



Sitienei & another v Lang'at t/a Kaloto Auctioneers (Miscellaneous Application E018 of 2022) [2023] KEELRC 2815 (KLR) (9 November 2023) (Ruling)

Neutral citation: [2023] KEELRC 2815 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
MISCELLANEOUS APPLICATION E018 OF 2022
DN NDERITU, J
NOVEMBER 9, 2023**

BETWEEN

HOSEA SITIENEI 1ST APPELLANT

PROF EZEKIEL K KIPROP 2ND APPELLANT

AND

ISAAC KIPYEGON LANG'AT T/A KALOTO AUCTIONEERS ... RESPONDENT

RULING

Introduction

1. In a chamber summons dated 23rd July, 2022 (the application or the appeal) the applicants/appellants pray for-
 1. Spent
 2. That this Honourable court be pleased to review, vary and/or set aside the taxing officer's decision of 30th November, 2021 and certificate of costs issued in Nakuru ELRC Misc. Application No. E016 of 2021.
 3. That the costs of this Appeal be awarded to the Appellants.
2. The application is expressed to be a memorandum of appeal pursuant to Rule 55(5) of the Auctioneers Rules 1997 (Rev. 2012). It is based on the grounds on the face of it and supported with the affidavit of Hosea Sitienei, the 1st applicant, on his own behalf and on behalf of the 2nd applicant.
3. Alongside the above application, the applicants filed another chamber summons application of even date under a certificate of urgency seeking the following orders –
 1. That the application be certified urgent and heard in the first instance ex parte.



2. That this Honourable Court be pleased to stay the execution of the Taxing Officer's decision of 30th November, 2021 and consequential orders pending hearing and determination of this Application.
 3. That this Honourable Court be pleased to stay the execution of the Taxing Officer's decision of 30th November, 2021 and consequential orders pending hearing and determination of the appeal and or intended appeal.
 4. That the Applicant be granted leave to appeal out of time against the Taxing Officer's ruling and consequential orders of the 30th day of December, 2021.
 5. That the Memorandum of appeal filed herein be deemed as properly filed.
 6. That cost of the application be provided for.
4. This latter application was heard and determined in a ruling dated 18th May, 2023 and the following orders were issued –
- a. That an order of stay of execution be and is hereby issued against the award of the taxing officer as contained in the certificate of costs dated 30th November, 2021 pending the hearing and determination of the intended appeal.
 - b. That the Applicants be and are hereby granted leave to file an appeal out of time and the appeal filed by the Applicants as contained in the chamber summons application dated 23rd November, 2022 be and is hereby deemed as duly filed and served.
 - c. That to facilitate an expeditious disposal of the appeal, the Respondent shall file his responses to the appeal within 14 days of this ruling, and the Applicants are hereby granted leave to file any response thereto within 14 days of service.
 - d. That the appeal shall be disposed of by way of written submissions and the Applicants shall file and serve their submissions within 14 days of (c) above and the Respondent shall file his submissions within 14 days of service.
 - e. That the Applicants shall deposit a sum of Kshs.1,000,000/= in court within 30 days of this ruling as security failure of which the orders above shall expire and lapse automatically.
 - f. That the costs of this application shall abide with the outcome of the appeal.
5. It is the above orders that set the stage for the hearing and determination of this appeal as embodied in the application.
6. In opposition to the application the Respondent filed a replying affidavit sworn by himself on 31st May, 2023 with several annexures thereto.
7. The applicants filed a further affidavit sworn by the 1st applicant on 15th June, 2023 for self and on behalf of the 2nd applicant.
8. As per order (d) above the appeal was heard by way of written submissions. Counsel for the applicants, Mr. Kipkoech, filed his submissions on 20th June, 2023 while counsel for the respondent, Mr. Kamanga, filed his on 4th July, 2023.



II. Background

9. As far as this court can gather, the applicants herein were the petitioners in Kericho ELRC Petition No. 11 of 2016, wherein they were claiming, inter alia, compensation from the University of Eldoret (the University) for unlawful termination. The court at Kericho (Marete J.) delivered a judgment on 14th November, 2016 which judgment was challenged by way of an appeal to the Court of Appeal. On 18th October, 2018 the Court of Appeal allowed the appeal and set aside the judgment of the Learned Judge and directed that the awardable compensation be assessed by a different judge of the ELRC, other than Marete J.
10. Following the orders of the Court of Appeal, the compensation awardable to the 1st and 2nd applicants herein was assessed at Kshs. 14,729,122/= and Kshs.24,173,994.60 respectively on 9th July, 2019. An application for stay of execution was made before the court upon delivery of this judgment but the same was rejected.
11. As it turns out, the University was dissatisfied with the judgment of the Court of Appeal of 18th October, 2018 and appealed to the Supreme Court vide Appeal No. 33 of 2019. On 1st November, 2019 the Supreme Court allowed stay of execution of the aforementioned decision and direction of the Court of Appeal.
12. As far as the court can infer from the pleadings and the submissions filed, the compensation from the University to the applicants was subsequently settled or paid following garnishee proceedings taken out by the applicants.
13. Prior to the settlement, however, the applicants had through their lawyers vide a letter dated 11th November, 2019 instructed the respondent to execute against the University in pursuit of the decretal sums awarded to them in compensation. For ease of reference the said letter instructed as follows –

Our Ref: GOK/CIV/124/16

Your Ref: T.B.A Date: 11th November, 2019

Kolato Auctioneers

Pluto Building, 2nd Floor

Door 9 Kenyatta Avenue,

Box 2155-10100

NAKURU

Dear Sir,

RE: Nakuru Elrc. Petition No 4 OF 2019

Prof Ezekiel Kiprop -vs- University Of Eldoret & 2 Others

We refer to this matter and the orders issued by the Supreme Court on the 1st day of November, 2019, though Supreme Court Judge Dr. Smokin C. Wanjala in relation to this matter. The orders are enclosed.

The orders stayed a judgment of the Court of Appeal made on the 18th October, 2018. That judgment has since been implemented fully and cannot be stayed without more. The Employment and Labour Relations Court has since delivered a judgment hence spent.



You may proceed with alacrity to execute the judgment of the honourable court without any further delay and proceed to sell attached items and forward to us appropriate cheques for onward transmission to our client.

We have taken the liberty to copy the letter to respondents as well as their counsel so that they prepare for inevitable conflagration.

Yours faithfully,

For: Gordon Ogola, Kipkoech & Co. Advocates

Signed

Kipkoech B. Ng'etich

Advocate

KBN

Encl.

C.c

1. Client 2. Gumbo & Associates
3. 3. Victoria Towers, 1st Floor, 4. Prof Teresa Akenga Elgon Road, Upper Hill, Vice Chancellor

Box 22966-00100 University of Eldoret

Nairobi Eldoret

Attorney General

Nakuru

14. It is evident that the applicants and the respondent were at that point in time fully aware of an order for stay of execution that had been issued by the Supreme Court in regard to the judgment of the Court of Appeal. However, in the applicants' counsel view the order for stay was of no consequence as the ELRC had already acted on the judgment of the Court of Appeal, assessed the compensation that was payable to the applicants, and as such the order for stay by the Supreme Court was of no consequence. It is not disclosed by either party as to the current status of the matter before the Supreme Court or how the same was concluded, if at all.
15. It is alleged that upon the settlement of the compensation as between the applicants and the University (pursuant to the garnishee proceedings in which the respondent had no role) both the applicants and the University failed, refused, and or neglected to settle the respondent's/auctioneer's fees that was purportedly due and payable.
16. In pursuit of his fees the respondent filed a bill of costs dated 26th June, 2020 in Nakuru ELRC Misc. Application No. 5 of 2020 – Kolato Auctioneers V University of Eldoret. In a ruling delivered on 15th June, 2021 the court (Wasilwa J.) struck out the said bill of costs as the same was found to be in contravention of the order for stay of execution that had been issued by the Supreme Court as alluded to above.
17. It is the Applicants' position that since the warrants of attachment stated above were issued against an order for stay of execution by the Supreme Court, the said warrants of attachment and any other or further orders or proceedings based thereon were null and void.



18. Subsequently, the respondent filed another bill of costs, this time round against the applicants, in Nakuru ELRC Misc. Application No. E016 of 2021 for assessment of his costs in the execution of the aforesaid warrants of attachment which had been declared null and void. The said bill of costs dated 29th July, 2021 was taxed at Kshs.1,220,387/= by the Deputy Registrar (DR) of this court and a certificate of costs issued on 30th November, 2021.
19. The applicants were dissatisfied with the said taxation and filed an application for review and or setting aside of the taxation in Nakuru ELRC MISC. Application No. 16 of 2021. In a ruling of 21st July, 2022, the court (Wasilwa J.) opined that the applicants ought to have filed an appeal and not a reference and as such the said application was struck out for being irregular.
20. The Applicants have now come back to court with the instant application/appeal filed in court on 25th July, 2022 seeking the orders as stated in the introductory part of this ruling.

III. The Evidence

21. The facts and circumstances of this matter are as enumerated above and both sides are in concurrence on the same. It is not denied that as at the time of the instructions by the applicants' lawyers to the respondent to execute there was an order for stay of execution of the orders of the Court of Appeal that had remitted subject petitions back to the ELRC for assessment of the compensation payable to the applicants. The said conservatory order of the Supreme Court issued on 1st November, 2019 stated as follows –

It is hereby ordered:

- i. The Certificate of Urgency be and is hereby granted as prayed;
 - ii. A conservatory Order hereby issues staying Execution, enforcement or any other steps or actions intended to implement the Judgment and Decree of the Court of Appeal made on 18th October, 2018 in Nakuru Civil Appeal No 55 of 2017 (As consolidated with Civil Appeal No. 58 of 2017) Hosea Sitienei V University of Eldoret and Others, pending the hearing and determination of the Application for Stay dated 20th August, 2019.
22. As stated elsewhere in this ruling the court has not been briefed or informed of the status or outcome of the proceedings in the Supreme Court in the pleadings and evidence filed in court by both sides.
 23. However, it is clear that by the time the Supreme Court issued the above orders for stay on 1st November, 2019 the ELRC had already acted on the judgment and directions from the Court of Appeal and awarded compensation to the applicants through a judgment of 9th July, 2019. It is also clear that this award for compensation to the applicants was not challenged either on appeal or review. It is not this judgment that had been challenged by the University in the Court of Appeal and the Supreme Court as there is no evidence availed in that direction. It is not against this judgment that stay orders had been issued by the Supreme Court but there is a nexus as shall be demonstrated hereunder.
 24. It is in the foregoing scenario that the applicants' lawyers proceeded to give the instructions to the respondent to execute vide the letter alluded to above dated 11th November, 2019. The respondent acted on the said instructions and the court issued warrants of attachment.
 25. However, as stated elsewhere above, the applicants abandoned the execution as per the instructions to the respondent and opted to file garnishee proceedings, presumably after establishing that the



- University held liquid cash in some bank account. Apparently, the garnishee proceedings succeeded and the applicants were paid their dues.
26. In the circumstances, the respondent was left “high and dry” as he acted on the instructions from the applicants through their lawyers, received warrants of execution dated 11th November, 2019 from the court, and proclaimed attachable assets of the University as per the proclamation form dated 12th November, 2019.
 27. The respondent then decided to pursue his fees against the University but the court (Wasilwa J.) in a ruling dated 15th July, 2021 dismissed the bill of costs holding that the same arose from unlawful execution in view of the orders for stay of execution by the Supreme Court. It seems that the respondent then abandoned pursuing his fees from the judgment debtor, the University, and decided to pursue the applicants for the same culminating in the taxation and award of Kshs.1,220,387/= which award is now under challenge in this appeal.
 28. It is not clear from this appeal the extent to which the applicants participated in the said taxation. The applicants have not challenged specific items in the bill of costs and the taxation by the deputy registrar (DR) of this court. However, the applicants’ position and main ground of this appeal is that the execution was illegal and unlawful ab initio as the execution process was carried out while there was an order for stay of execution from the Supreme Court as alluded to above. It is the applicants’ position that the execution was null and void and as such this court should not reward an illegality through allowing the respondent to enjoy the fruits of flawed and unlawful process.

IV. Issues For Determination

29. Flowing from the foregoing analysis as read alongside the pleadings and submissions filed from both sides, the issues for determination by this court flow from the prayers in the application –
 - a. Should this court review and or set aside the taxation by the DR and consequently the certificate of costs dated 30th November, 2021?
 - b. If (a) above is in the affirmative what orders should issue? And,
 - c. Who should meet the costs of the proceedings herein?
30. On issue (a), Wasilwa J. in a ruling dated 15th June, 2021 ruled that the respondent herein should not file and tax a bill of costs dated 26th June, 2020 against the University as such action was in contempt of the stay orders from the Supreme Court issued on 1st November, 2019. Going by the evidence on record, that ruling has not been successfully reviewed or appealed against and remains in force unless and until set aside or vacated. The court has not been supplied with evidence on when the orders by the Supreme Court were either set aside or vacated. However, it is clear that from the onset the respondent knew and appreciated that his fees, if any, was payable by the University. For the record, the court (Wasilwa J.) did not rule or hold that the auctioneer’s fees were payable by the applicants.
31. From the record, as stated elsewhere in this ruling, it is not clear when and how the stay order by the Supreme Court was either set aside or vacated or the status of that appeal in that court.
32. Rule 55 of the Auctioneers Rules 2017 provides that a person aggrieved by the taxation of auctioneer’s charges made by a magistrate, registrar (in this case the DR), or the Board shall file an appeal before a judge by way of a chamber summons. This appeal is therefore properly before this court – See *Sinohydro Corporation Limited V Samson Itonde Tumbo T/A Dominion Yards Auctioneers (2021) eKLR*.



33. Execution is a process in enforcement of a court order or decree and the costs incurred in such process shall be costs in the cause bearable by the judgment debtor, unless otherwise ordered or directed by the court – See Sections 27 and 38 of the *Civil Procedure Act* and Order 22 of the Civil Procedure Rules.
34. No evidence has been availed of an order or a direction by any court that the costs incurred by the respondent in execution of the decree were to be borne by the applicants. The reasoning by Wasilwa J. in the above-mentioned ruling did not and cannot be construed to have directed the respondent to recover the costs of the execution against the applicants herein. The reason why the learned Judge struck out the bill of costs is that there was in force an order for stay of execution by the Supreme Court but that did not exonerate or absolve the University from paying the said costs at the appropriate time or when the stay order was set aside or vacated.
35. In view of the foregoing, there is no legal or factual basis upon which the DR proceeded to tax the respondent's bill of costs dated 29th July, 2021 and issuing the certificate of costs dated 30th November, 2021 against the applicants. There is no evidence on record that the applicants had undertaken to settle the said costs prior to or upon giving instructions through their lawyers to the respondent. There is also no evidence that the respondent has made all due efforts to recover the said costs from the University, the judgment debtor.
36. It is also clear from the evidence presented that as at the time the applicants' lawyers instructed the respondent to proceed with the execution there was an order from the Supreme Court staying execution or enforcement of the orders of the Court of Appeal. Further, it is evidently clear that as at the time the ELRC acted on the directions from the Court of Appeal and awarded the applicants compensation on 18th October, 2019 the Supreme Court had not issued the orders for stay which were actually issued on 1st November, 2019. What is not debatable though, is that by the time the applicants' lawyers instructed the respondent to proceed with the execution vide a letter dated 11th November, 2019 the said order for stay of execution from the Supreme Court was in force. No evidence has been availed by either party as to when and how the said order for stay of execution was set aside or expired.
37. In the circumstances, whether or not the applicants, respondents, or even the DR were aware of the said order for stay of execution is immaterial as a court order remains so unless set aside or reviewed in accordance with the law. It is therefore evident, and this court so finds and holds, that the entire process of execution by the respondent, including the instructions from the applicants' lawyers, was null and void and against an order for stay of execution from the highest court on the land. It was an exercise in futility amounting to nothing. In any event, the said instructions did not amount to an undertaking that the applicants were to meet the costs of the execution, which costs are legally costs in the cause payable by the judgment-debtor as demonstrated above.
38. An auctioneer is essentially an officer of the court who, as an agent of the decree-holder, is directed by the court to enforce its orders through execution – See *Felix Apollo Owuor T/A Victoria Blue Services Auctioneers V Lake Basin Development Authority* (2012) eKLR.
39. An auctioneer's foremost duty and obligation is fidelity to the law and to at all times act in accordance with the law and lawful directions from the court. Where a court issues orders that are contradictory or invalid an auctioneer has a legal duty and indeed an obligation to seek clarification from the court. It is not justifiable for an auctioneer to blindly act on instructions from the judgment-creditor or his lawyer even in case of ambiguous, blurred, or unclear circumstances. In this case, the respondent was clearly aware that there was an order for stay of execution as per the letters dated 11th and 12th November, 2019 by lawyers for the applicants which the respondent has filed as exhibits annexed to his replying affidavit.



In those circumstances, as an officer of the court, the respondent ought to have inquired and exercised due diligence before indulging in an execution process that turns out to have been null and void.

40. I have read in detail the pleadings filed by the parties and the submissions by counsel and I conclude and hold that the execution carried out by the respondent was null and void for the reason that there was a valid order for stay of execution from the Supreme Court. Secondly, if any costs were payable to the respondent at any point, bar the execution which was null and void, the same ought to have been paid or pursued against the judgment debtor in absence of a court order or direction to the contrary.
41. It is therefore the finding and holding of this court that the taxation of the respondent's costs against the applicants herein was in error and unlawful. Consequently, the certificate of costs issued cannot stand.
42. For the foregoing reasons, issue (a) above is determined that the decision of the DR in taxing the respondent's costs against the applicants was undertaken in obvious error and this court has good grounds for setting the same aside and the same is hereby set aside alongside the certificate of costs. This finding and holding also takes care of issue (b).
43. On costs, issue (c), in the interest of justice and fairness the court orders that each party shall meet own costs as both the appellants and the respondent instigated and participated in the unlawful execution process that was null and void.
44. For all the foregoing, the appeal as embodied in the chamber summons application dated 23rd July, 2022 is allowed in the following terms –
 - a. That the taxing officer's (DR) decision in Nakuru ELRC Misc. Application No. E016 of 2021 taxing the respondent's costs against the applicants at Kshs.1,220,387/= alongside the certificate of costs issued and dated 30th November, 2021 be and is hereby set aside.
 - b. That each party shall bear own costs in this appeal.
 - c. That the sum of Kshs.1,000,000/= deposited in court as security by the applicants on 14th June, 2023 shall be refunded and released to the applicants forthwith.

DATED, DELIVERED VIRTUALLY, AND SIGNED AT NAKURU THIS 09TH DAY OF NOVEMBER, 2023.

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DAVID NDERITU
JUDGE

