



**REPUBLIC OF KENYA**

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

**CAUSE NO.454 OF 2012**

**HELLEN WASEKA.....CLAIMANT**

**VERSUS**

**MIDDLE EAST BANK KENYA LIMITED..... RESPONDENT**

**RULING**

The respondent, Middle East Bank Kenya Limited filed application dated 1<sup>st</sup> February, 2021 under the provisions of Order 22 Rule 18 of the Civil Procedure Rules and Rule 32 of the Employment and Labour Relations Court (Procedure) Rules and seeking for orders that;

1. ...

2. ...

3. *The Warrants of Attachment issued on 28<sup>th</sup> January 2021 be set aside and declared null and void.*

4. *It be affirmed that the stay of execution order granted by this court on 20<sup>th</sup> April, 2019 is still valid and in force.*

5. *Further, and in the alternative, a stay of execution be granted until the hearing and determination of (i) an Appeal by the respondent against the judgement of this court delivered on 20<sup>th</sup> December 2018 being Nairobi Civil Appeal number 36 of 2019, and (ii) Civil Appeal Number E236 of 2020 being appeal against the ruling of this court delivered on 21<sup>st</sup> May 2020; and*

6. *Costs of the application be paid by the claimant.*

The application is supported by the Supporting Affidavit of Felix Ngang'a Karanja, advocate for the respondent and in the conduct of this matter and on the grounds that the claimant has issued a warrant of attachment despite an order for stay of execution pending the hearing of Civil Appeal No.36 of 2019 and granted on 30<sup>th</sup>

April, 2019 and the terms thereof have been complied with and the claimant is aware. The application before the Court of Appeal seeking stay of execution is pending determination and to satisfy the stay orders herein the respondent made a deposit of security of Ksh.12, 180,000 into an interest earning account of both parties on 27<sup>th</sup> June, 2019.

Other grounds in support of the application are that on 28<sup>th</sup> January, 2021 the claimant in violation of Order 22 Rule 18 of the Civil Procedure Rule has failed to issue a notice to show cause as the decree herein was issued on 22<sup>nd</sup> January, 2019 two years ago and on 29<sup>th</sup> January, 2021 auctioneers levied the respondent's goods and issued a proclamation of attachment and in deliberate abuse of process and unless stopped the respondent shall suffer loss and damage.

The respondent's appeal against the judgement and ruling delivered on 21<sup>st</sup> May, 2020 is pending before the Court of Appeal, Civil Appeal No.E236 of 2020. The order of stay granted on 30<sup>th</sup> April, 2019 is still in force and should be upheld.

In reply, the claimant filed the Replying Affidavit of Geoffrey Eric Odongo advocate for the claimant and in the conduct of the matter herein and who avers that the application is made with misrepresentations and meant to mislead the court and in abuse of court process.

Application by the respondent is seeking stay of execution of the warrant of attachment issued on 26<sup>th</sup> January, 2021. On 30<sup>th</sup> April, 2019 the court issued order of stay of execution on condition that the respondent deposits the decretal sum in a joint interest earning account in the

names of the parties within 60 days and failure to which execution to proceed upon the decree. The respondent initiated the process of opening the bank account at its bank and the claimant objected to the same as in conflict of interest and which the respondent ignored and opened the same in own bank instead of a joint interest earning account.

The respondent failed to comply with the orders issued on 30<sup>th</sup> April, 2019 within 60 days and hence the stay order was invalidated and warrants of attachment issued on 28<sup>th</sup> January, 2021. There is no contradiction of the court orders of 30<sup>th</sup> April, 2019. The application before court is in abuse of court process and should be dismissed with costs.

The respondent filed Replying Affidavit of Isaac Mwige, the managing director of the respondent and who avers that the respondent as a bank is regulated by the Central Bank of Kenya to carry on banking business an industry highly regulated. The order of stay granted by the court was in recognition that the respondent is a bank and the security deposit was to be in an interest earning account held by both parties.

Mr Mwige also avers that the advocates for the parties were unable to agree where the deposit was to be held and to avoid default the respondent proceeded to open an account and paced the deposit therein and informed the claimant's advocates. The respondent shall abide any directions of the court on how the respondent should handle such deposits in the circumstances where the claimant has failed to agree as required.

Both parties filed written submissions in addressing the application.

On the application, the affidavits and the written submissions, the core issue herein is whether there should be stay of execution of the warrants of attachment issue don 29<sup>th</sup> January, 2021 and the same declared null and void; whether the stay of execution herein issue don 30<sup>th</sup> April, 2019 is still valid and in force; and in the alternative, whether a stay of execution should be granted pending hearing of Civil Appeal No.36 of 2019 and Civil Appeal No.E236 of 2020; and who should pay costs.

The claimant in the Replying Affidavit of Mr Odongo confirms that warrants of attachment were obtained upon the respondent failing the stay condition granted by the court on 30<sup>th</sup> April, 2019 for the parties to pen a joint interest earning account held in the names of both parties and within 60 days and failure to which execution to issue. That the respondent being a bank proceeded to open an own account in conflict of interest despite the claimant objecting to the same.

On 30<sup>th</sup> April, 2019 the court at paragraph 30 ordered and directed as follows;

*Given that the respondent have already filed Notice of Appeal at the Court of Appeal, and given that this Court should not make any other that may destroy the substratum of the appeal, I allow stay orders on condition that the respondent deposits the entire decretal sum in an interest earning account held in the joint names of Counsel on record within 60 days. In default execution may proceed upon taxation and issuance of a decree.*

The conditions crystallised were;

- 1) Stay of execution was granted to preserve the substratum of the appeal;
- 2) A deposit of the entire decretal sum in an interest earning account held by both parties within 60 days; and
- 3) In default, execution to proceed after taxation and issuance of a decree.

In the supporting affidavit of Mr Karanja he avers that upon the orders of 30<sup>th</sup> April, 2019 a security deposit was made and communication sent to the claimant vide annexure page 5 to his Affidavit sworn on 1<sup>st</sup> February, 2021. This was done on 27<sup>th</sup> June, 2019 upon the respondent opening account No.1003138000287 in the names of *Esmail & Esmail and Ameli, Inyangu & Partners Advocates* and therein deposited the sum of ksh.12, 180,000.

This was done within 58 days.

Mr Odongo in his Replying Affidavit sworn on 11<sup>th</sup> February, 2021 at paragraph 6 avers that on 24<sup>th</sup> June, 2019 the respondent's advocates sent to him proposing the opening of a bank account at the respondent bank and attached the account opening forms and in reply on 25<sup>th</sup> June, 2019 the claimant raised concern and noted this would be prejudicial owing to conflict of interest given the respondent was the judgement debtor to open own account.

Mr Odongo also asserted that there was lapse of 60 days as directed by the court and hence the orders of 30<sup>th</sup> April, 2019 lapsed. Execution proceeded.

As set out above, the orders of the court on 30<sup>th</sup> April, 2019 had three limbs. The court granted stay of execution pending hearing of the appeal, a deposit of the decretal sum in an interest earning account held by both parties within 60 days and in default execution to proceed.

There is no contest that there is no appeal. The respondent has filed evidence of Civil Appeal No.36 of 2019 and E236 of 2020 and relating to judgement and ruling herein respectively.

There was no set condition with regard to which bank the account was to be opened. The court reading of the entire ruling delivered on 30<sup>th</sup>

April, 2019, such an issue never arose.

In any event, before obtaining the Warrants of Attachment herein, the claimant was bound by Order 22 Rule 18 read together with Rule 32 of the Employment and Labour Relations Court (procedure) Rules, 2016. Order 22 Rule 18 requires that;

18. (1) Where an application for execution is made:

(a) More than one year after the date of the decree;

(b) Against the legal representative of a party to the decree; or

(c) For attachment of salary or allowance of any person under rule 43;

*The Court excluding the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him ...*

The judgement herein was delivered on 20<sup>th</sup> December, 2018. There is a Decree on record dated 22<sup>nd</sup> January, 2019. Subsequently, the court delivered ruling dated 30<sup>th</sup> April, 2019 with regard to stay of execution.

Before obtaining the Warrants of Attachment on 28<sup>th</sup> January, 2021, Order 22 Rule 18 applied. The motions of the set procedures ought to have been invoked as held in **Santowels Limited v Stanbic Bank Kenya Ltd [2020] eKLR**. The claimant cannot be found to justify the execution process following taxation of the costs and ruling of the Taxing Officer delivered on 11<sup>th</sup> December, 2020 outside the orders issued on 30<sup>th</sup> April, 2019. To do so would be to negate the very orders which allowed stay of execution on the given reasons.

Therefore, in satisfaction of the stay orders granted, the respondent was in order by moving with haste and opening own account and in the joint names of the parties as directed and sending the necessary documentation for the execution by the claimant and who failed to attend and introduced other matters outside of the orders issued. Where the claimant was keen to secure and address any conflict of interest, such matter ought to have been addressed before the court rendered ruling or immediately soon thereafter taking into account the 60 days issued with regard to the security deposit.

To proceed and obtain warrants of attachment on the face of the respondent secured the orders issued on 30<sup>th</sup> April, 2019 was to engage in rush practice and the

Warrants of Attachment issued on 29<sup>th</sup> January, 2021 are irregular, null and void *ab initio*. Further the stay orders issue don 30<sup>th</sup> April,, 2019 remain valid and in force and shall suffice until the pending appeal in Civil Appeal No.36 of 2019 and which related to the application and ruling delivered on 30<sup>th</sup> April, 2019. For good measure and to ensure full determination of all matters before the Court of Appeal, it is imperative that the stay of execution and upon compliance as directed the same extend to the hearing and determination of Civil Appeal No.E236 of 2020 with regard to ruling delivered on 21<sup>st</sup> May, 2020.

**Accordingly, the court finds merit in the application dated 1<sup>st</sup> February, 2021 and the following orders are hereby issued;**

**(a) Warrant of Attachment issued on 28<sup>th</sup> January, 2021 are declared irregular, null and void;**

**(b) Orders of 30<sup>th</sup> April, 2019 herein remain in force pending hearing and determination of Civil Appeal No.36 of 2019 and Civil Appeal No.E236 of 2020; and**

**(c) The claimant shall pay costs herein.**

**DELIVERED IN OPEN COURT AT NAIROBI THIS 23RD DAY OF MARCH, 2021.**

**M. MBARU**

**JUDGE**

In the presence of:

Court Assistant: Okodoi

..... and .....