



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 1104 OF 2016

PHILIP MUTINDA.....CLAIMANT/ RESPONDENT

VERSUS

LADY LORI (K) LIMITED.....RESPONDENT/APPLICANT

RULING

1. The Respondent/Applicant seeks relief through the notice of motion expressed to be brought under Order 42 Rule 6(1) and Order 50 Rule 1 of the Civil Procedure Rules, 2010; Sections 12(3), 20(1) of the Employment and Labour Relations Court Act; Rule 17 of the Employment and Labour Relations Court (Procedure) Rules and all enabling provisions of the Law. In the main, the Respondent/Applicant is seeking the following orders:-

i. *Spent*;

ii. THAT this Honourable Court to order a stay of execution of Judgement, Decree and Warrants of Attachment pending the determination of the Application in Court dated 22nd April 2021 and appeal thereafter.

iii. THAT costs for this application be provided for in this Cause.

2. The Application is supported by the Affidavit of Mohamed Ferhan Chaudhri Advocate annexed to the motion and on the grounds on the face of the Application. The grounds, in brief, are to the effect that:

a. THAT the Claimant/Applicant obtained warrants of Attachment of Movable Properties issued on the 23rd July 2021 and has proceeded to proclaim the Respondent/Applicant's movables constituting tools of trade based on the aforesaid warrants which are now due for execution despite a pending Application in Court dated 22nd April 2021 on the same;

b. THAT the Claimant/Respondent made an initial attempt to execute the same Decree and challenged a Court Order delivered by Justice Nzioki wa Makau dated 17th March 2021;

c. THAT indeed that we are in possession of the Decretal Sum of United States Dollars Seventeen Thousand One Hundred and One Point One Six Six Five (\$17,101.1665) from the Respondents/Applicants plus interest as Ordered by this Honourable Court as security for cost however the Claimant/Respondent's Advocates have blatantly refused to accept and/or open a Joint Account with the Respondent/Applicants Advocates;

d. THAT subsequent to the aforesaid order and a pending Application in Court, the Claimant/Applicant is attempting to execute the Decree;

e. **THAT** it is therefore apparent that in the absence of any order stopping the Claimant/Respondent, he shall still execute the Warrants of Attachment and levy execution against the Applicants;

f. **THAT** in view of the Decretal amounts in the face of the harsh economic times, the execution thereof shall occasion immense loss and damage to the Applicants which losses shall not be by way of recoverable damages;

g. THAT if the said execution is not granted, the object of this application and that of the Application pending in court will be defeated and rendered nugatory;

- h. THAT the Respondent/Applicant is willing to deposit the total decretal sum in the Honourable Court;
- i. THAT the Application was made without reasonable delay.
- j. THAT will not occasion any prejudice to the Claimant/Respondent
- k. THAT this application should be granted in the interest of justice and fairness.

3. The Claimant/Respondent is opposed and filed a Replying Affidavit in which the Counsel for the Claimant deponed that it was common ground that the Claimant obtained a Court Order against the Respondent *vide* a Ruling delivered by this Court and while the Order was granted on 17th March 2021, the same was extracted, issued and served *via* email on 25th March 2021. She deponed that is instructive to note that the Respondent was well represented by Counsel when the Ruling and Order aforesaid were given and thus it is presumed that the Respondent had knowledge of the Order on the date it was delivered. She deponed that the Claimant's Advocates furnished the Respondent's Advocates with the requisite forms from Standard Chartered Bank Limited *vide* a letter dated 18th March 2021 received at their offices on Friday 19th March 2021. She deponed that in addition to the above, the Respondent has conveniently failed to disclose that the advance copy of the aforesaid letter and the requisite forms from Standard Chartered Bank Limited were forwarded to the Respondent's Advocates *via* email on the date of the letter. She deponed that in addition to the above, on 31st March 2021 the Claimant forwarded further correspondence to the Respondent through their Advocates requesting for the joint account opening documents and reminding them that the 21-day deadline set by the Honourable Court lapses on 7th April 2021. She deponed that neither correspondence aforesaid elicited any response and that it is clear that the deponent is wilfully and fraudulently misleading this Honourable Court by stating that "*The Respondent/Applicant instructed us to open the Joint Account and furnish them with details to deposit the said decretal sum plus interest in our Advocates Account...*" and that contrary to the aforesaid averment, page 1 of Exhibit MFC-3 clearly demonstrates that the Respondent instructed their Advocates to open the joint account and requested for the details of the joint account in which the Respondent shall deposit the funds. The instructions which were forwarded *via* the Respondent's email of 30th March 2021 read as follows: "*Please go and open the joint account and give us details we deposit the funds*" She deponed that it is instructive to note that the Respondent withheld and/or sat on the instructions to comply with the Court Order until about two weeks after the date the same was granted despite the Order giving a timeline of 3 weeks for compliance. She deponed that in addition, the deponent has further wilfully misled this Honourable Court by stating that they furnished their Client, the Respondent, with their account details on "*the same date*" they received instructions. However, it is evident from page 2 and 3 of Exhibit MFC-3 that the Respondent's Advocates only responded to the Applicant 3 days later after receipt of the instructions, that is on 2nd April 2021.

4. The matter was disposed of by way of submissions which the court need not rehash as the determination is on facts. The issue that I have isolated for determination is whether it is proper and just to vary the terms of the conditional stay granted by the Court. The facts are that a conditional stay was granted and the Court made the timelines finite. There was a 21-day period to open a joint account in the names of the counsels for the parties. The evidence before the Court it is clear that the Respondent was well aware of the determination of the court in real time as the Respondent was duly represented at the Ruling. Further, it is clear from evidence before the Court that the default herein was caused by the Respondent who took their sweet time to initiate the account opening and the transfers necessary for the execution of the Court order. There is a point the Respondent's counsel went as far as to suggest that a joint account opening can be undertaken by a single party to the transaction a fact that they know is as stated by the Claimant since the correspondence attached and the emails reveal the lackadaisical approach to the matter of securing the funds as ordered by the Court. The foregoing is grounds for the finding that the application by the Respondent lacks merit and is dismissed with costs to the Claimant. As execution had commenced the same to proceed as the stay granted herein against the execution is hereby vacated.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF OCTOBER 2021

Nzioki wa Makau

JUDGE