



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

ELRC CAUSE NUMBER 313 OF 2015

LEONARD MATU WANJAU.....CLAIMANT

-VERSUS-

THE AGRICULTURE, FISHERIES & FOOD AUTHORITY (PYRETHRUM

& OTHER INDUSTRIAL CROPS DIRECTORATE.....RESPONDENT

(BEFORE HON. JUSTICE DAVID NDERITU)

RULING

I. INTRODUCTION

1. In a Notice of motion dated 17th November, 2021 brought under **Order 22 Rule 22, Order 51 Rule 2 of the Civil Procedure Rules, and Sections 1A, 1B and 3A of the Civil Procedure Act**, filed under a certificate of urgency, the Respondent/Applicant prays for the following:-

- 1. THAT this application be certified as urgent and service thereof be dispensed with at the first instance.**
- 2. THAT pending inter-partes hearing and determination of this application there be stay of execution of judgment/decreed herein.**
- 3. THAT the Claimant/Respondent be directed to forthwith release motor vehicles registration number KCP 050K and KCD 311F to the Respondent/Applicant.**
- 4. THAT the warrants of attachment and proclamation herein be lifted and declared null and void.**
- 5. THAT the decree and certificate of costs as drawn herein be cancelled and a fresh decree and certificate of costs do issue reflecting sums lawfully due from the Respondent/Applicant**
- 6. THAT the Claimant/Respondent's be directed to account for the sums already recovered by them through the sale of the Respondent/Applicant's motor vehicles registration number KAL 688U and KCE 099A.**
- 7. THAT the Auctioneer be directed to file his bill of costs for assessment/agreement on the same.**
- 8. THAT this court be pleased to declare as an illegality the act of the Auctioneer in purporting to retain a sum of Kshs.451,265.00 from the proceeds of sale of Respondent/Applicant's motor vehicles registration number KAL 688U and KCE 099A as the Auctioneer's fee.**
- 9. THAT this court be pleased to hold and find that the sum lawfully due to the Respondent is made up as hereunder:**
 - a) Decretal sum of Kshs.2,301,384.80 as ordered on 18th July, 2019**
 - b) Interest of - Kshs.363,177.44**

c) *Half costs of* - Kshs.103,456.00

Total due - Kshs.2,768,018.24

Less paid on

account -Kshs.1,540.000.00

Total amount -Kshs.1,228,018.24

10. THAT the applicant be allowed to settle the sum due within 30 days from the date of the order.

11. THAT the costs of this application be in the cause.

2. The matter came before this court on 23rd November, 2021 *ex parte* and temporary stay of further execution of the judgment/decree herein was issued. The court further ordered that motor vehicles registration numbers KCP 050K and KCD 311G belonging to the Respondent/Applicant attached in execution of the judgment/decree herein be held in safe custody pending the hearing interpartes or until further orders of this court. The said temporary order is in force.

3. The said Notice of motion is supported by an affidavit of **KIONGO P. MURIMI Advocate** for the Respondent/Applicant with several annexures thereto.

4. Upon service of the said application the Claimant/Respondent filed a replying affidavit sworn by himself, **LEONARD MATU WANJAU**, on 29th November, 2021 annexing thereto several documents.

5. The Respondent/Applicant filed a further supporting affidavit sworn by **PAUL MIRIMU KIONGO Advocate** on 6th December, 2021.

6. On 6th December, 2021 the court directed that the application be disposed of by way of written submissions. Both Counsel filed their respective written submissions Claimants'/Respondent's dated 16th December, 2021 and Respondent's/Applicant's dated 6th January, 2022.

II. ISSUES FOR DETERMINATION

7. This court has carefully gone through all the materials placed before it by both sides as enumerated above and flowing therefrom the following broad issues manifest for determination:-

- (i) Is the attachment of Respondent's/ Applicant's motor vehicles KCP 050K and KCD 311G proper, procedural, and lawful?
- (ii) Is it proper and lawful for DIRECT "O" AUCTIONEERS to withhold Kshs.451,265/= arising from sale by public auction of Respondent's/Applicant's motor vehicles Registration numbers KAL 688U and KCE 099A in execution of the judgment/decree in this cause?
- (iii) What amount of money is currently due and payable by the Respondent/Applicant to the Claimant/Respondent?
- (iv) Who meets the costs of this application?

III. ATTACHMENT OF MOTOR VEHICLES KCP 050K AND KCD 311G

8. There are a number of dimensions that are not contested. On 18th July, 2019 Lady Justice Mbaru delivered the judgment in this matter wherein the Claimant/Respondent was awarded a sum of Kshs.2,301,384.80 with interest at court rates. The learned Judge added "**The Claimant is awarded 50% of his costs as his claims partly succeeded.**"

9. Subsequently, the Claimant/Respondent filed a party and party bill of costs, and as clear as daylight the Claimant/Respondent was only entitled to 50% of the costs. The taxation by the Deputy Registrar (DR) did not review and or reverse the judgment wherein the Claimant was awarded only 50% of the costs, and the DR did not at any point state that the Claimant/Respondent was from then on entitled to 100% of the costs. It was incumbent upon the Claimant/Respondent to ensure that any subsequent action taken after the taxation of the party and party costs took into account the fact that he was only entitled to 50% of the costs.

10. The Claimant/Respondent in his replying affidavit and in the written submissions by his counsel has argued that if the Respondent/Applicant was dissatisfied with the taxation it ought to have filed or made a reference to the judge under **Rule 11 of the Advocates Remuneration Order (2014)**. However, as far as this court understands the Respondent's/Applicant's argument as contained in the supporting affidavit to the application, the supplementary affidavit, and the written submissions, the Respondent/Applicant is not asking for review or setting aside of the taxation and the award of the DR. The argument and position of the Respondent/Applicant is that based on the judgment of the court the Claimant/Respondent was entitled to only 50% of those costs and any further steps taken after the taxation ought to have been based on the award of half of the costs in the judgment as opposed to the entire assessment of Kshs.206,913/=.

11. As it now turns out the Claimant/Respondent did not take into consideration the fact that he was only entitled to 50% of the costs being Kshs.103,456.50 and instead applied for warrants of execution claiming the entire 100% of the costs. This was clearly and outrightly wrong, improper and unlawful. Likewise it was erroneous and/or an oversight for the court to issue the warrants of attachment dated 18th November, 2020 as the same was based on wrong and misleading calculation on the amount that was due and owing. That warrant of attachment was therefore issued in error apparent on the face of the same.
12. However, MS DIRECT "O" AUCTIONEERS (The Auctioneers) proceeded to attach the properties of the Respondent/Applicant acting on the wrongful and erroneous warrants of attachment and subsequently sold through public auction the attached properties being motor vehicles KAL 688U and KCE 099A and realized a sum of Kshs.1,540,000/=.
13. It is by now evidently clear that the attachment and sale by public auction of motor vehicles KAL 688U and KCE 099A was based on wrongful and erroneous warrants of attachment.
14. Out of the proceeds of the said public auction the Auctioneer retained a sum of Kshs.451,265/= and paid the balance to the Advocates for the Claimant/Respondent. The Respondent/Applicant argues that this retention is illegal and that issue shall be dealt with in a moment as hereunder.
15. Although the above attachment and sale by public auction of the properties of the Respondent/Applicant was based on erroneous and wrongful warrants of attachment this court will not set the same aside for the following reasons. Firstly, the said attachment and sale is long concluded and secondly there is no allegation that the vehicles were sold below the reasonable price of their value. In any event the Respondent/Applicant has not sought to have the said sale set aside. However, as a matter of fact, the warrants leading to the attachment and the sale were clearly issued in error and were not accurate in regard to amounts due and payable. Further, disturbing the said sale may negatively affect innocent purchasers for value who bought the same.
16. Subsequent to the above events the Claimant/Respondent has obtained other warrants of attachment and seized motor vehicles KCP 050K and KCD 311G belonging to the Respondent/Applicant prompting the Respondent/applicant to file this instant application.
17. The Respondent/Applicant has annexed the two warrants of attachment dated 29th October, 2021 for Kshs.1, 784,690.24 and the other dated 8th November, 2021 for Kshs.1,930,208.21.
18. In Paragraphs 30, 31 and 32 of the replying affidavit the Claimant/Respondent explains that the second warrant of attachment was issued to replace the first set in rectification of an error in calculating the interest due. However, there is no indication whatsoever that the error in terms of the costs payable to the Claimant/Respondent was ever rectified.
19. The Claimant's/Respondent's counsel in the written submission takes a rather strange position that there is nothing wrong with the Claimant/Respondent recovering 100% of the costs which is contrary to the 50% awarded in the judgment. He takes the view that the same can only be set aside by way of reference before a judge. This is wrong and a misapprehension of the law as the DR did not award the Claimant/Applicant 100% of the costs as that would have been contrary to the clear orders in the judgment. The Claimant/Respondent is not forthright on this issue.
20. It is on the basis of this erroneous calculation on the costs and interest thereon that the Claimant/Respondent has now obtained new warrants of attachment in execution of the judgment/decree and seized the motor vehicles KCP 050K and KCD 311G belonging to the Respondent/Applicant.
21. As noted above the warrants of attachment originally issued by the court leading to the attachment and sale by public auction of Respondent's/Applicant's motor vehicles KAL 688U and KCE 099A were issued in error and the court has reluctantly desisted from setting aside that entire process for the reasons given above but not to sanitize a clearly wrongful and unprocedural process. There was a clear abuse of court process based on deliberate or erroneous, and misleading misapprehension of the law.
22. If the first warrants of attachment and the entire process leading to the sale of the motor vehicles by public auction was infested with illegalities and errors and hence unlawful, and this court finds and holds so, then there is no way that the new warrants of attachment can be proper and lawful without the original error being rectified first.
23. The foremost duty of this court is to ensure that justice is done to all parties at all times. That is the principal objective of this court as set out in **Section 3 of the Employment and Labour Relations Court Act No. 20 of 2011**. This duty of the court is further magnified in Sections **1A, 1B and 3A of the Civil Procedure Act (Cap 21) and Article 159(2)(d)(e) of the Constitution of Kenya**.
24. This court has found above and holds that the warrants of attachment leading to the seizing of Respondent's/Applicant's motor vehicles KCP 050K and KCD 311G were issued based on erroneous calculations of the amount due flowing from the original warrants of attachment which were also issued on misconceived and erroneous calculation of the amounts due and payable to the Claimant/Respondent. This court has inherent powers and duty to ensure that justice is done at all times to all the parties who appear before it. The provisions of the law cited above grant this court powers to intervene and stop, set aside, and vacate an illegality at the earliest opportunity.
25. This court finds and holds that the attachment and seizing of the Respondent's/Applicant's motor vehicles KCP 050K and KCD 311G by the Auctioneers, who are agents of the Claimant/Respondent is illegal, null and void as the warrants of attachment giving rise to the same are unlawful. The said warrants of attachment are hereby set aside and nullified.

IV. RETENTION OF KSHS.451,265 BY THE AUCTIONEERS

26. The Respondent/Applicant has vehemently prayed that it is unlawful for the Auctioneer to hold a sum of Kshs.451,265/= from the first sale allegedly as fees for work done. On the other hand the Claimant/Respondent argues that the Auctioneer had a right to withhold the amount as their fees. However, it is important to note that the warrants of attachment and sale were in respect of decretal sum plus costs. The Auctioneer's fee was not part of the amounts in the warrants of attachment. This court has stated elsewhere that the said warrants were issued in error for failure to reflect the accurate amount that was due and payable.

27. The Auctioneers, for all intents and purposes, are in this cause acting as authorized agents of the Claimant/Respondent but sanctioned by the court. There is nothing that would have prevented the Claimant/Respondent to alert the Auctioneers to respond to this application even though not served. However, the court shall proceed on the basis that the Auctioneer were not served and hence did not participate in these proceedings.

28. This court has carefully examined the submissions and counter-submissions of both counsel on this issue and the authorities cited. There is no dispute that an auctioneer is entitled to fees for work done and that is the law under the **Auctioneers Act No. 5 of 1996** and the rules thereunder. However, what should happen where a dispute arises as to the fees payable to an Auctioneer? Or where it has not been ascertained as to who should pay such fees?

29. On the one hand the Respondent/Applicant is urging that the retention of the said sum is illegal and that it is also in excess of the fees payable to the Auctioneers. On the other hand the Claimant/Respondent takes the view that the retention is lawful and that the fees as raised by the Auctioneers is correct.

30. This court holds that the only way the Auctioneer's fees may be determined, now that it is a contested issue, is for the Auctioneers to file an itemised bill that shall be assessed and a ruling issued. It is important to note that Auctioneers fees and costs are costs in the cause that arise once the work is done.

31. Flowing from the foregoing, while an Auctioneer may retain some money as fees, see **LABHSONS LIMITED VS MONURA HAULIERS LTD (2004) eKLR**, once such fees is contested an itemized bill of the fees ought to be filed in court for assessment and this court directs the Auctioneers to file an itemized bill of their fees for assessment within seven (7) days of this ruling.

32. Pending the assessment of the Auctioneers fees the withheld amount of Kshs.451,265/= shall be taken into account when calculating the amount now due and payable from the Respondent/Applicant to the Claimant/Respondent.

V. AMOUNT DUE AND PAYABLE

33. The parties have differed on the balance now due and payable by the Respondent/Applicant to the Claimant/Respondent. While the Respondent/Applicant puts the balance at Kshs.1,228,018.24 the Claimant/Respondent puts the balance at Kshs.2,757,826.12 making this a contested issue. This court will not sit and calculate the amount due. Instead the court shall issue guidelines on how the parties shall calculate the amounts due and file their tabulations within seven (7) days of this ruling:-

(i) There is no contest that the Claimant/Respondent was awarded Kshs.2,301,384.80 in the judgment dated and delivered on 18th July, 2019 and that should be the foundation of the calculations.

(ii) The Claimant/Respondent was awarded half (½) or 50% of the costs of the cause. The costs were assessed at Kshs.206,913/= and hence the Claimant/Respondent is entitled to 50% of that amount which is Kshs.103,456.50.

(iii) The total in (i) and (ii) above should be added and interest thereon calculated at the court rates.

(iv) However, the amount so far paid shall be the entire amount realized out of the first sale being Kshs.1,540,000/= and that is the sum that should be presumed to have been recovered so far.

34. Counsel for both parties should have no problem at all in arriving at the correct and same answer for the above arithmetic exercise.

VI. COSTS

35. On the issues of costs of this application each party shall meet own costs.

VII DISPOSAL

36. This court gives the following orders in respect of the Notice of motion dated 17th November, 2021.

1. **THAT** the Claimant/Respondent by himself, his agents M/S DIRECT "O" AUCTIONEERS, servants, and or others howsoever be and is hereby ordered to UNCONDITIONALLY release motor vehicles KCP 050K and KCD 311G to the Respondent/Applicant, and in any event within 24 hours of this ruling.

2. **THAT** the warrants of attachment and proclamation in respect of the said motor vehicles be and is hereby lifted, set aside, and declared null and void as the same was issued in error without reflecting the correct amounts due and payable by the Respondent/Applicant to the Claimant/Respondent.

3. **THAT** counsel for the parties do now calculate the amount due by the Respondent/Applicant to the Claimant/Respondent based on the directions given by this court in this ruling and file their respective tabulation and calculations in court, within seven (7) days of this ruling.

4. **THAT** the sum of Kshs.451,265 withheld by the Auctioneers be taken into account as payment towards the decretal sum.

5. **THAT** M/S DIRECT "O" AUCTIONEERS are hereby ordered to file an itemized bill of their fees in the attachment and sale by public auction of motor vehicles KAL 688U and KCE 099A.

6. **THAT** a stay of execution be and is hereby issued in this cause pending further orders of this court.

7. **THAT** the Respondent/Applicant do serve a copy of this ruling upon M/S DIRECT "O" AUCTIONEERS immediately upon delivery of this ruling.

8. **THAT** each party shall meet own costs of this application.

DATED AT NAKURU AND DELIVERED VIRTUALLY THIS 15TH DAY OF FEBRUARY, 2022.

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DAVID NDERITU

JUDGE

Nderitu Komu for Claimant/Respondent

Murimi for Respondent/Applicant

Court Assistant - Mercy