance of the court order.*
 3. *The said execution was also unlawful because the execution was effected two days prior to the expiry of the time provided for by the proclamation issued by the said auctioneers dated 24 October, 2014.*
 4. *The items taken away in the execution are the applicant's tools of trade, seats used by the Bank staff. The computers contain highly sensitive and confidential data, pertaining to applicant's customers, accounts and operations. That for these reasons the applicant is handicapped and paralysed in his business of operations.*
 5. *The amount of money which the subject of this execution had been deposited in joint account in the names of the applicant/and respondent, advocates, although late.*
5. The respondent's opposition is grounded on their statement dated 22nd January, 2015 I listened keenly to the submissions of Mr. Ochwangi, but I find no substantial argument in support by his cause. The auctioneer is but an agent of the respondent and by court order staying the execution meant for the respondent but served on the auctioneer must be obeyed. The auctioneer is not and was never a party to this matter. The rules of natural justice and the like and article 50 of the Constitution, being invoked by the respondent is misdirected. I agree with Mr. Nyachoga that orders are orders *in rem*, not *in personam*.
6. Therefore this court directs that items carted away from the applicant's premises, in defiance of the court, must be returned to the applicant's premises pending the hearing and determination of the applicant's application dated 15th January, 2015. Court orders must be obeyed, the alternative is anarchy.
7. It is so ordered.

Dated and delivered at KISII this 6th day of February, 2015.

C.B. NAGILLAH,

JUDGE.

In the presence of:-

Nyawencha holding brief for Nyachoga for the appellant.

Ochwangi for the respondent.

Edwin Mongare Court Clerk.