



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
MISCELLANEOUS APPLICATION NO. 356 OF 2015

ELSEK & ELSEK CONSTRUCTION COMPANY

LIMITED.....DECREE HOLDER/RESPONDENT

- VERSUS -

PRESBYTERIAN UNIVERSITY OF EAST AFRICA

REGISTERED TRUSTEES.....JUDGEMENT DEBTOR/APPLICANT

RULING NO.3

1. The application before me is for the setting aside, revocation and cancellation of the Warrants of Attachment and Sale issued on 21st December 2016.
2. Secondly, the Judgement-Debtor asked the court to order for the restitution of the goods which had been attached by **CLEAR REAL TRADERS AUCTIONEERS**.
3. According to the applicant, there had been a clear understanding and agreement between the parties, about how the disputes between them would be resolved. Basically, the applicant was to pay to the respondent the sum of Kshs. 30,335,200/-.
4. However, the said payment would be made on the understanding that the respondent would return to the construction site and complete the works on **ELSEK II**.
5. The respondent said that the payment of Kshs. 30,335,200/- was sufficient to enable the applicant complete that particular task.
6. It is the applicant's case that it met its part of the bargain, but that the respondent had failed to return to the site, to complete the works in issue.
7. The applicant pointed out that as a direct consequence of the respondent's failure to complete the works on **ELSEK II**, it would become difficult for the applicant to expand the programmes which the University was offering to students.
8. If the University was unable to expand the programmes being offered to students, it would make it difficult for the said University to meet the agreed terms of payment.

9. That notwithstanding, the applicant blames the respondent for commencing execution of the Decree, even after receiving a total of Kshs. 41,855,200/- to date.
10. Not only had the applicant made that payment, it recalls that the respondent had expressed a desire to change its advocates. The advocates who were on record had declined to hand over the brief to the advocates whom the respondent had engaged to take over their case.
11. It is noteworthy that amongst the reliefs sought by the respondent, was the review, variation or setting aside of the Ruling dated 6th June 2016.
12. The court had directed that the first aspect of the application which would have to be determined is the issue concerning the representation of the respondent.
13. Obviously, if the court were to reject the defendant's request for leave to engage the new lawyers, that may well spell the end of the application dated 30th June 2016, as that application was brought by a Law Firm which was not yet on record for the respondent.
14. However, the position is that on 19th December 2016, the court granted leave to the Law firm of Miyare & Company Advocates to come on record for the defendant.
15. After granting the new advocates leave to come on record, the Court adjourned the case to 13th February 2017. It is the applicant's case that the court set that date because there were still outstanding issues, emanating from the respondent's application dated 30th June 2016.
16. The applicant complained that, instead of waiting for the court to determine the issues it had raised, the respondent commenced the process of execution.
17. The applicant reasoned that the process which the respondent commenced was irregular and illegal. Therefore, the applicant asked the court to revoke and cancel the Warrants of Attachment which the court had issued.
18. In answer to the application, the respondent submitted that the court had not relieved the applicant from its obligations under the Decree.
19. If anything, the respondent emphasised that the court had expressly authorised the respondent to proceed with execution if there was any default by the applicant.
20. The respondent said that the applicant had defaulted, when it failed to make available to the respondent, the necessary Permits and Approvals, which could have facilitated the respondent's continued work on the project.
21. Following the alleged default by the applicant, it was the view of the respondent that it is the applicant who had made it impossible for the respondent to proceed to complete the construction works.
22. The respondent even pointed out that the photos annexed to its affidavit sworn in support of the application dated 30th June 2016, show that the respondent had returned to the site, in line with the orders of the court.
23. But, thereafter, the applicant told the respondent not to work until the applicant had obtained the relevant Permits and Authority: that is the respondent's case.
24. In the circumstances, the respondent submitted that the application before the court was not for stay of execution. The respondent sees the application as an attempt by the applicant, to stop the actualisation of the consent order which had been transformed into a Decree.

25. The applicant's brief Reply to the respondent's submission was that in June 2016, the court had granted an order for stay of execution. That order was said to still be in force, because it had not yet been set aside.

26. And as regards the photos which the respondent pointed out, the applicant said that they relate to the respondent's application dated 30th June 2016, which was still pending in court.

27. It is to be noted that in the pending application, the respondent herein proposes to show that the court had exceeded its jurisdiction, when it reviewed or varied the arbitral award, as none of the parties had sought such orders.

28. The respondent also expressed an intention to demonstrate that;

“...no additional award, correction or a contrary interpretation of the consent award herein has been made by the Arbitral Tribunal, and the award is binding upon the parties”.

29. Thus, the respondent had every intention of persuading the court to set aside the orders made on 6th June 2016.

30. The reason for that is that;

“8.The ruling/orders of the High Court impose a duty upon the Decree-Holder/Applicant which it cannot discharge without committing an offence. The ruling/orders is contrary to public policy: hence there is an error on the face of the record, necessitating a review, variation and/or setting aside of the said orders”.

31. Therefore, when the respondent now blames the applicant for failing to discharge its obligation to obtain permits and Authority to enable the respondent complete the work on **ELSEK II**, that stance appears to be inconsistent with the position stated above.

32. The respondent was already aware that it could not complete the remaining works without the requisite Permits and Authority. Therefore, when it asked the respondent to await the Permits and Authority, the applicant was not an obstacle to the respondent.

33. By asking the respondent to wait until it got the Permits and Authority, the applicant was doing the very thing which would ensure that when the respondent was carrying on the construction, it was doing so without committing an offence.

34. The quest for the Permit and Authority would facilitate the lawful discharge of the obligation which this court had imposed upon the respondent through the order made on 6th June 2016.

35. The irony is that whilst the respondent was waiting to canvass its application for the setting aside, variation or review of the orders which it considers extremely prejudicial, the respondent went ahead to execute the very same “*prejudicial orders*”.

36. To my mind, Justice demands that parties must place all their cards on the table. Justice is not about pulling surprises against the other party or parties. Therefore, if the respondent no longer wished to canvass the application dated 30th June 2016, it should have made that position clear, so that the court and the applicant could have been made aware that the respondent was now desirous of enforcing the order which it had earlier set out to challenge.

37. But it is also clear that the applicant defaulted in remitting payments in accordance with the orders made.

38. Whilst I appreciate that the stance taken by the respondent may have led the applicant to conclude that

the respondent was still desirous to challenge the orders made on 6th June 2016, it is equally correct to state that when an order of the court had not been set aside, varied or reviewed, the said order was still effective and binding.

39. In the circumstances, the applicant should have anticipated that when it was in default, the respondent could take steps to execute the Decree.

40. In the final conclusion therefore, I find that the process of execution, which the respondent has set in motion, is not illegal. Accordingly, I reject the application for stay of execution.

41. The costs of the application dated 12th January 2017 are awarded to the respondent.

DATED, SIGNED and DELIVERED at NAIROBI this 28th day of March 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

P.M. Kamaara for the Decree Holder/Respondent

Miyere for the Judgement Debtor/Applicant

Collins Odhiambo – Court clerk.