Kariuki & 16 others v Kenya Agricultural Research Institute (Employment and Labour Relations Petition 2 of 2013) [2023] KEELRC 1819 (KLR) (25 July 2023) (Ruling)

Neutral citation: [2023] KEELRC 1819 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

EMPLOYMENT AND LABOUR RELATIONS PETITION 2 OF 2013

HS WASILWA, J

JULY 25, 2023

BETWEEN

PETER WAMBUGU KARIUKI & 16 OTHERS ..... PETITIONER

AND

KENYA AGRICULTURAL RESEARCH INSTITUTE ..... RESPONDENT

RULING

1. Before me for determination is the Respondent's Notice of Motion dated May 5, 2022 filed pursuant to section 12(3)(viii) of the *Employment and Labour Relations Court Act*, rule 32 of the *Employment and Labour Relations Court (Procedure) Rules, 2016*, Order 22 Rule 18(1)(a) of the *Civil Procedure Rules*, Section 3,3A,63(e) and 94 of the *Civil Procedure Act* and all other enabling provisions of the law, seeking for the following Orders; -

    1. Spent.

    2. Spent.

    3. The Honourable court be pleased to set aside, cancel and recall the warrants of attachment and sale dated July 26, 2022.

    4. This Honourable Court be pleased to issue such orders as it deems fit and just in the interest of justice.

    5. That costs of this Application be borne by the Petitioners.

2. The basis of this Application is that, the Applicant herein being dissatisfied with the judgement of this Court of May 3, 2013, lodged an appeal at the Court of Appeal at Nakuru under Nakuru Civil Appeal case number 315 of 2015, Kenya Agricultural Research Institute V Peter Wambugu Kariuki and 16 others. After hearing the Appeal, the Court of Appeal dismissed that Appeal on December 21, 2018

and allowed the Respondent's Cross Appeal. Subsequently, the Appellant filed review application dated January 30, 2019 seeking for the Orders allowing cross-appeal to be reviewed.

3. As they awaited the outcome of the Appeal, the parties entered into a consent on January 24, 2020 staying the execution of the cross Appeal, which was granted on condition that the Applicant deposits Kshs 6,942,616.70 in a joint interest earning account in the names of counsels on record within 14 days.

4. The Applicant complied with the Court of Appeal Orders and deposited the said money on February 7, 2020. The Application for Review proceeded for hearing and it was dismissed on April 28, 2022. Soon thereafter, the Respondent through their advocates applied for warrants of attachment and sale dated July 26, 2022 claiming Kshs 7,133,407.50. Their auctioneers, Benjamin K Sila trading as Legacy Auctioneering services, proclaimed the applicant's goods.

5. It is stated that the proclamation was done illegally because the money sought had been secured in an interest earning account in the name of both advocates, which money was available to satisfy the decree. Also that the said attachment was illegal, considering that there was money in a joint account which parties were signatory to.

6. He states that they inadvertently paid Kshs 283,243 to the auctioneers to avert the effect of the attachment made on July 26, 2022 and following pressure they received from the said auctioneers who threatened them with attachment and seizure of their property.

7. It is averred that after the proclamation was done, the Respondent herein sought for release of the funds amounting to Kshs 6,942,616,7 that had been deposited in the joint account vide its letter of August 2, 2022. Additionally, that since the decree in this suit was passed on May 3, 2013, the Respondent ought to have complied with issuing notice to show cause to the Judgement debtor before instructing auctioneers as required under order 22 rule 18(1)(a) of he *Civil Procedure Rules*, therefore that the proclamation and warrants of attachment were premature, unlawful and should be set aside, recalled and or cancelled.

8. It's their case that the failure by the Respondent to issue Notice to show cause in compliance with Order 22 Rule 18 (1)(a) of he Civil Procedure Rules, rendered the warrants of attachment unlawful. Further that proceedings to obtain warrants of attachment before ascertain costs was in violation of the dictates of section 94 of the *Civil Procedure Act*, which bars partially execution without leave of Court.

9. He stated that the Auctioneers have now filed Bill of costs in Nakuru High Court Miscellaneous Application number 1 of 2023 seeking for its costs, which arose from warrants of attachment in Nakuru ELRC No. 2 of 2013. He added that they are seeking for orders herein as a matter of urgency to be relied on as grounds of opposition in the Auctioneers Bill of costs.

10. He prayed for the Warrants of attachment and sale to be declared illegal for the sole reason that the decretal sum which the auctioneers was seeking to secure had been deposited in the joint names of the Advocates.

11. The Application is also supported by the Affidavit of Dr. Eliud Kireger, the Director General of the Applicant. He basically reiterates the grounds of the Application.

12. The Application is opposed by the Petitioners/ Respondents herein who filed a replying affidavit sworn by Peter Wambugu Kariuki, the 1st Respondent herein, on the May 25, 2023. In his affidavit, the affiant admitted the proceedings as narrated by the Applicant in this case from the delivery of judgement to the hearing of Appeal and subsequently Review and its dismissal thereof. He however stated that as soon as the Appeal was dismissed they filed a Bill of costs and taxation done on May 26, 2020, with the ruling delivered on July 7, 2020.

13. He avers that on April 28, 2020, the Review application which the Applicant had filed in Court of appeal was heard and dismissed and on May 5, 2022, the Respondents' Advocates wrote a letter and forwarded a consent to the Applicant's advocates seeking to liquidate the account and have the money that had been deposited in the joint account transferred to the Respondents herein.

14. No action was taken by the Applicant's advocates, informing a remainder of May 19, 2022 which did not elicit any response either. Left with no other option, the Respondents applied for warrants of attachment and sale, claiming the decretal sum, costs and interests as awarded by the Court and on July 29, 2022, they instructed Legacy Auctioneers to execute on their behalf who proclaimed the Applicant's goods.

15. It is stated that as soon as the proclamation was effected, the Applicant's advocates called the Respondent's advocates expressing their interest in signing the consent to transfer the funds to forestall the execution which had began.

16. By a letter of August 2, 2022, the parties agreed to have the money that had been deposited in an interest earning account, released to the Petitioners advocates, who then acted accordingly and paid the Petitioners their dues. He added that costs are yet to be paid by the Applicant herein.

17. He stated also that the warrants of attachment which the applicant is seeking to recall and or cancel had since expired and this application has therefore been overtaken by events. He added that the application herein is done in abuse of Court process. Also that various applications that had been filed relating to this matter have all been dismissed.

18. He stated that the Orders which were being executed are orders of the Court of Appeal and not orders of this Court. Further that the Kshs 283,242.58 paid to auctioneers was not inadvertently done but rightly paid to auctioneers who had commenced legal execution proceedings as such the charges were due. In any event that the said money was made after a request was send by their advocates to the Applicant's Advocates seeking for payment of auctioneers' fees. He prayed for the Application herein to be dismissed.

19. The application was canvassed by written submissions.

Applicant's Submissions.

20. The Applicant submitted from the onset that it's not disputing that Kshs 6, 942,616.70 was deposited in a joint account in the names of advocates for both parties, which money was security for due performance of the decree. He argued that as soon as the Review application was dismissed by the Court of Appeal, the Respondent was at liberty to either seek transfer of the money by consent or in the alternative make an application at the Court of Appeal to have the money released to them. He argued that the Respondents herein did not indicate in their letter of 5th and May 19, 2022 that they had waived their right to the monies to warrant the instructions given to auctioneers and execution proceedings that ensued therefrom.

21. It was submitted that from the actions of the Respondent it can be inferred that the Respondent was seeking double compensation being the 7.1 Million indicated in the decree and the money held in the joint account adding up to 14 Million, without any justification. He added that the Respondent executed the decretal amount and in addition requested for the release of the funds in the joint account by its letter of August 2, 2022, confirming that the they were seeking for double benefit from them.

22. The Applicant reiterated that since there was security deposited in the joint account, the only other option that the Respondent should have pursued was to seek for the release of that money in the Court

of Appeal and not instruct auctioneers to carry out execution. Therefore, that the Respondents right to apply for execution of the decretal sum had not crystalized and the execution carried out was unlawful. In this they relied on the case of *Factory Guards Limited v Abel Vundi Kitungu* [2015] eKLR where the Court held that;-

> "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 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 s 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."

23. Accordingly, the Applicant urged this Court to be guided by the decision above and declare the warrants of attachment premature, unlawful, unnecessary and recall them and or set them aside.

24. The Applicant submitted that indeed the judgement that was up for execution is the one of December 21, 2018 and not November 19, 2019 as indicated in the warrants of attachment. Therefore, that as the law dictates, execution of Court of Appeal judgement are done as if they are judgement of the High Court and by extension this Court as stated under Section 4 of the *Appellate Jurisdiction Act*, therefore that the rules that apply are those under the Civil Procedure Rules. It was argued further that the taxation of the Court of Appeal application dismissing the review is pending, together with taxation of the trial Court's costs, therefore that the Respondent/ decree holder, ought to have either applied for leave for partial execution under section 94 of the *Civil Procedure Act* or tax all its Bills, before commencing execution. In this they relied on the case of *Kartar Singh Dhupar & co Limited V Lianard Holdings Limited* [2017] eKLR where the Court stated that ;-

> "In the case of; Lakeland Motors Ltd vs Sembi (1998) LLR 682, the Court of Appeal observed that:-
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> "The exercise of judicial discretion by the superior court under Section 94 of the Act necessarily required that parties to a decree passed by that court in the exercise of its original civil jurisdiction should be availed an opportunity to be heard before making an order for execution of that decree before taxation. This, we think, is the spirit of the observation of Shah J.A, with which we agree in Bamburi Portland Cement Co. Ltd Vs Abdulhussein

(1995) LLR 2519 (CAK) in regard to the application of Section 94 of the Act."The mischief sought to be addressed by section 94 of the *Civil Procedure Act*, is to protect a judgment debtor from suffering multiple executions, one in respect of the principal sum and the other for the costs after ascertainment in respect of the same suit, as observed by Justice Odunga in the case of, Erad Suppliers & General Contractors –Vs- NCPB observed that:"In my view, the necessity for leave to be obtained where a party intends to execute before taxation is to obviate situations where a judgment debtor is likely to be confronted with two sets of execution proceedings. In respect of the same decree i.e. for the principal sum and for costs. This is a recognition of the fact that in a civil action the main aim is compensation and the process should not be turned into a punitive voyage. Therefore where there are no costs to be paid or where a party entitled to costs has abandoned or waived the same, in my view, Section 94 of the *Civil Procedure Act* does not apply. If the Respondent was not aware that the claimant was not keen on the said costs now it is aware and that would render that ground unnecessary."

25. Accordingly, that since no leave had been sought and taxation was yet to be done, the warrants of attachment were illegal, null and void.

26. The Applicant submitted further that the warrants of attachment dated July 26, 2022 relates to the Court of Appeal decision of November 19, 2019. Being that the decree which was up for execution was issued more than a year later, the Respondent should have complied with the provisions of Order 22 Rule 18(1) which mandates the executing party to give the judgement debtor, a notice. therefore, that the warrants of attachment were unlawful. To support this argument, they relied on the case of *Rosslyn Development Limited V Bidco Oil Refeneries Limited* [2014] eKLR where the Court stated that;-

> " The stay sought is not under order 42 rule 6 (2) but under order 22 rule 18. The provisions of the said order are clear it provides that, where an application for execution is made more than one year after the date of decree the court executing the decree shall issue a notice to the person against who execution is applied for requiring him to show cause , on a date to be fixed, why the decree should not be executed against him. The issue therefore is when was the decree issued? The applicant does not deny that there is judgment against it, it has filed an appeal in C.A. 258 of 2001. I have perused the court file and this is what I find; the Ruling that struck out the defendant's defense was read on the 4th of October 2010 by Justice Sitati. The decree the subject of this application was drawn on the 11th of November 2011 as per the warrants of attachment. The warrants of attachment and sale were issued on the 3rd July 2013. This a period over a year from the date the decree was issued, the decree-holder should have moved under order 22 rule 18 (1) (a) and caused the court to issue a notice to show cause against the judgment debtor/ applicant. Having not complied with the said provision, then it is only in order that the warrants of attachment and sale be cancelled. Any goods that could have been attached shall be released to the defendants unconditionally. The Respondent has a right to execute but only after it has complied with the relevant provisions of the law as provided in the Civil Procedure Rules. The order granted is that the warrants of attachment and sale be delivered to the Registrar for cancellation."

27. A similar view was held in the case of *Rubo Kingetich Arap Cheruiyot V Peter Kiprop Rotich*[2006] eKLR and the case of A*ndrew Achoki Mogaka v Samson Nyambati Nyamweya and another* [2010] eKLR.

28. In conclusion, the Applicant submitted that the warrants of attachment dated July 26, 2022 contravened the mandatory provisions of section 22 Rule 18(1)(a) of the *Civil Procedure Rules*,

rendering them unlawful, null and void. He thus urged this Court to allow its application in terms of prayer 3 and 5 of the Application.

Respondent's Submissions.

29. The Respondent submitted on two issues; whether the application merits the orders sought and who should bear costs of the Application.

30. On the first issue, the Respondent reproduced the provisions of Order 22 Rule 18 and stated that the provisions have a proviso of instances when Notice can be done away with even when execution is for a period more than year from the date of Judgement. One of such instances is when a decision has been made by the Court on a follow up application after the Judgement as was reiterated in the case of *James Wambugu v Mellen Mbera* [2020] eKLR where the Court held that;-

> " Applying the above provision to the instant case, the last order that was made against the Respondent was the judgment of the Court of Appeal which was delivered on April 3, 2020 therefore the proviso to rule 18(1) is applicable as this application was filed on June 5, 2020 which is a period of two months form the last order. I also agree with counsel for the applicant that under sub-rule (2) the Court has the discretion to issue any process in execution without issuing the Notice prescribed if the issuance of such notice would cause unreasonable delay or defeat the ends of justice."

31. They also cited the case of *Nicholas Sumba V Radio Africa ltd, Jimmy Gathu and another* [2017] eKLR where it was held that;-

> " The application for execution in this matter was filed on August 29, 2016 and the warrants issued on September 7, 2016. The last order against the defendant in this matter is the dismissal of their appeal on November 5, 2015 by the Court of Appeal. The application having been made within one year from the date of the last order against the defendants (the date of the Court Of Appeal judgment) then the proviso to Order 22 Rule 18 (1) applies. It is the duty of the court under this rule to issue the notice contemplated but as a matter of courtesy however, the plaintiff should have moved the court to issue such notice. That notwithstanding, no such notice was necessary and therefore the plaintiff was in order not to have served such a notice."

32. Similarly, that in this case, the last order issued in relation to the proceedings in this case was the one that was issued by the Court of appeal on the Review Application that was delivered on April 28, 2022. Therefore, being that the execution proceedings kick started within one year of the last order of the Court, the Notice was not necessary.

33. Having argued as such, the Respondent submitted that the mode of execution permissible under the *Civil Procedure Act* and rules are contained in Section 38 of the Act and Order 22 Rule 7 (2)(j) of the Rules. Accordingly, that the Respondent requested for the release of money that was held in a joint account by its letter of May 5, 2022 and another reminder letter of May 19, 2022 which did not elicit any response, forcing them to instruct auctioneers to pursue the decretal sum for them. He argued that the Applicant did not deny receiving the letters requesting for the release of the decretal sum, affirming that due process was followed before execution was commenced as was held in *Republic V Chief of General staff and another* [2017] eKLR.

34. The Respondent submitted further that the argument by the Applicant that they ought to have sought leave in compliance with Section 94 of the *Civil Procedure Act* is misplaced because, the Judgement,

which they executed is the one of the Court of Appeal, whose costs had been determined on the July 7, 2020. Additionally, that the basis of the application herein is spent because the Applicant has already released the decretal sum and the warrant of attachment have since expired therefore that there are no active warrants of attachment that is capable of being recalled, cancelled and or set aside. Thus, the application herein should be dismissed.

35. On costs, it was submitted that costs follow event as was held in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai and 4 others* [2014] eKLR, where the Supreme Court held that;-

> "It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation."

36. In conclusion, the Respondent urged this Court to award them costs basing their argument on the reason given above.

37. I have examined the averments and submissions of the parties herein.

38. The applicants' contention is that the execution carried out by the respondents was illegal since the respondents didn't apply to have moneys deposited in a joint interest earning account released to them and neither did they issue a notice to show cause to the applicants before levying execution.

39. The respondents submitted that the last order issued on this matter was the one issued by the Court of Appeal in the review application delivered on 28th April, 2022 and therefore execution was proceeding within one year.

40. They also submitted that NTSC was not necessary in the circumstances.

41. They have also submitted that the warrants of attachment have since expired and there is nothing to be stayed.

42. I have followed up the chronology of events in the matter from the time the judgment was passed on 3rd May, 2013 to the appeal process which was resolved on April 25, 2022.

43. The warrants of attachment were there after applied for on July 26, 2022 which in my view was within one year from the time the last order was made by the Court of Appeal and therefore the provisions of Order 22 Rule 18 (1) did not apply.

44. Other than this fact, the applicants insist that the respondents also didn't apply to have moneys deposited in court released to them.

45. The respondents have averred that they wrote to the applicants asking for release of these money but the applicants remained none committal.

46. Indeed the claimants agreed that they received the letter asking for the release of the money deposited in a joint account.

47. It is only after proclamation was done that the applicants now agreed to sign a consent to the transfer the funds to forestall the execution which had began.

48. The process leading to execution in my view was clear. It proceeded with communication between the parties and it is evident that the applicants only agreed for the release of the cash in a joint account after proclamation had began.

49. The decretal sum seems to have now been paid. The warrants of attachment and sale dated July 26, 2022 have already been overtaken by events. The decretal sum having been paid. There is nothing then to recall or set aside.

50. In my view the application is overtaken by events as it were and there is nothing remaining to be stayed.

51. I find the application untenable and is therefore dismissed.

52. There will be no order of costs.

RULING DELIVERED VIRTUALLY THIS 25TH DAY OF JULY, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Konosi for Petitioner/Respondent – present

No appearance for Applicant

Court Assistant - Fred