



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 63 OF 2015

(Before Hon. Justice Mathews N. Nduma)

NATIONAL UNION OF WATER AND SEWERAGE EMPLOYEES.....CLAIMANT

VERSUS

LAKE VICTORIA NORTH WATERS

SERVICE BOARD KAKAMEGA – BUSIA WATER SUPPLY.....RESPONDENT

AND

KAKAMEGA COUNTY WATER & SANITATION

COMPANY LIMITED.....1ST INTERESTED PARTY

COUNTY GOVERNMENT OF KAKAMEGA.....2ND INTERESTED PARTY

RULING

1. In this application dated 17th January 2020, the Applicant prays for an order in the following terms: -
2. That the court orders that the firm of M/s Mahalah & Co. Advocates is improperly on record in this Cause and declare that all procedures done by the said firm of Advocates be expunged from the record.
3. The application is premised on grounds set out on the face of the notice of motion and in the supporting affidavit of Elijah Otieno Awach the Secretary General of the claimant Union as follows: -
 - i. The suit was fully heard and determined vide a Judgment delivered on 19th July 2018.
 - ii. That in execution of the decree herein the claimant applied and the court issued warrants of attachment and sale of the respondent's property which warrants were executed by Yamuko Auctioneers.
 - iii. The Auctioneer proclaimed the respondent's movable property on 1st February 2019 in execution of the warrants.
 - iv. That without any instructions from the claimant the firm of M/s Mahalah & Company Advocates lodged a Notice of Appeal against the decision of the Court on 16th August 2018 and as a result the claimant is unable to complete the execution process and to date the respondent has not satisfied the decree herein.
 - v. That the conduct of the said advocate in the proceedings is contemptuous and an abuse of court process.
4. The application be granted with costs.

Replying Affidavit

5. The application is opposed vide a replying affidavit of Eng. Boniface L. Mulama, the acting Chief Executive officer of the Respondent. The gist of the response is that firm of Mahalah & Co. Advocates came on record in the matter pursuant to an application by the two grievants namely Mr. Wilson N. Chietech and Mr. Gilbert Kaliboh on 5th November 2018 consequent upon the firm of Mahalah and Co. Advocates came on record in this matter.
6. That the said firm of advocates subsequently obtained orders to commit Eng. Boniface L. Mulama to civil jail for failure to pay the decretal sum.
7. That on 16/11/2018, Mr. Mahalah Advocate accompanied by ten (10) police officers went to the office of the deponent to arrest him pursuant to the said warrant of committal.
8. The attempts to stop the process of arrest failed and the respondent paid the entire decretal sum of Ksh. 5,696,450 through the firm of Mr. Mahalah & Co. Advocates on 1st February 2020. Annexed to the application is a letter dated 2nd February 2019 by the firm of Mahalah & Co. Advocates acknowledging receipt of the decretal sum.
9. That on 1st February 2020 upon payment of the decretal sum the deponent received the proclamation notice from Yamuku Auctioneers purporting to commence execution against the Respondent's property and the deponent informed and showed them evidence of settlement of the decretal sum in favour of the firm of mahalah & Co. Advocates.
10. That the matter is already settled and this application is an abuse of court process and it be dismissed with costs.

Determination

11. The application brought by the applicant dated 17th January 2020 has not been filed in good faith in that the applicant is guilty of non-disclosure of the facts of the matter as set out in the replying affidavit of the respondent. 12. Indeed, he applicant did not file further affidavit to rebut the facts disclosed in the replying affidavit that the firm of Mahalah & Co. Advocates was duly instructed by the two grievants in this matter vide proceedings of 5th November 2018.
12. That the said law firm has lawfully executed the Judgment and decree of the Court vide contempt of Court proceedings and the respondent has fully satisfied the Judgment debt.
13. The Court finds that this application is an abuse of Court process and is bereft of any merits at all.
14. The judgment of the Court having been fully settled, the matter is marked as fully settled and any purported further execution is declared unlawful null and void.
15. Any issues of unsettled fees that may arise between the Union and its grievant members ought not to be visited unlawfully on the respondent. There are lawful avenues for that purpose.
16. Accordingly, the application is dismissed with costs and matter marked as closed.

Ruling Dated, Signed and Delivered at Nairobi this 25th day of June 2020.

Mathew N. Nduma

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, this ruling has been delivered to the parties online with their consent. 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 18 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

Mathews N. Nduma

Judge

Appearances

Mr. Omae for Claimant/Union

Mr. Oduor for the Respondent.

Chrispo: Court Clerk