



Power Source Technologies v Kenya Tea Packers Limited (Civil Appeal 533 of 2018 & 350 of 2019 (Consolidated)) [2024] KEHC 396 (KLR) (Civ) (24 January 2024) (Ruling)

Neutral citation: [2024] KEHC 396 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL APPEAL 533 OF 2018 & 350 OF 2019 (CONSOLIDATED)**

JN NJAGI, J

JANUARY 24, 2024

BETWEEN

POWER SOURCE TECHNOLOGIES APPELLANT

AND

KENYA TEA PACKERS LIMITED RESPONDENT

RULING

1. The Appellant had vide an application dated 23rd October 2018 sought for orders for temporary stay of execution of the exparte judgment entered against them on 25th January 2017 and for stay of warrants of attachment issued to Kenya Shield Auctioneers on the 14th September 2019 pending account taking. The trial court on the 24th of October 2018 certified the application as urgent and granted interim orders for stay of execution pending inter partes hearing on 7/11/2018. On 31/10/2018 the Respondent filed grounds of opposition dated 30th October 2018 wherein they contended that there was no substratum to the application nor did it have legal or factual basis.
2. When the matter came for inter partes hearing on the aforesaid date, that is, 7/11/2018, the trial court gave directions that the application be canvassed by way of written submissions and for advocates appearing for the parties to exchange written submissions. The matter was fixed for mention on 7/12/2018 to confirm filing of submissions. The trial court however declined to extend the interim orders for stay of execution issued on 24/10/2018. The Applicant was aggrieved by the refusal to extend the interim orders and filed an appeal in Nairobi HCCA No.533/2018.
3. The trial court in the meantime proceeded to hear the application dated 23/10/2018 and eventually dismissed it on 27/5/2019. The appellant was similarly aggrieved by the dismissal of the application and filed an appeal in Nairobi HCCA no.350 of 2019. The two appeals were heard together.



Appeal No.533 of 2018

4. The grounds of appeal are that the trial Magistrate erred in discharging the interim orders pending inter partes hearing of the application dated 23/10/2018.
5. The appeal was canvassed by way of written submissions. It was the submission of the Appellant that the refusal to extend the interim orders were made by the trial court suo moto and without any application by any party to the proceedings. The Appellant submitted that the refusal to extend the interim orders meant that the process of execution which was the subject of the notice of motion was allowed to proceed which rendered the hearing of the application useless and unnecessary to the detriment of the Appellant.
6. It was submitted that the trial Magistrate did not give reasons for refusal to extend the interim orders. That it was against the rules of natural justice for the Magistrate to condemn the Appellant unheard.
7. It was submitted that it is trite law that judicial discretion should be exercised judiciously and fairly but not capriciously and oppressively. That the refusal to extend the interim orders necessitated a miscarriage of justice to the Appellant and condemned them unheard and without inviting the Appellant to submit on the issue which is against the rules of natural justice.
8. The Appellant urged the court to allow the appeal with costs.
9. The Respondent on the other hand submitted that the appeal in Nairobi HCCA No.533/2018 has no substratum since the orders of temporary stay that the Appellant seeks to reinstate are anchored on a Notice of Motion dated 23/10/2018 that was heard and determined and a ruling delivered on 27/5/2019 which dismissed the application. The Respondent urged the court to dismiss the appeal with costs.
10. I have considered the grounds adduced in support of the appeal No.533 of 2019 and the submissions made by the respective advocates for the parties. The Appellant faulted the trial court for declining to extend the interim orders issued on 24/10/2018 pending the hearing and determination of the application dated 23/10/2018. Whereas I find that the trial court was wrong in declining to extend the interim orders when there was a pending application, it is evident that the application was heard and a ruling delivered on 27th May 2019. The Appellant has not shown that there is any execution that took place between 7/11/2018 when the interim orders were denied and 27/5/2019 when the ruling on the application was delivered. The interim orders were meant to prevent execution pending the hearing of the application. If no execution took place in the intervening period, then the Appellant did not suffer any detriment by the denial of the interim orders. The orders sought in the appeal have been overtaken by events. No purpose will be served by granting the orders. I find no merit in the appeal and the same is dismissed with no order as to costs.

Appeal No.350 of 2019

11. On the second appeal No. 350 of 2019 it was the case for the Appellant that the Respondent obtained judgment against the Appellant on 25/1/2017 for a sum of Ksh.1,558,849/=. That on the 24/10/2017 the Respondent instructed Clear Real Traders Auctioneers- to obtain Warrants of Attachment and Proclamation. And on the 21/12/2017, the said auctioneers proclaimed and carted away from the Appellant's premises one Borri UPS machine valued in excess of Ksh.800,000/= so as to secure the payment of the decretal sum.
12. That following the proclamation and attachment, the Appellant entered into negotiations with the Respondent for payment of the outstanding amount by instalments and paid a sum of Ksh.785,000/



- =. That despite that, the Respondent caused the Appellant's tools of trade and furniture to be proclaimed by Kenya Shield Auctioneers who were demanding a sum of Ksh.1,174,796.60 before the previous auctioneer could account for the machine worth Ksh.800,000/= that was in their custody and possession. The appellant then filed the application dated 23/10/2018 seeking for orders that:
1. Spent
 2. Spent
 3. That the Honourable court be pleased to grant Order for stay of execution of the exparte judgment and decree made on the 25th day of January, 2017 and the warrants of Attachment issued to Kenya Shields Auctioneers on the 14th day of September, 2018 together with all consequential Orders in as far as they affect the Defendant/Applicant pending account taking and or further Orders of the Court.
 4. The Honourable court be pleased to set the Warrants of Attachment issued to Kenya Shields Auctioneers on the 14th day of September, 2018 together with all consequential orders thereof, the same having been irregularly issued.
 5. The cost of the application be provided for.
13. The trial Magistrate however dismissed the application dated 23/10/2018 on the 27/5/2019 on the ground that the prayers sought therein were similar to the prayers in a Notice of Motion dated 6th November 2017 which application had been dismissed on 14/2/2018. The Magistrate further held that the Appellant should have appealed against the court's ruling of 14/2/2018 or sought for a review. That the application of 23/10/2018 was an abuse of the process of the court.
14. The Appellant was aggrieved by the ruling of 27th May 2019 and filed Appeal No. 350 of 2019. The grounds of appeal are that:
1. The learned Magistrate erred in Law and in fact by failing to set aside the Warrants of Attachment issued to Kenya Shields Auctioneers on the 14th day of September, 2018 together with all consequential Orders bearing in mind that the process of Execution by Clear Real Traders had not been concluded and accounts rendered by the Auctioneer as required by the Law.
 2. The Learned Magistrate erred in Law and in fact by failing to find that the decretal amount had been settled in full, considering the amount so far paid by the Appellant, and the value of Borri, UPS Machine valued at Kshs 800,000/- at the time in possession of Clear Real Traders Auctioneers on instructions of the Respondent.
 3. The Learned Magistrate erred in Law and in fact by failing to find that the parallel process of Execution initiated by the Respondent as against the Appellant was irregular and unlawful and amounted to an abuse of the court process.
 4. The Learned Magistrate erred in Law and in fact by misapprehending the nature and content of the Notice of Motion dated 23rd October, 2018 and the evidence therein and hence arrived at an erroneous decision thereof.
 5. The Learned Magistrate erred in Law and in fact by dismissing the Notice of Motion dated 23rd day of October, 2018 as against the weight of the evidence on record thereof.
15. The Appellant submitted that the Notice of Motion dated 6/11/2017 and the one dated 23/10/2018 were seeking different and distinct prayers. That the Magistrate was in error to find that they were



- seeking similar prayers. That the pertinent issue raised by the Notice of Motion dated 23/10/2018 was whether the Respondent could apply for warrants of attachment for a second time before the previous auctioneers had sold and accounted to the court and the Appellant the proceeds of the UPS machine in their possession.
16. The Appellant submitted that the Respondent did not deny the payment of a sum of Ksh.785,000/= nor did they deny the attachment of the UPS machine. That there was need for accounting prior to any other process of recovery. It was submitted that the application dated 23/10/2018 sought for stay and setting aside of the double and parallel process of execution and had nothing to do with reinstatement of the dismissed application. That the second application cannot be said to have been an abuse of the process of the court. That the trial Magistrate failed to consider the payment of Ksh.785,000/= to the Respondents who were also in control of the UPS machine valued at Ks.800,000/= making a total of Ksh.1,585,000/= which was more than the decretal sum. That there was need to grant the application dated 23/10/2018.
 17. The Respondent on the other hand submitted that the appeal has no substratum as the appellant had filed a similar application dated 6/11/2017 which was dismissed. That the instant application constitutes a blatant abuse of the court process as the matter is res judicata having failed to appeal or seek review of the initial court ruling.
 18. I have considered the arguments raised in the appeal in respect to the application dated 23/10/2018. The issue for determination is whether the application dated 23/10/2018 raised similar prayers as the dismissed application dated 6/11/2017.
 19. I have perused the two applications. The Notice of Motion dated 6/11/2017 was seeking for the following prayers:
 1. Spent
 2. That there be a stay of execution of the decree dated 25th January 2017 and other consequential orders issued herein pending the hearing and determination of this application inter partes.
 3. That the application dated 26th July 2017 by the Defendant/Applicant be reinstated for hearing.
 4. That costs of the application be in the cause.
 20. Though both applications were seeking a similar prayer for stay of execution of the judgment and decree of 25/1/2017, the Notice of Motion dated 23/10/2018 had a different prayer for stay of warrants of attachment issued to Kenya Shield Auctioneers pending account taking. It is the prayer for stay of execution of the judgment and decree of 25/1/2017 that had been dismissed and could not be raised again. The court was however obligated to consider the new prayer for stay of execution of warrants issued to Kenya Shield Auctioneers on the 14//9/2018.
 21. The reason given by the Applicant for stay of execution of the said warrants is that the Appellant had instructed a different auctioneer to proclaim some other property of the Appellant before the previous auctioneer had accounted for the attached property and which property was still in the custody of the auctioneer.
 22. The Respondent did not deny that the Appellant had paid a sum of Ksh.785,000/= and that they were still in possession of the UPS machine. An auctioneer is an officer of the court and is required to account to the court of any property attached or sold. It was therefore in order for the Appellant to demand for accounting of the money paid and attached property before further execution could proceed. It is clear to me that the trial court failed to comprehend the application that was before it



and thus held erroneously that the application was similar to the one dated 6/11/2017 when the latter did not have a prayer for stay of execution of warrants pending taking of accounts of the money paid by the Respondent and the property attached. I am in agreement with the argument by the Appellant that it was necessary for the Respondent to account for the money paid and the attached UPS machine before further execution could proceed. The trial court therefore failed to consider the second limb of the Appellant's application dated 23/10/2018 on whether it was necessary to stay the warrants of attachment issued to Kenya Shield Auctioneers and whether the respondent should give an account before further execution could proceed.

23. I find that the trial court was in error in declining to consider the application for stay of warrants of attachment issued to Kenya Shield Auctioneers on 14/9/2018 pending account taking. I therefore find part of the application dated 23/10/2018 to be merited. In the premises, I allow the appeal in HCCA No.350 of 219 in the following terms:
1. The application dated 23/10/2018 is allowed to the extent that the warrants of attachment issued to Kenya Shields Auctioneers on 14th September 2018 together with all consequential orders thereof are stayed pending account taking of the of money paid by the Respondent and the property attached by the Appellant in the matter.
 2. The Appellant to have the costs of the appeal.
24. As earlier stated above, the appeal in HCCA No.533 of 2018 is dismissed with no order as to costs.
25. Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 24TH JANUARY 2024

J. N. NJAGI

JUDGE

In the presence of:-

Ms Otagu HB Mr. Mwangi for Appellant

Ms Anyango HB for Mr. Kipkorir for Respondent

Court Assistant – Amina

30 days Right of Appeal.

