



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO.237 OF 2014**

**LEONARD GETHOI KAMWETI ..... CLAIMANT**

**VERSUS**

**NATIONAL BANK OF KENYA ..... RESPONDENT**

**RULING**

The respondent and judgement debtor herein filed application dated 18<sup>th</sup> November, 2020 and seeking for orders that;

- a) *There be stay of execution of the judgement entered on 12<sup>th</sup> October, 2016 pending hearing and determination of the application inter-parties.*
- b) *In the alternative, there be stay of execution of the Warrants of Attachment taken out by the respondent/decree holder and given on 5<sup>th</sup> of August 2020, pending the hearing and determination of this application.*
- c) *The decree of this court as extracted by the respondent/ decree holder as well as the Warrants of Attachment taken out in execution of the decree be reviewed, varied and or set aside.*
- d) *The applicant/ judgement debtor be declared as having discharged its obligation as directed by the court in its judgement of 12<sup>th</sup> October, 2016.*

The application is supported by the affidavit of Samuel M Mundia and on the grounds that upon delivery of judgement herein both parties were dissatisfied and filed appeal vides Court of Appeal No. 240 of 2016 and 299 of 2017 and which were consolidated. And where judgement was delivered on 8<sup>th</sup> May, 2020. Being dissatisfied, the respondent herein moved the Court of Appeal so as to proceed to the Supreme Court and also sought stay of execution. There is a pending ruling.

Despite the claimant being aware of the pending ruling before the Court of Appeal he has proceeded and obtained warrants of attachment and the respondent is now required to pay Ksh.11,944,015 or the proclaimed goods be sold by public auction.

The respondent has paid the decretal sum per the judgement herein and the warrants of attachment obtained are based on an erroneous decree that was extracted without notice to the respondent for an outstanding amount which is erroneous since the respondent has since paid the entire judgement sum.

Other grounds in support of the application are that where execution and sale of the respondent's goods is allowed to proceed there shall be irreparable loss and damage. The claimant has already received Ksh.8, 050,728 which had been deposited as security in the joint names of the parties. The respondent has also remitted ksh.2, 342,407.20 to the Kenya Revenue Authority being the PAYE as ordered by the court on 12<sup>th</sup> October, 2016.

The total decretal sum of Ksh.10, 603,814.77 in full satisfaction of the judgement is now paid and the application herein should be allowed as prayed.

In reply, the claimant filed his Notice of Preliminary Objections and on the grounds that on 25<sup>th</sup> October, 2016 the respondent filed a similar

application as done in this instance and the court addressed the same and the court became *functus officio*.

That on 1<sup>st</sup> March, 2017 the respondent filed another application seeking stay of execution pending hearing of Civil **Appeal No.34 of 2017** and the court granted stay but this was vacated on 8<sup>th</sup> May, 2018. The matter herein is now *res judicata*.

On 6<sup>th</sup> August, 2020 the respondent filed a similar application and obtained interim orders and which application was struck out on 17<sup>th</sup> September, 2020. The court is *functus officio*.

This is the 4<sup>th</sup> application by the respondent seeking stay of execution and should be dismissed *in limine* with costs.

The claimant also filed his Grounds of Opposition and affidavit thereof and avers that the respondent has a similar application before the Court of Appeal, in the Supreme Court and previously, has had three occasions to move this court on the same application and which were dismissed upon the court going into the merits. The instant application is in abuse of the court process.

The respondent has already made part payment of the decretal sum and should be compelled to pay the balance of Ksh.1, 239,959.95 as per the decree.

The respondent applications for stay of execution are vexatious and meant to deny the claimant the fruits of his judgement. The court stands *functus officio* and the matter is *res judicata*.

There is an outstanding and unpaid balance of Ksh.1, 239,959.95 being Decretal sum

Ksh.11, 944,015;

Less paid

Ksh.8, 050,728;

Less paid

ksh.310, 919.85;

Less tax (PAYE)

Ksh.2, 342,407.20

Balance unpaid

ksh.1, 239,959.95

The auctioneer's charges are ksh.585, 823.50.

The decretal sum has not been paid in full as alleged and the instant application should be dismissed with costs.

Both parties attended court on 17<sup>th</sup> December, 2020 and by consent agreed to address the application by way of written submissions and the court allocated timelines. The respondent failed to comply. The claimant opted to file his written submissions.

The claimant submitted that the court stand *functus officio* upon addressing similar applications herein. The matter is *res judicata* having previously addressed and a decision given.

The application seeking for review is made contrary to section 8 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure rules. A decree which has been subjected to an appeal is not open for review.

The respondent has moved this court before seeking stay of execution and upon the merits the same was dismissed. they moved the Court of Appeal and stay granted vacated. A review application cannot counter what is already addressed.

The claimant also submitted that the total decretal sum is not fully paid. There is no overpayment as alleged. There is no new matter to justify the application for review and on the filing of Civil Appeal No.146 of 2020, the respondent are in abuse of court process and should be dismissed with costs.

Determination

This application was filed by the respondent, they attended court and obtained hearing directions but failed to address by filing written submissions.

The respondent as the applicant is seeking for stay of execution herein and in the alternative the decree as extracted by the claimant and the Warrants of Attachment taken out in execution of the decree be reviewed, varied and or set aside and that the respondent be declared to have discharged its obligations pursuant to the judgement of the court delivered on 12<sup>th</sup> October, 2016.

By application dated 25<sup>th</sup> October, 2016 the respondent applied for stay of execution. A ruling was delivered on 21<sup>st</sup> February, 2017 and the application dismissed. The court cannot go back on this ruling and allow stay of execution.

Parties have since proceeded on appeal and judgement delivered. Where the respondent is keen to proceed to the Supreme Court, this is not the court to secure stay of execution. The court stands *functus officio*.

On the review sought, rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016 regulate an application seeking a review of this court orders. There is no effort whatsoever by the respondent to plead the provisions thereof and even where such were applied, the court finds no sufficient cause given to justify for a review.

The total decretal sum being Ksh.11, 944,015 unlike the preposition by the respondent that this is Ksh.10, 603,814.77 is imperative to apply. the respondent must also put into account the attendant costs due to the auctioneers which costs are lawful as the execution commenced by the claimant is a legitimate process.

**Accordingly, application dated 18<sup>th</sup> November, 2020 is without merit and is hereby dismissed. costs to the claimant.**

**Delivered in open court at Nairobi this 11<sup>th</sup> day of February, 2021.**

**M. MBARU**

**JUDGE**

In the presence of:

Court Assistant: Okodoi ..... and .....