



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 179 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

JOSEPH OUKO LWAMBE.....CLAIMANT

VERSUS

ROYAL GARMENT INDUSTRIES LIMITED.....RESPONDENT

RULING

Before me, for determination is the Respondent/Applicant's Notice of Motion Application dated 14th February, 2020. It seeks the following orders that:

1. Spent.
2. There be a stay of execution of the Warrants of Attachment issued on 31st January, 2020 and the proclamation of Attachment dated 3rd February, 2020 issued by M/s Mbusera Auctioneers pending hearing and determination of the instant Application.
3. This Court be pleased to issue an order recalling and cancelling the warrants of attachment dated 31st January, 2020.
4. The Costs arising out of the execution of the Warrants of Attachment and the instant application to be met by the Claimant.

This Application is premised on the grounds that:

1. This Court on the 29th January, 2019 delivered Judgment in this matter upon which the Respondent/Applicant was ordered to pay the Claimant a total decretal sum of Kshs.71,172.00/- together with costs thereof.
2. Between 29th January, 2019 and March 2019, the Respondent through its advocates on record made several attempts to access the Court file to appraise with the contents of the Judgment with no reasonable hope whatsoever.
3. On 12th March, 2019 the Respondent proceeded to issue to the Claimant through its Advocates on record Cheque No. 001501 for Kshs.71,172.00/- being the decretal sum due and owing to the Claimant herein.
4. This Cheque was however returned by the Advocate on record for the Claimant with a demand that the cheque be issued in the name of the Advocates on record.
5. The Respondent subsequently reissued a cheque being cheque No. 001603 on 7th May, 2019 in favour of the Claimant's Advocates for Kshs.71,172.00/- being full and final settlement of the decretal sum as awarded by this Court.
6. The matter subsequently proceeded for taxation and the Claimant's bill was taxed at Kshs.127,040/-. However, the Claimant failed to attach any order from this Court to buttress this assertion.
7. The Respondent/Applicant learnt on 3rd February, 2020 that the Claimant's Advocate had sent its Agents M/S Mbusera Auctioneers to the Respondent's premises with warrants of Attachment dated 31st January 2020 and proceeded to issue a Notice of Proclamation dated 3rd February, 2020.
8. The said Warrants of Attachment are erroneous and an outright illegality for the reasons that:

- i. The same contains a decretal amount of Kshs.71,172.00/- which amount had already been settled by the Respondent way back in May 2019.
- ii. It further contains interest on the decretal amount of Kshs.8,587.00/- which interest does not arise in light of the fact that the decretal amount had already been settled by the Respondent.
- iii. The amount contained taxed costs that were never served upon the Respondent.
- iv. The consequential Notice of Proclamation dated 3rd February, 2020 that is squarely based on the above erroneous Warrant of Attachment is therefore unjustified.

9. The Respondent was only served with the Certificate of Taxation issued by this Court on 16th December, 2019 on 4th February, 2020 and the Claimant proceeded to instruct the auctioneers to execute based on an Order that was never served upon the Respondent despite several requests for service.

10. The Respondent further maintains that the Claimant further failed to comply with the provisions of Order 22 Rule 18 (a) of the Civil Procedure Rules, 2010.

11. The Respondent did on 13th February, 2020 issue the Claimant yet another cheque being Cheque No. 002085 for Kshs.127,040.00/- being full and final settlement of the costs arising out of the Taxation of costs before this Court.

12. What remains for determination by this Court is whether or not the Proclamation, intended execution and warrants of attachment herein as well as the Auctioneer's costs are justified in the circumstances to which it maintains that the same were illegal or irregularly obtained and are therefore erroneous.

13. The Applicant stands to suffer irreparable loss and damage if the aforementioned irregularities are not halted by this Court for the reason that the Respondent shall be forced to cater for costs that are wholly not justified in the circumstances.

The Application is further supported by the Affidavit of **WELLINGTON ATTANASI**, the Administration Manager of the Respondent Bank sworn on 14th February, 2020 in which he reiterates the grounds as set out on the face of the notice of motion application.

The Application is filed under Order 22 Rule 22 and Rule 50, Order 51 Rule 1 of the Civil Procedure Rules, 2010, Rule 16, Rule 27(g) and 32 of the Employment and Labour Relations Court Rules and Section 3 of the Employment and Labour Relations Court Act.

In response to the Application the Claimant filed a Replying Affidavit sworn by **NAMADA SIMONI**, counsel on record for the Claimant on 21st February, 2020 in which he contends that the Application as filed is vexatious, amounts to an abuse of the Court process and is an attempt by the Respondent/Applicant to save face.

He further averred that the Respondent despite settling the decretal sum as awarded by the Court, failed to settle the costs prompting the Claimant to proceed with taxation of his Bill of Costs.

He further averred that the said Bill was taxed on 26th November, 2019 and immediately on 28th November, 2019 the Respondent's Advocates on record were duly informed of the same vide email communication. That despite notice and service of the Certificate of Taxation the Respondent failed to settle the amount forcing the Claimant to proceed with the process of execution.

The Affiant maintained that at the time of proclamation the Respondent had not paid the costs due and therefore the proclamation was legal and justified in the circumstances.

It is on this basis that the Claimant urged this Court to find the instant Application devoid of merit and to proceed and dismiss the same with costs to the Claimant.

Parties thereafter agreed to disposed of the Application by way of written submissions.

Applicant's Submissions In its Submissions the Respondent/Applicant maintained that the Warrants of Attachment dated 31st January, 2020 are indeed erroneous and an outright illegality on the face of the record and that the consequential Notice of Proclamation dated 3rd February, 2020 by the Auctioneers is based on an illegality and is therefore null and void *ab initio*.

The Respondent/Applicant further contends that it is likely to suffer irreparable loss and damage if the irregularities are not halted by this Court as it shall be forced to cater for costs that are wholly not justified in the circumstances.

It is on this basis that the Applicant argued that this Court ought to recall the illegal warrants and that the consequent auctioneer's fees be declared unjustified in the circumstances.

In conclusion the Applicants urged this Court to allow the instant Application as prayed.

Claimant's Submissions

The Claimant on the other hand submitted that upon failure by the Respondent to settle his costs, he rightfully proceeded with the process of execution and was issued with Warrants of attachment by this Court on 31st January, 2020. He further maintains that the said amount remains due and outstanding and therefore urged this Court to dismiss the instant Application with costs to the Claimant.

The Claimant further maintains that the Warrants of Attachment was properly drawn to scale and there was proper service of the Certificate of taxation on the Respondent via the email dated 18th December 2019.

The Claimant contended that the Applicant having been well aware of the Judgment entered in his favour, the Respondent ought to have complied with the Court Order without undue delay. In the circumstances the Claimant argued that the issuance of the Warrants of Attachment and subsequent proclamation was valid and is thus justified.

The Claimant further submitted that the Respondent is bound to bear the Auctioneer's costs by dint of Rule 7 of the Auctioneers Rules, 1997 for failure to honour the payments of costs timeously thus prompting the action by the auctioneers and is therefore liable to pay the Auctioneer's fees. The Claimant relied on the cases of **Re Ennio Limited (2009) eKLR** and **Bonface Bandari Chipa v Mwadzombo Jumbale and 3 Others (2016) eKLR**.

Analysis and Determination

After considering the parties' arguments and the evidence adduced, I find that there is only one issue for determination being whether the instant Application is merited or not.

The application herein was brought under Order 22 Rule 22 of the Civil Procedure Rules which provides:

- 1. The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.**
- 2. Where the property or person of the judgment-debtor has been seized under an execution, the court which issued the execution may order the restitution of such property or the discharge of such person pending the results of the application.**
- 3. Before making an order to stay execution or for the restitution of property or the discharge of the judgment-debtor the court may require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit.**

Further, Order 22 Rule 50 provides as follows:

Determination of attachment.

Where any property has been attached in execution of a decree, but by reason of the decree-holder's default the court is unable to proceed further with the application for execution, it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a future date and upon the dismissal of such application the attachment shall cease.

The Applicant maintains that the Warrants of Attachment are erroneous and an outright illegality and if allowed to proceed it would be forced to cater for costs that are wholly not justified.

The Claimant on the other hand maintains that the issuance of the Warrants of Attachment dated 31st January 2020 and Proclamation were justified as the Respondent failed to settle his costs in good time. He further maintains that as a result of the commenced execution process the Respondent is bound to settle the Auctioneers fees and other expenses.

I have carefully examined the documents in question and note that indeed at the time of commencement of the execution process the Respondent had not settled the costs despite taking part in the process of taxation.

Justice is a double edged sword. It cuts both ways. A person seeking justice must also be prepared to do justice. In that breath the Respondent cannot seek this Court's protection if it is not willing to abide by Court Orders. Noting that execution commenced following the Respondent's failure to settle the Claimant's costs as awarded it is bound to settle all costs arising from the action including Auctioneers fees. Reference is made to the case of **Re Ennio Limited (2009) eKLR** where the Court held that:

"...Since the auctioneers costs arose as a result of the Respondent's indolence, the Auctioneers Act recognizes payment of auctioneers costs by the party at fault which means the applicant would bear the auctioneers charges."

Further, the Respondent has not raised sufficient reasons for the grant of the Orders sought in its Application. I find that the instant Application is devoid of merit and the same is dismissed with costs to the Claimant.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 30TH DAY OF OCTOBER 2020

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