



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS APPLICATION NO. 621 OF 2014

FACTORY GUARDS LIMITED.....APPLICANT

VERSUS

ABEL VUNDI KITUNGU.....RESPONDENT

RULING

The application dated 12th May 2015 by the applicants Factory Guards Limited and filed in court on the same date seeks from this court orders:-

1. Spent
2. Spent
3. Spent
4. That the proclamation and warrants of attachment dated 14th April 2015 be declared illegal, irregular and unlawful.
5. That the auctioneers fees of shs 69,700 be borne by the respondent
6. That a date for interpartes hearing of this application be given.
7. That costs of this application be provided for.

The application is based on the grounds that:-

1. This court issued an order on 11th November 2014 granting the defendant/applicant a stay of execution in CMCC NO. 3931 of 2011 on condition that the applicant deposits the decretal sum of shs 380,641.09 in court within 7 days.
2. The defendant in compliance with the court order deposited the said amount in court on 14th November 2014.
3. On 16th December 2014 the court ordered that 50% of the decretal sum be released to the plaintiff's advocates and a letter dated 17th December 2014 was done by the applicant's firm to the Deputy Registrar requesting that the order be effected and 50% of the sum deposited be released to the plaintiff's advocates.
4. However, on 15th April 2015, the plaintiff's proclaimed the applicant's good despite the fact that the decretal sum of kshs 380,641,09 had been deposited in court by the applicant pursuant to an order of the court on 11th November 2014 and the plaintiff was to pursue release of the 50% to themselves.
5. In order to secure its interests and avoid physical attachment, the applicant settled the decretal sum of shs 397,788.00 vide a cheque dated 21st April 2015.

6. Having settled the entire decretal sum, it is only fair and in the interest of justice that the decretal sum initially deposited in court on 14th November 2014 be released to the applicant.
7. It is only fair that this court intervene in the interest of justice and equity and the grants the prayers sought.

The application is supported by the affidavit sworn by Paul Kariba, the legal officer of APA Insurance Company Limited, the defendant's insurer, sworn on 12th May 2015.

The depositions therein mirror the grounds upon which the application is predicated. The deponent also annexes copies of order of this court dated 11th November 2014; cheque issued dated 14th November 2014 in favour of the Registrar, High court; deposit slip dated 18th November 2014 issued by the court to the applicant, letter dated 17th December 2014 asking for half of the decretal sum deposited in court to facilitate opening of a joint interest earning account, warrant of sale of property in execution of decree for money; proclamation dated 15th April 2015 by Mbusera Auctioneers; copy of cheque dated 21st April 2015 in favour of Nzamba Kitonga & Company Advocates for shs 397,788.80 and copy of auctioneer's invoice for the attachment dated 15th April 2015 for shs 69,700.

The respondents/defendants opposed to this application and filed a replying affidavit sworn by Eric John Mutemi on 19th May 2015.

It is deposed that albeit the applicant claims that it deposited the decretal sum in court on 18th November 2014 as ordered by this court on 11th November 2014 they nonetheless deliberately kept that information away from the respondent.

That the respondent's counsels had on 15th January 2015 written to the applicant's counsels urging them to facilitate compliance with court orders of 16th December 2014 which ordered that ½ of the decretal sum be paid to the respondent and ½ thereof be deposited in a joint bank account.

That the applicant's advocates did not respond and completely cut off communications with the respondent's counsels and that there is no way the respondent could have accessed the amount ordered by the court and as deposited in court without the active involvement of the applicant's advocates who were not co-operative. That the latter dated 17th December 2014 written by the applicant's advocates was never copied or received by the respondent's offices, it did not request for a cheque to be released to the respondent's firm's name as ordered by the court, it only requested for the release of ½ to be deposited in a joint interest earning account which was never opened and the said letter was received in court registry on 4th February 2015 but respondent's advocates were never notified. That it was the duty of the depositor to facilitate the release of that ½ of decretal sum to the respondents and to open a joint account for deposit of the remaining ½ and failure to facilitate that process was a failure to comply with the court order, which compliance was not done within 30 days hence the respondent was right in instructing auctioneers to proclaim in execution.

That the applicant has since settled the decretal sum but declined to pay auctioneers fees plus extra costs awarded in the lower court and this court totaling shs 50,000/- despite demand for the same.

And finally, that the applicant can have the decretal sum deposited in court released to them subject to their payment of auctioneers fees and the extra costs of shs 50,000/-.

The parties advocates agreed to have the application disposed of by way of written submissions. The applicant filed their written submissions dated 24th June 2015 whereas the respondents did not file any submissions and therefore this court is left to decide on the basis of the depositions made by John Eric Mutemi advocate as outlined above and the applicant's submissions on record.

I have carefully considered this application in line with the grounds, supporting affidavit, replying affidavit, annexures written submissions by the applicant and the two authorities relied on **HCCA 6/2010**

Chairman Agricultural Contractors Kenya Ltd V Rosemary Wanyanya Oyula & 2 others.

The main issues for determination, in my view, are, as correctly framed by the applicant and are as follows:-

1. Whether the proclamation and warrants of attachment dated 14th April 2015 should be declared null and illegal, irregular and unlawful.
2. Who should pay the auctioneers charges?

On whether the proclamation and attachment was unlawful, illegal and irregular, the answer can be found in the ruling of this court made on 16th December 2014. That ruling determined the applicant's application dated 16th September 2014 which sought for 2 main prayers:

1. Leave to be granted to the applicant to file an appeal out of time challenging the judgment and decree of Milimani **CMCC 3931 of 2011- Abel Vundi Kilungi Vs Factory Guards Ltd.**
2. Stay of execution of decree in Milimani CM CC 3931 of 2011 above pending hearing and determination of the intended appeal.

Upon hearing both parties on the said application this court did grant a conditional stay of execution of decree in the Milimani CM's court. It also granted to the applicant leave to file the intended appeal out of time. The said appeal was to be filed within 14 days from 16th December 2014. To date, that appeal has never been filed.

On the conditional stay, this court ordered that the respondent be paid ½ of the decretal sum deposited in court on 18th November 2014 and that the balance thereof be released to both advocates for the parties to be held in a joint interest earning account in a bank of their choice until the determination of the intended appeal and the court giving the green light on its disposal. In the summarized order No. 2 this court stated:

1.
2. Stay of execution granted conditional upon the applicant paying half of the decretal sum to the respondent as the said sums are held by the court, the court to affect this order as appropriate within 14 days from the date of this ruling."

The court also ordered that costs of the application to be borne by the applicant in any event and in the intended appeal.

Later on 20th April 2015, this court was confronted by an application filed by the applicant seeking for stay of execution and under certificate of urgency. That application did not indicate whether or not the applicant had filed an appeal following the leave granted and on my own motion I dismissed it with costs to the respondents on 24th April 2015 for the court could not grant orders in a vacuum. The applicant then filed another application dated 12th May 2015 herein under certificate of urgency and this court granted interim orders of stay of execution. Later, the parties advocates agreed and dispensed with prayers 2 and 3 after they were overtaken by the events of the applicant paying the whole decretal sum to the respondent's counsels thereby warrants of attachment and sale being lifted automatically.

From the above exposition, I find that there was no justification or at all for the respondent to instruct an auctioneer to attach the respondent's property in execution of decree in CMCC 3931/2011. The reasons are that the ruling of 16th December 2014 which was delivered in open court and was typed and duly signed was well within the knowledge of the respondent's advocates who have deposed as to what the ruling provided for, but carefully avoiding to mention that the ruling stated that "***As the said sums are held by the court, the court to effect this order as appropriate within 14 days from the date of this ruling.***"

This court was aware, as at the time of pronouncing that ruling that on 18th November 2014 the

applicants had deposited the whole decretal sum into court and therefore there would have been no need to burden the applicant over the ½ sums of money that were to be released to the respondent. It became the duty of the respondent to simply walk into the office of Deputy Registrar within the 14 days given and request for implementation of the Order 2 of that ruling which was as clear as crystal. It did not require the respondent to attach any other property of the applicant to execute the decree for the whole amount after the applicant failed to comply with the conditions of stay and leave to appeal out of time. In addition, it was not the duty of the applicant to follow up on the release of the ½ of decretal sum in favour of the respondent. The applicant was however obliged to pursue the release of the other half for purposes of depositing it in the advocates' joint interest earning account.

Furthermore, as the applicant had not even filed an appeal, the respondent only needed to enforce the orders of 16th December 2014 by requesting the court to release to him the whole of the decretal sum after such default, without embarking on an execution process by way of attachment of the applicant's property. In my view, not only was that process done in bad faith but were irregular and an abuse of the court process.

In my view, the respondent was pursuing a cause of action which would fail and with the object of unnecessarily and deliberately harassing and putting to expense the applicant by frivolous, or hopeless and unnecessary execution process, only intended to embarrass the applicant.

I reiterate that the decretal sum having been deposited in court and the court having made a clear order that the court to effect the order as appropriate, the respondent had no reason whatsoever to demand that he be told again by the applicant that the money was in court or that the applicant do pursue it for him. He had no cause whatsoever to cause the attachment and or proclamation of the applicant's property. On this point of fact I do not require any superior or concurrent authority to speak to me. I am persuaded that the courts exist to do justice to the parties and a court of law ought not to do an injustice to the parties. It would be unfair and unjust to allow a decree holder to attach the judgment debtor's property for recovery of decretal sum that is deposited in court as security for the due performance of decree with full knowledge of the decree holder and in the face of a specific order that the court would be responsible for releasing of the deposited sum to the respondent and the applicant as appropriate.

The above issue then leads me to the question as to who should pay the auctioneer's costs in the circumstances of this case. I note that the decretal sum was deposited in the High Court vide an order of this court. The appeal as intended was never filed by the applicant, thereby the orders if this for stay of execution lapsed and the decree holder was at liberty to enforce the decree for recovery of the full decretal sum. The said sums were in court and as at the time the auctioneer took out warrants of attachment and proclamation in execution of decree in the lower court, he was acting on instructions of the respondent. The respondent's advocates were in full control of these proceedings and they knew the contents of the ruling of 16th December 2014. They ought not to have instructed an auctioneer to attach the property of the applicant. The process that the respondent's advocates were engaged in is one that is deplorable and unacceptable and not even a layman could have instructed an auctioneer in the circumstances of this case, when the court order was clear that the respondents get their ½ of decretal sum from court.

In the premise, I find that the respondent's advocates are personally liable to pay the auctioneers charges. The said charges to be filed and assessed by the subordinate court. The circumstances of this case was such that since there is no evidence that the ruling or order of this court made on 16th December 2014 was filed in the subordinate court, I do not fault the auctioneers for not investigating or inquiring whether their actions were appropriate.

In the end, I find the applicant's application dated 12th May 2015 merited and I grant it as above.

I order that the respondent's counsels do pay to the applicant costs of this application in the sum of kshs 15,000/-.

Orders accordingly.

Dated, signed and delivered at Nairobi this 24th day of November 2015.

R.E. ABURILI

JUDGE