



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 581 OF 2018

(Before Hon. Lady Justice Maureen Onyango)

CEVINE OTIENO OWINO.....CLAIMANT/DECREE HOLDER

VERSUS

COAST BUS (MSA) LIMITED.....RESPONDENT/JUDGMENT DEBTOR

RULING

1. Judgment in this suit was delivered on 3rd October 2019 following an ex parte hearing as the Respondent had not defended the claim.
2. Vide an application dated 13th February 2020, the Respondent/Judgment Debtor sought the following orders –
 - (i) *THAT this application be certified urgent and service be dispensed with in the first instance.*
 - (ii) *THAT pending the hearing and determination of the application the court be pleased to stay the execution proceeding herein.*
 - (iii) *THAT pending the hearing and determination of this application, the court be pleased to stay the Execution of the judgment entered herein on 3rd day of October 2019 in its entirety.*
 - (iv) *THAT the Court be pleased to set aside the Judgment of LADY JUSTICE MAUREEN ONYANGO entered on the 3rd day of October 2019 in its entirety and the Defendant/Applicant be granted leave to file and serve its statement of Defence out of time.*
 - (v) *THAT the Court be pleased to make such orders as it sees-fit.*
 - (vi) *THAT cost of this application be provided for.*
3. On 25th February 2020 when the parties attended Court for hearing of the said application, parties compromised the application by recording a consent as follows –
 - (1) That the Respondent files defence within 7 days;**
 - (2) They pay to the Claimant throw away costs of Kshs.10,000/= within 7 days;**
 - (3) In default of either of the two conditions execution to issue.**
4. It would appear that the Respondent/Judgment Debtor did not file defence within 7 days as agreed in the consent and/or comply with any of the terms of the consent. As a result the Claimant/decree holder proceeded to execute the decree through Zasha Auctioneers who attached the Respondent/Judgment Debtor's motor vehicle registration No. KCC 554R after obtaining orders for police security on grounds that the Respondent/Judgment Debtor had resisted execution.
5. Following the attachment the Respondent/Judgment Debtor filed several applications one dated 26th August 2021 and the other two dated 30th August 2021.

6. In the application dated 26th August 2021, it seek the following orders –

i) THAT the Judgement dated 3rd October 2019 on which the respondent is acting on was set aside on the 25th February 2020 and therefore the respondent has no basis for execution

ii) THAT the respondent and or their advocates on record have never served the Applicant and or their advocates on record with any mention and or hearing notice.

iii) THAT the acts and actions by the respondents are an embarrassment and abuse of the court process.

iv) THAT the respondent has appointed auctioneers namely

Zasha Auctioneers to attach the property of the applicant without following due process of the Law.

v) THAT the purported attachment and sale by public auction is in blatant contravention of the Law and due procedure for the reason that the Judgement that the respondent is acting upon was set aside and therefore the execution has no legal basis.

vi) THAT the applicant will suffer great prejudice if the orders sought are not granted.

vii) THAT costs of this application be in the cause.

7. The application dated 30th August 2021, both Chamber Summons and Notice of Motion, seek the same orders which are –

(i) Spent.

(ii) THAT this Honourable court review and set aside orders issued on the 6th day of August, 2021 by Hon. Lady Justice M. Mbaru granting the respondent authority to break into and attach proclaimed property owned by the applicants.

(iii) THAT pending hearing and determination of this application, this Honourable court review and set aside the orders issued on the 27th day of August, 2021 by Hon. Justice Nzioki wa Makau setting this matter for inter-party hearing on the 21st day of September, 2021 and hear it at first instance.

(iv) THAT pending the hearing and determination of this

application the court be pleased to issue prohibitory injunction/orders restraining the respondent directly and or through Zasha Auctioneers from the sale of motor vehicle registration number KCC 554R or any other property belonging to the applicant.

(v) THAT pending hearing and determination of this application this Honourable court do issue mandatory injunction directing the release of motor vehicle registration number KCC 554R which is in the possession of the Zasha Auctioneers.

(vi) THAT pending hearing and determination of this application this honorable court do issue a prohibitory injunction restraining the respondents directly or through his agents from interfering with the business of the applicant or any movable property in relation to the business of the applicant.

(vii) THAT status quo be maintained pending hearing and determination of this application.

(viii) THAT costs of this application be in the cause.

8. The application dated 26th August 2021 was placed before Nzioki Wa Makau J. Duty Judge who certified the application urgent and fixed it for inter partes hearing on 21st September 2021.

9. The application dated 30th August was paced before Onesmus Makau J., the Duty Judge who granted interim prohibitory injunction in terms of prayer 4 of the application and fixed the same for hearing on 21st September 2021.

10. The parties were heard in Court on 21st September 2021.

11. Mr. Walubengo for the Applicant/Judgment Debtor submitted that the application dated 30th August 2021 is a result of a previous application (presumably the application dated 26th August 2021). He submitted that the orders of Justice Onesmus Makau (sic) were unfavourable. I believe he meant the orders of Justice Nzioki Wa Makau of 27th August 2021 in respect of the application dated 26th August 2021. The orders of Justice Onesmus Makau were indeed favourable as he granted temporary prohibitory injunctive orders.

12. Mr. Walubengo confirmed that the motor vehicle was attached

and they filed another application dated 30th August 2021 which seeks mandatory orders of release of the Judgement Debtor's motor vehicle.

He submitted that the motor vehicle was attached without seeking leave of Court. That the same is worth Kshs.8 million while the decretal sum is only Kshs.240,000/=. That his client had suffered serious loss of income.

13. He prayed for orders that the attached motor vehicle be released and for compensation for days when the motor vehicle was impounded.
14. Mr. Juma for the Decree Holder submitted that the consent recorded on 25th February 2020 was conditional upon payment of throw away costs within 7 days and filing of defence within 7 days. That the consent provided that in the event of default, execution to proceed.
15. He submitted that the Decree Holder had not been served with any defence and that he was not aware that the Judgment Debtor had complied.
16. Mr. Juma further submitted that since the orders of 25th February 2020 were by consent, the same could only be set aside by consent of the two parties. That the Decree Holder executed because the Judgment Debtor did not comply with the consent orders.
17. He submitted that the argument that the assets attached were worth Kshs.8 million while the decretal sum was Kshs.295,000/= is neither here nor there. That the orders of the Court were self-executing. That litigation must come to a stop.
18. In a rejoinder, Mr. Walubengo submitted that indeed the Judgment Debtor filed a defence on 24th April 2020 and served the Decree Holder via email, which Counsel believed was received.
19. On the attachment, Counsel referred the Court to Section 44 of the Civil Procedure Act. He submitted that the Judgment Debtor is a company engaged in transport business.
20. Counsel further submitted that Order 22 Rule 18 is clear that one must seek leave by giving the Defendant a show cause notice.
21. Counsel urged the Court to grant the orders releasing the attached motor vehicle and compensation for accrued losses.

Analysis and Determination

22. The issues for determination are whether the execution of the decree and the attachment of the Judgment Debtor's motor vehicle registration number KCC 554R was unlawful and whether the Judgement Debtor/Applicant is entitled to the orders sought.
23. It is not in dispute that on 25th February 2020, the parties recorded a consent order in respect of the application by the Judgment Debtor dated 13th February 2020. The consent was to the effect that the ex parte judgment and decree be set aside upon the Judgment Debtor paying throw away costs of Ksh.10,000/= and filing defence within 7 days. That in default execution to issue.
24. Counsel for the Judgment Debtor submitted that defence was filed on 24th April 2020. This is some 29 days after the date of the consent order. There was no mention of the payment of the throw away costs by either the Judgment Debtor's Counsel or the Decree Holder's Counsel who only stated that the Judgment Debtor did not comply.
25. The Decree Holder's Counsel further stated that the Judgment Debtor never served the defence, which was obviously filed well outside the timeline agreed upon in the consent. There is no evidence on the Court record of service of the defence.
26. In the undated supporting affidavit of CORNELIUS W. LUPAO he states at paragraph 6 that –
 6. *THAT the Applicant complied with the orders of the Court being payment of throw away costs to the Respondent and filing and service of the defence out of time within 7 days.*
27. This is obviously not true as the Counsel for the Judgment Debtor submitted that the defence was filed on 24th April 2020, after 29 days and not 7 days.
28. Section 44 of the Civil Procedure Act provides as follows –

44. Property liable to attachment and sale in execution of a decree

(1) All property belonging to a judgment debtor, including property over which or over the profits of which he has a disposing power which he may exercise for his own benefit, whether that property is held in his name or in the name of another but on his behalf, shall be liable to attachment and sale in execution of a decree:

Provided that the following shall not be liable to attachment or sale—

(i) the necessary wearing apparel, cooking vessels, beds and bedding of the judgment-debtor and of his wife and children, and those personal ornaments from which, in accordance with religious usage, a woman cannot be parted;

(ii) the tools and implements of a person necessary for the performance by him of his trade or profession;

29. Further Order 22 Rule 18 of the Civil Procedure Rules provides as follows –

[Order 22, rule 18.] Notice to show cause against execution in certain cases.

(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 executing 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:

Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom the execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the court has ordered execution to issue against him:

Provided further that no such notice shall be necessary on any application for the attachment of salary or allowance which is caused solely by reason of the judgment debtor having changed his employment since a previous order for attachment.

(2) Nothing in subrule (1) shall be deemed to preclude the court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice.

(3) Except as provided in rule 6 and in this rule, no notice is required to be served on a judgment debtor before execution is issued against him.

30. It is clear from the forging that the Judgement Debtor cannot benefit from the provisions of either Section 44 of the Civil Procedure Act or Order 22 Rule 18 of the Civil Procedure Rules.

31. Under Section 44 of the Act, the Judgment Debtor has not demonstrated that the attached motor vehicle was the only motor vehicle it owned or that its operations were paralyzed as a result of the attachment of the subject motor vehicle. It has not even demonstrated that it suffered any loss as a result

of the attachment.

32. Secondly, Order 22 Rule 18 clearly provides that notice to the Judgment Debtor is not necessary if there was a previous application made within one year. The application for execution was first made on 7th February 2020 following service of the decree upon the Judgment Debtor on 28th January 2020 as is evident from the affidavit of service of ALEXANDAR OCHWO ALELA dated 5th February 2020.

33. For the foregoing reasons I find that the attachment was not illegal or irregular.

34. On the issue about the decretal sum being much lower than the value of the attached asset, the Applicant/Judgment Debtor has not demonstrated that there was any other asset with a lower value sufficient to cover the decretal sum that was available for attachment. In any event, there was a proclamation which notified the Judgment Debtor of the intended attached. It was under a duty to mitigate its losses.

35. The attachment was further in default by the Applicant of a consent order recorded by the parties. The Judgment Debtor was the author of its tribulations and cannot cry foul to the Decree Holder who had in fact indulged the Judgment Debtor by agreeing to the setting aside of the ex parte judgment, albeit on conditions which would have cost the Judgment Debtor only throw away costs of Kshs.10,000.

36. I agree with Mr. Juma that the value of the attached asset it neither here nor there, taking into account the circumstances of this case.

Is the Applicant entitled to the orders sought?

37. I think not. The Applicant has not come to Court with clean hands. It defaulted in filing defence. It further defaulted in complying with the consent order.

38. To add insult to injury, the Judgment Debtor falsely stated in the supporting affidavit of CORNELIUS W. LUPAO in support of the application dated 30th August 2021 that it complied with the consent orders by paying throw away costs and filing defence within 7 days as per the consent when it had indeed not done so.

39. For the foregoing reasons, I find no merit in the application herein and dismiss the same with costs.

40. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 5TH DAY OF NOVEMBER 2021

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE