



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT IN KITALE

LAND CASE NO. 7 OF 2018

ELDORET EXPRESS COMPANY LIMITED.....PLAINTIFF

VERSUS

MARTIN NYONGESA.....1ST DEFENDANT

GEORGE NATEMBEA WELOBA.....2ND DEFENDANT

TAWAI LIMITED.....3RD DEFENDANT

RULING

The Application

1. By a notice of motion dated 24/11/2020 and filed on 25/11/2020, brought under **Order 22 Rule 22(1), Order 40 Rule 1 & 4(1), Order 51 Rule 1 & 4** of the **Civil Procedure Rules, Sections 1A, 1B & 3A** of the **Civil Procedure Act**. The applicant/plaintiff seeks the following orders:

(a) ...spent

(a) ...spent

(a)...spent

(d) **That this honourable court do set aside the warrants of attachment and sale issued on 20/11/2020 together with the consequential proceedings and any other orders.**

(e) **The attachment of the applicant's movable properties be lifted forthwith.**

(f) **Any other directions/orders that this court may deem fit and just to grant.**

(g) **The 2nd defendant/respondent bears the costs of this application.**

The application is supported by the affidavit sworn on 24/11/2020 of **James Muigai Thungu**, one the Directors of the plaintiff's company. The application is premised on the grounds that there is a pending application to wit **Kitale ELC Misc. Application No. 16 Of 2020** seeking a review of the costs awarded to the respondents herein; that notwithstanding that application and with the intent of defeating it the 2nd defendant respondent has instructed a firm of auctioneers to proceed with execution of warrants against the applicant; that the said auctioneers proclaimed the applicant's assets on 23/11/2020 and any execution would render the earlier application and the instant application nugatory and subject the applicant to irreparable loss and damage.

The Response

In reply to the application herein the 2nd defendant filed a replying affidavit sworn on 27/11/2020 by his counsel Mr. Rioba Omboto. His response is that a **30 day** stay of execution was granted upon taxation of the bill of costs; that the reference application was aimed at frustrating the 2nd respondent and he has already responded to it; that there are some legal technicalities that render the reference application fatally defective and that the due process has been followed in the execution process. He terms the current application as an abuse of the court process. I have perused through the court record and I have not found any response filed on behalf of the 1st and 3rd defendants/respondents.

Determination

Issues for determination

2. The main issues for determination in the instant application are as follows:

(a) Whether the court should set aside the warrants of attachment and sale issued on 20/11/2020 together with the consequential proceedings and any other orders and whether the attachment of the applicant's movable properties be lifted forthwith.

(b) Who should bear the costs of this application?

3. The issues are addressed as hereunder:-

(a) Whether the court should set aside the warrants of attachment and sale issued on 20/11/2020 together with the consequential proceedings and any other orders

4. There is no dispute that there is a reference application filed by the applicant herein being **Kitale ELC Misc. Application No. 16 of 2020** and that the same has not been heard and determined. The 2nd respondent justifies his jumpstarting of the execution process on the ground that there was a stay of execution that was granted after the taxation and that the applicant herein failed to comply after the expiry of that period.

5. I note that the reference was filed on **22/10/2020** and that the ruling of the taxing master had been given on **30/9/2020** in the main suit. The reference was therefore filed before the end of the **30 day** stay period that the 2nd defendant alleges was allowed by the taxing master. The very fact that the 2nd respondent filed the replying affidavit to the said reference sworn on **5/11/2020** by his counsel in the matter shows that by the time of the obtainance and purported proclamation of the applicant's assets **23/11/2020** the 2nd respondent was aware of the pendency of the said reference.

6. The 1st and 3rd respondents appear not to have commenced any execution process against the applicant but their responses to the reference are evident on the file record of that reference.

7. In this court's view the attempt to execute while the reference was underway and had been issued with a hearing date was wrongful and meant to disadvantage the applicant and render the reference nugatory.

8. It may be true that there were no orders staying execution but practice demands some courtesy where the opposite side is evidently assiduously attempting to bring his claim to justice as the applicant had done regarding the reference. In saying this I note that by **9/11/2020** the applicant herein had already set down the reference for hearing on **26/11/2020**. That can not be considered as a lackadaisical attitude that would entitle the 2nd respondent to rush and cause execution to issue notwithstanding the fact that he was aware of the reference and the hearing date. In effect the proclamation took place just **3 days** before the reference came up for hearing. I have noted that the reference has been set down for the delivery of a ruling on **2/2/2021**.

9. In this court's view, the said proclamation was clearly wrong and should not have been prompted by the 2nd respondent in the circumstances of this case. Consequently this court finds that the warrants of attachment and sale dated **20/11/2020** and all other consequential orders should be set aside. The upshot of what this court has stated in addressing **issue No. (a)** above is that the attachment of the applicant's movable properties should be lifted forthwith.

(b) Who should bear the costs of this application?

10. The 2nd respondent instigated the execution process as described above and this court is of the view that such instigation was malicious and an abuse of the process in the circumstances prevailing then. The 2nd respondent should therefore bear the costs of the instant application.

Conclusion

11. The upshot of the foregoing is that the applicant's application dated **24/11/2020** has merit and it is therefore granted in terms of **Prayers Nos. (d) and (e)** thereof. The 2nd defendant/respondent alone shall bear the costs of the instant application. Further, I hereby order that no execution shall be levied on the applicant until after the decision on the reference in **Kitale ELC Misc. Application No. 16 of 2020** is given by this court.

It is so ordered.

Dated, signed and delivered at Kitale via electronic mail on this 26th day of January, 2021.

MWANGI NJOROGE

JUDGE, ELC, KITALE.