



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAKURU**

**MISC APPLICATION NO. 5 OF 2020**

**ISAAC KIPYEGON LANGAT T/A**

**KOLATO AUCTIONEERS..... APPLICANT/RESPONDENT**

**UNIVERSITY OF ELDORET...RESPONDENT/APPLICANT**

**IN THE MATTER OF WARRANTS OF ATTACHMENT AND SALE IN NAKURU ELRC NO. 3 OF 2019.**

**HOSEA SITIENEI..... PETITIONER**

**VERSUS**

**UNIVERSITY OF ELDORET..... RESPONDENT**

**R U L I N G**

1. For the determination of this Court, is the application dated 7<sup>th</sup> July, 2020 filed by the applicant/ Respondent through the firm of Gumbo & Associates Advocates LLP, brought pursuant to the provisions of **Order 2 Rule 15, Order 51** of the *Civil Procedure Rules* and **Article 159** of the constitution of Kenya 2010. The Applicant prays for the following orders inter alia:

**1) This Honourable Court be pleased to strike out the Applicant Bill of Costs dated 26<sup>th</sup> June, 2020.**

**2) Costs of the Application be met by the Applicant to the Bill.**

2. The application is predicated upon the grounds as set out therein and in the supporting affidavit of the applicant's advocate on record one **Mr.Moses Kipkogei** sworn on 7<sup>th</sup> July, 2020 and on the following grounds.

a) That the applicant herein being dissatisfied with the decision in Court of Appeal civil appeal numbers 55 and 58 of 2017 lodged an appeal at the supreme Court of Kenya being Supreme Court Civil Appeal Number 33 of 2019; university of Eldoret –Vs- Hosea Sitienei.

b) That while the Supreme Court Appeal was pending, the Applicant herein sought for conservatory orders at the Court of Appeal by its application dated 29<sup>th</sup> August, 2019 and another application dated 31<sup>st</sup> October, 2019 which orders were granted by the Court of Appeal on 1<sup>st</sup> November, 2019 staying execution pending hearing and determination of the stay application.

c) That the said orders were served upon the advocates for the petitioners and the auctioneers. subsequently upon request of the applicant herein the court registrar recalled the warrant of attachment which decision was later set aside by this Court.

d) That the stay orders were affirmed by the supreme Court vide orders issued on 14<sup>th</sup> November, 2019. Therefore, urged this Court to strike out the Bill of costs having been taken out and execution commenced when there was valid stay Order issued by the Court.

3. In opposing the application, the auctioneer filed a Replying Affidavit sworn by **Isaac Kipyegon Langat** on 27<sup>th</sup> July, 2020. The Respondent contended that the application is misconceived, incompetent, bad in law, an abuse of the process of the Court.

4. The Respondent/ Auctioneer avers that the Court of Appeal in Civil Appeal Number 55 and 58 of 2017 delivered its judgment on 18<sup>th</sup>

October, 2018 allowing both appeals and remitted both files back to ELRC Court for assessment of remedies attendant to the petitioners.

5. On 8<sup>th</sup> January, 2019 the Applicant herein, filed two applications being civil application number 1 and 2 of 2019 at Nyeri Court of Appeal seeking for the court to review, vary or set aside its judgment of 18<sup>th</sup> October, 2018 and stay execution which application were dismissed for lacking merit.

6. The respondent avers that when the court of Appeal dismissed the said application, the matter at court of Appeal and the one in ELRC ran concurrently and judgement was delivered in the ELRC matter on 9<sup>th</sup> July, 2019.

7. That by an application dated 9<sup>th</sup> September, 2019 the petitioners, **Hosea Sitienei** and **Professor Ezekiel Kiprop**, moved the court to allow them partially execute the Court decree of 9<sup>th</sup> July, 2019 which application was opposed by the respondent who filed a stay of execution application which was dismissed and the petitioner's application was allowed on 24<sup>th</sup> October, 2019.

8. The respondent contends that the supreme Court Orders were staying the Court of Appeal Orders of 18<sup>th</sup> October, 2018 and that if the supreme Court intended to stay the ELRC Orders of 9<sup>th</sup> July, 2019 it ought to have expressly stated as such.

9. That by the time the Supreme Court issued the said Orders, the Court of Appeal had already directed the ELRC court to assess remedies which were already undertaken and no orders remained unexecuted capable of being stayed.

10. Accordingly, he avers that he acted in accordance with law in executing the Court Orders and urged Court to dismiss the Applicant application herein.

### **Applicant submissions**

11. The Applicant submitted that the warrant of proclamation and attachment taken out by the respondent herein were done in defiance of the stay orders issued by the Supreme Court. He argues that the court of appeal directed the matter to be reverted back to ELRC court for assessment of appropriate remedies on 18<sup>th</sup> October, 2018 which orders were stayed by the supreme Court on 1<sup>st</sup> November, 2019.

12. Counsel submitted that the warrants of attachment were extracted on 11<sup>th</sup> November 2019 and executed afterward when the Respondents counsel had already been served with the Supreme Court stay Orders, therefore they were acting in defiance of the Court Orders in the execution proceedings. In this he relied on the cases of **Gusii Mwalimu & 2 others –v- Mwalimu Hotel Kisii** and **Nzoia Sugar Co Ltd –v- Nzoia Sugar Co. Ltd & 3 others [2014] eKLR** where Justice Mabeya held in the later that;

**“As far as I know, the position in law is that, the effect of issuance of Warrants against a judgment/debtor is that any costs incurred in their execution is upon such debtor. However, when such Warrants are recalled and annulled, it means that whatever was done pursuant to their issuance is also a nullity. The debtor is absorbed from acting on them. That leaves the Court with the party who applied for their issuance, in this case the Applicant. It is the Applicant who caused the issuance of the Warrants that were a nullity. Any costs incurred as a result thereof must fall where they lie, at the Applicant's doorstep. Accordingly, I hold that the charges of the auctioneer in the execution of the Warrants dated 11<sup>th</sup> and 12<sup>th</sup> October, 2011 are payable by Nzoia Outgrowers Company Ltd.”**

13. Accordingly, it was submitted that the warrant of attachment relied upon by the auctioneer was a nullity and therefore argues that the party that took out the said warrant in defiance of Court orders ought to bear the costs of the auctioneers.

14. In conclusion the applicant urged this Court to allow the said application with costs to them.

### **Respondent's submissions**

15. The Respondent on the other hand submitted that at the time the conservatory orders were issued by the Supreme Court on 1<sup>st</sup> November, 2019, the assessment of remedies had already been carried out by ELRC Court as directed by the Court of Appeal by its Judgment of 18<sup>th</sup> October, 2018, therefore, there was nothing capable of being stayed.

16. He thus submitted that the attachment and execution was carried out legally and urged this Court to dismiss the Respondents application herein.

17. I have examined the averments and submissions of the parties herein. It is true that this court (Hon. J. Marete) in ELRC Kericho Petition 11/2016 delivered a Judgment on 14/11/2016 which was appealed against. The Court of Appeal allowed the appeal and set it aside but substituted thereto with a declaration that the purported termination of the appellant's respective employment with the 1<sup>st</sup> respondent was null and void.

18. The matter was also remitted to ELRC Kericho for assessment of appropriate remedies attendant thereto by a Judge other than Hon. Marete. The Court of Appeal rendered its Judgment on 18/10/2018.

19. The respondents sought stay orders of the Court of Appeal Judgment but this was declined. Following this development, the ELRC acting on the orders of the Court of Appeal went ahead and rendered its Judgment in appropriate remedies for the petitioners being the sum of Kshs.14,729,122 and 24,173,994.60 respectively on the 9<sup>th</sup> July 2019.

20. There was another application for stay of execution of this Judgment of 9/7/2019 which application was also dismissed by the ELRC (Nyeri).

21. In the meantime, the applicants herein proceeded to file yet another appeal before the Supreme Court Appeal being No. 33/2019. The applicants also sought stay orders which were granted on 1/11/2019. For me to determine whether to allow orders sought in this application, I must determine what was pending execution as at 1/11/2019 when the Supreme Court of Kenya granted the stay orders.

22. The warrants of execution in this court were issued after the stay orders. The Notice of Taxation was also being sought to be determined on 7/7/2020 when the Supreme Court Appeal had already issued stay orders.

23. This in my view was in further disregard to clear orders of Supreme Court Appeal which stayed the Court of Appeal Judgment of 18/10/2018 and therefore by extension any other action pursuant to the Court of Appeal's direction.

24. By the respondent proceeding to purportedly tax their bill of costs dated 26/6/2020, they are in contempt of the orders granted staying execution. I therefore find merit in this application where I allow and strike out the bill of costs dated 26/6/2020. Costs abide the determination by the Supreme Court.

Ruling delivered virtually this 15<sup>TH</sup> day of JUNE, 2021.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:-**

Mwangi for Respondent – present

M. Kamanga for Applicant/Claimant – present

Court Assistant – Wanyoike/Fred