



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 1271 OF 2015

ROSE SANG TARUS.....CLAIMANT/1ST RESPONDENT

VERSUS

BARCLAYS BANK OF KENYA LIMITED.....RESPONDENT/APPLICANT

AND

MBUSERA AUCTIONEERS.....2ND RESPONDENT

RULING

1. The subject of this ruling is the Respondent/ Applicant's application dated 26th October 2021 seeking the following reliefs:

- a) A temporary order of injunction restraining the Claimant from executing the Judgement and Decree dated 26th June 2020 and the proclamation by the 2nd Respondent dated 26th October 2021 and the consequential orders thereof, pending the hearing and determination of the application for stay at the Court of Appeal dated 28th June 2021 filed in *Nairobi Civil Appeal (Application) No. 244 of 2020: Barclays Bank of Kenya v Rose Tarus*;
- b) That the proclamation by the 2nd Respondent, Mbusera Auctioneers dated 26th October 2021 be nullified;
- c) A declaration that the execution by the 2nd Respondent vide proclamation dated 26th October 2021 was premature as the execution was stayed when the Applicant filed and served a letter dated 19th October 2021 under Rule 11 of the Advocates Remuneration Order.

2. The application is supported by an affidavit sworn by the Applicant's Legal Officer, Michael Massawa and is based on the following grounds:

- a) There is a pending application at the Court of Appeal dated 28th June 2021 in *Nairobi Civil Appeal (Application) No. 244 of 2020: Barclays Bank of Kenya v Rose Tarus*, seeking stay of execution in exercise of the Appellate Court's powers to grant orders of stay;
- b) On 6th July 2021, the Court of Appeal certified the aforesaid application as urgent and directed the parties to file written submissions. Both parties have filed their written submissions and are awaiting the ruling of the Court of Appeal on the stay application;
- c) In the meantime, the Deputy Registrar taxed the Claimant's Bill of Costs on 14th October 2021. The Deputy Registrar only indicated that she had taxed the Bill at Kshs. 338,433 and no reasons were given and no ruling has been served upon the parties so that any party may object within the 14 days provided by Rule 11 of the Advocates Remuneration Order which provides:

(1) *Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.*

(2) *The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by Chamber Summons, which shall be served on all the parties concerned setting out the grounds of his objection.*

d) As per Rule 11 of the Advocates Remuneration Order, the Applicant requested for reasons for the taxed costs vide a letter dated 19th October 2021, within timelines for a party disputing the Bill to request for the reasons. It is imperative to note that once the letter requesting for reasons is filed, it acts as a stay of execution of the taxed amount and the decree therein;

e) No ruling was delivered and thus, when a letter was filed on 19th October 2021, it acted as a stay. In any case, the execution was premature as the Claimant could only commence execution, if any, after the lapse of the 14 days from date of delivery of the ruling on the Bill of Costs and only after the Respondent/Applicant had not objected and/or indicated objection to the taxed amounts;

f) Without even extracting a Certificate of Costs and serving the same upon the Applicant, the Claimant caused and/or instructed the 2nd Respondent to proclaim the goods of the Applicant. The Claimant's Advocates had no courtesy to first write to the Applicant's Advocates and forward the Certificate of Costs and/or demand payment within a reasonable time;

g) The execution by the Claimant when the letter dated 19th October 2021 was served upon her and being well aware that there is pending an application at the Court of Appeal, which has been certified urgent in addition to the fact that parties have submitted on the main appeal, is not only contrary to the provisions of Rule 11 of the Advocates Remuneration Order, but also an act in total bad faith and is meant to defeat the cause of justice and render the pending application for stay at the Court of Appeal an academic exercise;

h) Among the goods that have been proclaimed are computers, laptops, telephone heads, photocopying machines, cabinets and printers against the provisions of Section 44(1)(ii) & (iv) of the Civil Procedure Act, which provides *inter alia* that tools of trade and implements of a person for the performance of his trade or profession cannot be attached by an auctioneer;

i) By 2nd November 2021, the proclaimed goods would be removed from the premises and sold. This would have an impact on the operations of the Applicant and dent its image in the financial sector;

j) The Auctioneer has issued an invoice even before carting away the goods from which his commission will be based. The commission so charged is exorbitant and excessive. The Court of Appeal in *Civil Appeal No. 195 of 2004: National Industrial Credit Bank Ltd v S.K Ndegwa Auctioneer* held that an auctioneer's charges for attachment should be based on the value of goods attached and not the decretal amount;

k) If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. The entire proclamation is a nullity as the Claimant instructed the 2nd Respondent to commence execution well aware that she had been served with letter dated 19th October 2021 under Rule 11 of the Advocates Remuneration Order, which letter acts as a stay of execution of the taxed amount. Further, the 2nd Respondent proceeded to proclaim goods not attachable under the provisions of Section 44(1)(ii) & (iv) of the Civil Procedure Act;

l) Unless this application is certified urgent and heard urgently, the Bank will suffer irreparable damage to its business and reputation and the intended application for stay at the Court of Appeal, which has been certified urgent and on which parties have already submitted, shall be rendered nugatory;

m) The urgency of this application is to forestall the imminent threat of execution where the Bank's properties may be proclaimed thus increasing costs and causing disruption of its business operations and affect its reputation in the market;

n) A court of justice has no jurisdiction to do injustice and where injustice on a party to a judicial proceeding is apparent, a stay of execution is irresistible;

o) The Respondent/Applicant is willing to deposit such security for the due performance of the judgment as this Court may deem fit to order pending the hearing and determination of the stay application at the Court of Appeal dated 28th June 2021;

p) A court of law is under a duty to exercise its inherent power to prevent injustice. The Applicant has thus approached the seat of justice to prevent an injustice.

3. In the supporting affidavit sworn by the Applicant's Legal Officer, Michael Massawa it is deponed that on 26th June 2020, judgment was entered against the Applicant in the sum of Kshs. 2,400,000.

4. Being dissatisfied with the judgment, the Applicant lodged a Notice of Appeal on 2nd July 2020. The Applicant thereafter filed its Record of Appeal at the Court of Appeal and the appeal is pending hearing and determination.

5. Massawa further depones that after delivery of the judgment, the Applicant filed an application for stay, which was disallowed by **Makau J.** Subsequent to this, the Applicant filed a similar application at the Court of Appeal, which is pending determination.

6. In opposition to the application, the Claimant filed a Notice of Preliminary Objection on the ground that the application is *res judicata* pursuant to a ruling on a similar application delivered by the Court on 27th May 2021. The Claimant takes the view that this Court is now *functus officio*.

7. The Claimant also filed a replying affidavit sworn on 15th November 2021. She depones that the present application is indeed an

application for stay of execution, disguised as an application for injunction when it is clear that there exists no suit pending before this Court, which would call for any preservative orders by way of an equitable relief in the nature of an injunction.

8. The Claimant points out that by a ruling of this court dated 27th May 2021, an application by the Applicant seeking stay of execution was dismissed with costs.

9. The Claimant further depones that her Advocates lodged a Party and Party Bill of Costs and the matter was thereafter slated for taxation at which the Applicant fully participated.

10. The Claimant adds that on 14th October 2021, the Taxing Officer made her ruling, taxing the Bill of Costs at Kshs. 338,433 and a Certificate of Taxation was issued on 19th October 2021.

11. The Claimant avers that according to the court records, the ruling was delivered in the presence of the Applicant's Counsel and challenges the allegations that the Applicant was not informed about the contents of the ruling. The Claimant states that the Taxing Officer delivered a comprehensive ruling.

12. According to the Claimant, there exists no legal provision which entitles an automatic stay of execution upon filing of a letter for reasons.

13. The Claimant denies that the Applicant's tools of trade have been attached and adds that the provisions of Section 44 of the Civil Procedure Act do not apply to the Applicant.

14. Although the Applicant states its main prayer as an order of injunction, my reading of the application reveals that what the Applicant seeks is a stay of execution of the judgment delivered by **Makau J** on 26th June 2020.

15. The Applicant appears to be well aware of this because in its written submissions it relies on Order 42 Rule 6 of the Civil Procedure Rules which sets out the conditions upon which an order of stay of execution of judgment may be granted. The Applicant even goes ahead to cite the decision of the Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** where these conditions were discussed.

16. The Applicant concedes that a similar application was considered and disallowed by **Makau J** in a ruling delivered on 27th May 2021. Pursuant to this, the Applicant filed a similar application before the Court of Appeal. The Applicant now asks me to stay execution of the judgment by my brother Judge, pending determination of its application before the Court of Appeal

17. The question to ask is whether this Court has jurisdiction to grant the Applicant's plea.

18. Section 7 of the Civil Procedure Act states as follows:

7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

19. This provision codifies the rule on *res judicata* whose rationale was restated by the Court of Appeal in its decision in **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR** in the following terms:

“The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of court's limited resources and timely determination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unravelling uncontrollably.”

20. The Applicant made a good show in trying to create a difference between the application canvassed before **Makau J** and the present application. In my estimation however, the substance of the application before me, like the one before my brother Judge, is stay of execution of judgment pending appeal.

21. This issue having been determined on merit on 27th May 2021 is *res judicata* and this Court has no power to re-open it. What is more, the Court of Appeal is now fully seized of the matter and the trial court is *functus officio*. If the Applicant has any issues regarding this matter, it can only raise them at the Court of Appeal.

22. In light of the foregoing, the Applicant's application dated 26th October 2021 fails and is dismissed with costs to the Respondent.

23. The interim orders granted on 27th October 2021 are set aside.

24. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 3RD DAY OF FEBRUARY 2022

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JUDGE

Appearance:

Mr. Ogembo for the Claimant

Mr. Kithinji for the Respondent/Applicant