



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL CASE NO 133 OF 2009

BEDROCK SECURITY SERVICES LIMITED.....PLAINTIFF

VERSUS

BEDROCK HOLDINGS LIMITED.....DEFENDANT

RULING

1. In its Notice of Motion dated 28th October 2020, the Plaintiff herein sought orders that its Motor Vehicle Registration No KBL 042L attached on 26th October 2020 be released unconditionally, that the entire process of execution it commenced and all subsequent processes of execution be set aside, the warrants of attachment together with sale dated 28th August 2020 be lifted, that the Defendant be ordered to pay it general damages for trespass to property and the same be recovered from it as a judgement debt. It also prayed for costs of this application and for orders that the unlawful execution process be borne by the 1st and 2nd Defendant.
2. On 28th October 2020, Erick Okeyo, a Managing Director at the Plaintiff company, swore an Affidavit in support of the said application. The Plaintiff averred that this matter was heard and on 9th October 2018, the suit was dismissed with costs. It pointed out that it filed an appeal to the Court of Appeal and that the Defendant subsequently filed its Bill of Costs which 29th May 2020 was taxed at Kshs 660,315/=.
3. It pointed out the Defendant sued it in **Kisumu High Court Civil Case No 134 of 2020** which was related to the matter herein but the said suit was dismissed on 1st August 2019. It averred that costs were subsequently taxed at Kshs 826,686/=.
4. It added that vide email dated 5th August 2020, the Defendant's counsel asked its counsel to pay the said costs in **Kisumu High Court Civil Case No 134 of 2020** within seven (7) days failing which it would execute. It averred that as a result of the decision of the Defendants email, its counsel applied for execution in the other suit (sic) and the auctioneers served a Proclamation on 20th August 2020. It further averred that it moved to court and obtained an order staying execution.
5. It stated that the matter herein, **Kisumu HCCC No 134 of 2020** and **Kisumu HCCC Misc Civil App No 109 of 2020** which it had also filed against the Defendant herein were placed before the court on 22nd September 2020 for directions where its counsel expressed surprise about the execution in **Kisumu HCCC No 134 of 2020** because both parties had filed appeals. It added that the court proposed that parties discuss a way forward and return to court on 29th September 2020 for further directions. It was its contention that the Defendant did not disclose that it had already taken out the warrants of attachment in the matter herein or proclaimed.
6. It expressed surprise that Demigen Auctioneers had seized its Motor Vehicle Registration Number KBR 042L in Kisumu pursuant to warrants of attachments and sale issued by this court. It denied that any proclamation was served upon it before the said seizure.
7. It was categorical that the Defendant falsely declared that interest was awarded to the Defendant when in truth no interest was awarded by court and as result the warrants that were issued by the court were far in excess of what was truly due under the decree. It added that the Defendant's decision to load onto the warrants monies which were not due it was a deliberated attempt by the Defendant to settle scores and ensured that the costs cancelled themselves.
8. It further stated that in its application for execution, the Defendant failed to disclose the fact that the decree had been given on 9th October 2018. It was emphatic that the decision to insert a wrong case file number was designed to ensure that it would not be able to connect the documents in this suit and move to question the process. It averred that the failure to insert the date of the decree was intended to make it difficult for the court to tell that the mode of execution applied for was unavailable in the circumstances.
9. It asserted that the decree herein was more than a year old and execution by attachment could not issue without the decree-holder first taking out a Notice To Show Cause (NTSC) in accordance with Order 22 Rule 18 of the Civil Procedure Rules. It was its contention that the

attachment without issuing the said NTSC was intended to embarrass it.

10. It stated that it used the attached vehicle in the ordinary course of discharging its duties to its clients in the sensitive industry of offering security services and it had been grossly embarrassed by the Defendant's acts and omissions.

11. On 6th April 2021, it filed a Supplementary Affidavit that was sworn by Erick Okeyo. It averred that it served the Defendant with the present application on 3rd November 2020 and that its Motor Vehicle that was attached on 28th October 2020 was released on 6th November 2020.

12. In opposition to the Plaintiff's application, on 16th March 2021, the Defendant filed Grounds of Opposition of even date. It contended that the Plaintiff had not satisfied the grounds stated under Order 22 Rule 22(1) & 3 of the Civil Procedure Rules. It added that the High Court's discretion to grant a stay of execution of an order or decree was fettered by the three (3) conditions. These were that before an applicant could be granted a stay of execution, he had to establish a sufficient cause, that substantial loss was likely to ensue from the refusal of a grant of such stay and that the application had been filed without unreasonable delay as was held in the case of **Halai & Another vs Thornton & Turpin (1963) Ltd [1990] KLR.**

13. The second ground of opposition was that the prayers that had been sought in the application had already been spent as parties had agreed to sought out the entire decretal amount owed.

14. The third ground of opposition was that Order 22 Rule 18 of the Civil Procedure Rules 2010 did not apply herein because its Bill of Costs was taxed at Kshs 660,315/= on 29th May 2020 and the decree for payment filed on 28th August 2020.

15. It also stated that the application was bad in law, incompetent, ambiguous and an abuse of court process and the same should be struck out.

16. On 7th June 2020, Stephen O. Ayugi, a Director at the Defendant company also filed a Replying Affidavit that was sworn on the same date. The Defendant averred that it was attaching for costs and hence time started running from the date of taxation and not from the date of the decree. It was emphatic that it was not necessary to take out a NTSC as one (1) year had not lapsed. It added that there was nothing remaining in the application as it had already agreed to release the Plaintiff's Motor Vehicle that had been attached. It reiterated these averments in the Supplementary Affidavit that was sworn by Stephen O. Ayugi on 9th June 2021 and filed on even date.

17. On 23rd June 2021, the Plaintiff's advocate, David Otieno, further filed a Further Affidavit that was sworn on 22nd June 2021. It averred that the aforementioned two (2) court matters were different and independent matters. It contended that having been a successful litigant in **Kisumu HCCC No 134 of 2009**, that it was under no obligation to accede to the Defendant's proposal and that it was entitled to execute for its costs in the said suit.

18. It was emphatic that the Defendant opted to break the rules of execution to even out scores because it had moved out to execute against it in **Kisumu HCCC No 134 of 2009**. It added that the pendency of an appeal was no bar to execution unless the court ordered otherwise.

19. The Plaintiff's Written Submissions were dated 6th April 2021 and filed on 7th April 2021 while those of the Defendant were dated and filed on 16th March 2021. The Plaintiff filed Further Submissions dated 22nd June 2021 on 23rd June 2021. The Defendant filed Further Submissions dated 9th July 2021 on even date.

20. The Ruling herein is based on the Plaintiff's Written Submissions which were dated 6th April 2021 and filed on 7th April 2021, the Defendant's Written Submissions dated and filed on 16th March 2021 and the Plaintiff Further Submissions dated 22nd June 2021 which were filed on 23rd June 2021, which Written Submissions both parties relied upon in their entirety.

21. Notably, the Defendant's Supplementary Affidavit that was sworn by Stephen O. Ayugi on 9th July 2021 and its Further Submissions of even date were expunged from the court record for having been filed without leave of the court.

LEGAL ANALYSIS

22. The Plaintiff reiterated the averments it had set out in its affidavit evidence. It argued that the Court had jurisdiction to grant relief under Section 34 of the Civil Procedure Act where a party has suffered damages and loss arising out of a process of execution and that such relief must be claimed within this very action and not in a separate suit. It was emphatic that the actions of the Defendant were deliberate and unlawful and were actuated by malice.

23. It placed reliance on the case of **Blassio Simiyu & Another vs Vincent Sinino & Another [1985] eKLR** where the Court of Appeal upheld the decision of the subordinate court to award general damages for trespass in a case in which warrants of attachment had been wrongly issued against a party and property attached in execution thereof. In the said case, the court held that the person who was responsible for trespass was the person who put in motion the wrongful attachment. In that case, the court awarded a sum of Kshs 10,000/= as general damages for trespass.

24. It asserted that the detention of the vehicle for ten (10) days placed the lives of its clients and property at great risk. It submitted that malice aggravates damages and prayed that the court award it Kshs 3,000,000/= as damages for trespass. It stated that it was ready to pay additional fees if it was awarded the said sum of money.

25. It dismissed the Defendant's Written Submissions for misunderstanding what its application and submitted that the principles for granting of a stay of execution were irrelevant in the circumstances of the case herein. Notably, the Plaintiff's Further Submissions merely reiterated the facts that were in its affidavits. They did not add any value to the submissions it filed initially.

26. On its part, the Defendant placed reliance on the cases of **Daniel Chebutul Rotich & 2 Others vs Emirates Airlines Civil Case No 368 of 2001, Kenya Shell Limited vs Kibiru** (sic) [1986] KLR 410 and **Machira t/a Machira & Co Advocates vs East African Standard (No 2) [2002] KLR 63** to argue that the Plaintiff had not demonstrated that it had met the conditions for being granted an order for stay of execution. It was also emphatic that Order 22 Rule 18 was inapplicable as the execution was in respect of its Bill of Costs that was taxed in the sum of Kshs 660,315/= on 29th May 2020. It asserted that the subject Motor Vehicle was in the Plaintiff's possession as the Plaintiff also owed it costs vide a Bill of Costs that was taxed on 29th May 2020 amounting to Kshs 660,315/=.

27. As can be seen hereinabove, it was not in dispute that the Plaintiff's Motor Vehicle that had been attached was released. The only pending prayers were for the execution process that it had commenced against the Defendant be set aside and the warrants of attachment and all subsequent execution processes be set aside on account that the execution was commenced before a NTSC was issued herein.

28. Order 22 Rule 18 of the Civil Procedure Rules provides that:-

“Where an application for execution is made:

- a. More than one year after the date of the decree;**
- b. Against the legal representative of a party to the decree; or**
- c. For attachment of salary or allowance of any person under rule 43;**

the Court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him:

Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom the execution is applied for, or in consequence of the application being made...”

29. On 29th May 2020, the Taxing Master Hon L. Akoth taxed the Defendant's Bill of Costs dated 21st January 2020 in the sum of Kshs 660,315/=. On 21st October 2020, Cherere J dismissed the Plaintiff's Chamber Summons application dated 12th June 2020 in which the Plaintiff had sought to have the Defendant's Bill of Costs remitted back for taxation.

30. In Section 2 of the Civil Procedure Act Cap 21(Laws of Kenya), **“decree” means the formal expression of an adjudication, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may either be preliminary or final.....Provided that, for the purposes of appeal, “decree includes judgment, and a judgment shall be appealable notwithstanding that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up.”**

31. As the Plaintiff's suit was dismissed on 11th December 2018, there was no decretal sum that was awarded. The only sum that would have been recoverable by way of execution was the taxed sum of Kshs 660,315/=. In the event the Trial Court had awarded a sum of money, then the decree ought to have been from 2018 whereupon the Defendant would have been obligated to serve a NTSC before executing against the Plaintiff herein.

32. A perusal of the court records showed that the Defendant filed an application for execution of the decree on 26th August 2020. The Warrants of Attachment of Movable Property in execution of decree for money and Warrant of Sale of property in execution of decree for money for the sum of Kshs 811,945/= were both issued on 28th June 2020. In its own admission, the Plaintiff stated that its Motor Vehicle that was attached on 28th October 2020 and was released on 6th November 2020.

33. It was the finding and holding of this court that one (1) year from the date the application for execution of the decree had not elapsed as the order from which the Defendant intended to execute against was made three (3) months before.

34. Notably, the parties herein may have had a gentleman's agreement not to execute against each other as they tried to amicably resolve the issues between them or while the appeals were pending hearing and determination. However, in the absence of an order for stay of execution, the Defendant was well within the law to have executed against the Plaintiff herein.

35. Indeed, Order 42 Rule 6(1) provides that:-

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order (emphasis court) appealed from except in so far as the court appealed from may order...”

36. This court wishes to point out that it was very difficult to understand the prayers that had been sought in the application and contents of the Supporting Affidavit as it was not clear if the facts as set out were correct or if there were inadvertent errors. In prayer No 4 of its present application, the Plaintiff sought for the following order:-

“THAT the entire process of execution commenced by the Plaintiff against the Defendant (emphasis court) **be set aside...”**

37. In Paragraph 7 of its Supporting Affidavit, the deponent deposed as follows:-

“THAT as a result of the decision by the Defendant’s email referred to in paragraph 6 foregoing, our counsel applied for execution in the other suit and the auctioneer served a proclamation on 20th August 2020. I am aware the Plaintiff herein moved to court and obtained an order staying execution.”

38. It was not possible to understand whether it was the Plaintiff or the Defendant which served the Proclamation on 20th August 2020 and which of them obtained a stay. This court got even more confused when in Paragraph 8, the deponent deposed that:-

“... There was no disclosure by the Defendant’s counsel that there (sic) he had applied for and obtained warrants of attachment, let alone serve a proclamation.”

39. As there was no express averment that the Plaintiff was not served with a Proclamation in line with Rule 12(1)(a) of the Auctioneers Rules, 1997, this court came to the firm conclusion that the Plaintiff’s Motor Vehicle had been attached in a lawful execution process. As a result, its prayer seeking damages for trespass was misplaced and rendering Section 34 (1) of the Civil Procedure Act inapplicable in the circumstances of the case herein.

DISPOSITION

40. For the foregoing reasons, the upshot of this court’s decision was that the Plaintiff’s Notice of Motion application dated 28th October 2020 was not merited and the same be and is hereby dismissed with costs to the Defendant herein.

41. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF NOVEMBER 2021

J. KAMAU

JUDGE