



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 1933 OF 2015

EPHANTUS WAMBUA MACHARIA.....CLAIMANT

VERSUS

PRESBYTERIAN CHURCH OF EAST AFRICA.....1ST RESPONDENT

PRESBYTERIAN FOUNDATION.....2ND RESPONDENT

RULING

1. The Respondents/Applicants filed a Notice of Motion application dated 27th November 2020 seeking to be heard for orders that:

1. Spent.

2. There be a stay of execution of the decree herein pending the hearing and determination of this application inter-partes.

3. The Warrants of Attachment together with the Warrants for Sale both issued by this Court be set aside.

4. The costs of this application and the Auctioneer's charges, if any, be borne by the Claimant and/or his Advocates jointly and severally.

2. The Application is made on the grounds that the Warrants were issued prematurely and thus irregularly obtained and that the Decree is fully settled. That the Warrants of Attachment and Sale of the Respondents' moveable property were further obtained from this Court through concealment of material facts, namely:

(a) That execution of the decree should not have been necessary because the Respondents had informed the Claimant's Advocates of their readiness and willingness to pay the decretal sum plus costs but the amount of costs was yet to be agreed or taxed between the parties.

(b) That leave to execute the decree before taxation of costs had not been sought or obtained.

3. The Application is supported by the Affidavit of the Applicants' Advocate, Paul Amuga who avers that when Judgment in the suit was delivered on 6th March 2020, the Claimant was awarded Kshs. 594,958/- with no costs and that the Respondents/Applicants then filed an application seeking stay of execution of the decree pending hearing and determination of their intended appeal but the said application for stay pending appeal was however dismissed with costs to the Claimant. That the Claimant's Advocates thereafter demanded payment of the decretal sum plus costs of the stay application at Kshs. 90,000/-. That the Respondents did not agree with the said costs of Kshs. 90,000/- and therefore severally sought clarification of the correct costs through correspondence to the Claimant's advocates but their letters were never responded to. That the Claimant's advocates instead proceeded to apply for execution warrants without notice to the Respondents' advocates' firm took out warrants of attachment and caused Fantasy Auctioneers to attach the 1st Respondent's office furniture and hospital equipment on 6th November 2020. He asserts that since the Court was not aware of the material facts explained hereinabove, it is necessary that execution of the decree be stayed and the warrants be set aside or expunged from the record. He further deponed that the decretal sum was paid in full immediately after the Auctioneer raised a proclamation against the 1st Respondent's moveable property and that what is now in contention is the Auctioneer's claim for costs/fees of Kshs. 97,300/- which the Respondents contend they should not be required to pay because execution was both unnecessary and irregular. He deponed that the Respondents/Applicants are fearful that the Auctioneer may proceed to execute for the disputed costs if a stay is not granted immediately.

4. The Claimant/Respondent filed a Replying Affidavit sworn on 18th January 2021 by his Advocate, Raphael Warui who avers that when

the Claimant demanded payment from the Respondents, he similarly in the same communication served a seven (7) days' notice of his intention to execute if payment was not received. He denies that their firm received three letters from the Respondents' advocates averring that none of the said letters bears their firm's official stamp in acknowledgement of any effected service at their offices. That the costs of the Stay Application fell due for taxation by operation of law and that the Claimant was on his part thus pursuing the process of taxation of the costs. He further avers that after the Claimant's demand, the Respondents' advocates only served their firm with their letter dated 10th November 2020 forwarding a partial payment and also threatening court action. He further avers that there is nothing for the court to grant a stay or set aside since the Respondent had already made a partial payment as a consequence of the executed warrants and that the Respondents are yet to pay the unsatisfied amount of Ksh. 99,750/- being filing costs, court's collection fees and the Auctioneer's costs. That Auctioneer's costs of the attachment were to be borne by the Judgement-Debtor being the Respondents herein and that prayer 4 in the application is therefore untenable and incompetent. He asserts that the Respondents/Applicants are also aware that further action by the Auctioneer to recover the unsatisfied balance of the warrants was withheld in the interim because of this application. He urges the Court to dismiss the Respondents' Application and order them to pay up the unsatisfied balance of Ksh. 99,750/- together with liquidated costs of this application.

5. In rejoinder, the Respondents/Applicants filed a Supplementary Affidavit sworn on 22nd January 2021 by Paul Amuga. He avers that the 3 letters dated 2nd July 2020, 28th July, 2020 and 11th September 2020 were delivered to the Claimant's Advocates through their known email address which they had previously communicated to his firm through. He annexes the delivery confirmation for the same while asserting that none of those emails bounced back. He avers that the denial by the Claimant's Advocate is therefore in bad faith which bad faith is further demonstrated by the Claimant's Advocates act of secretly applying for and extracting warrants of attachment without notice to the Respondent's Advocates and before taxation of costs.

6. The Respondent/Applicant's Counsel Mr. Amuga submitted in Court that they seek prayers 2 and 3 of the application with the main prayer being to set aside the warrants of attachment. That they had suggested to the Claimant/Respondent's advocate to consider Kshs. 5,000/- as costs for the stay pending appeal application as there was one attendance. That the Claimant/Respondent thus proceeding to obtain warrants and then attaching before taxation was highly irregular and further because no leave was sought or granted. He also stated that service by email is now the norm and that there is evidence they delivered letters via email.

7. Mr. Warui for the Claimant/Respondent denied knowledge of the emails which he stated are not traceable at their office and further wondered why the Respondents did not make any effort to deliver hard copies of the letters considering their offices are 500 metres apart. He further stated that the Court awarded the Claimant the decretal sum without costs and that at no time did the matter have costs. That the purported letters from the Respondents/Applicants were addressing the stay application costs which parties did not agree on thus compelling the Claimant to get help from Court by extracting attachment order 4 months after waiting for payment. That the said warrants were properly obtained on 4th November 2020 and since they are legitimate, the Claimant is entitled to the payment.

8. Under Order 51 Rule 15 of the Civil Procedure Rules, 2010 there is provision that the Court may set aside an order which has been made *ex-parte* once satisfied that there exist good and sufficient reasons to set aside such *ex-parte* order. In the case of **Stephen Mukiri Ndegwa v Kenya Commercial Bank Limited [2020] eKLR**, High Court Civil Case No.172 of 1997, the court in an application to set aside warrants of attachment and sale of the defendant's property discussed the importance of full disclosure and held that:

"(21)...I am guided by the case of RE: KENYA NATIONAL FEDERATION OF CO-OPERATIVES LTD & OTHERS [2004] 2 E.A 128 in which Hon. Justice Mohamed Ibrahim (as he then was) stated:-

"...It does not matter the type of case or matter, once a matter is before the Court in the absence of another or other parties (ex parte) the duty of full and frank disclosures are imposed on the applicants and the standard must always be fairly high considering the authorities."

(22) The learned Judge went on to cite with approval the decision of Carnwath J in MEMORY CORPORATION PLC v SIDHU [2000] 1 WLR 1443 that:-

"Full disclosure must be linked to fair presentation. The Judge must be able to have complete confidence in the thoroughness and objectivity of those presenting the case for the applicant. Once that confidence is undermined he is lost..."

(23) I agree with the learned Judge that courts must insist on strict compliance with the rules pertaining to full disclosure in order to afford protection to the absent party at the ex parte stage..."

9. The Claimant's advocates deny receiving any correspondence enquiring into costs while the Respondents' advocates assert that they duly served the Claimant's advocate via email and even annexed the said correspondence in their Supplementary Affidavit dated 22nd January 2021. There was no suggestion that the emails did not reach the addressee as none of the attachments show the mail as not delivered. In my opinion, the Respondents/Applicants have given good and sufficient reasons to set aside the warrants of attachment in that they paid the decretal sum but are not agreeable to a certain cost as raised by the Claimant's advocate and/or that leave was not sought to execute decree before taxation of costs. It would be wrong in my opinion to penalize the Respondents (the client in this case) in the circumstances and considering that their Advocate made several enquiries but which were not responded to. The warrants of attachment together with the Warrants for Sale both issued by this Court be and are hereby set aside to allow the Respondents/Applicants raise their issue with the costs as suggested by the Claimant and if they fail to agree to have the costs taxed.

It is so ordered.

Dated and delivered at Nairobi this 17th day of February 2021

Nzioki wa Makau

JUDGE