



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1803 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

PROF. ROSE AOKO OGWANG.....CLAIMANT

VERSUS

NATIONAL GENDER AND EQUALITY COMMISSION.....RESPONDENT

RULING NO. 2

Before me for determination are two twin Applications both filed by the Respondent/Applicant dated 21st July, 2020 and 10th August, 2020 seeking to set aside the warrants of attachment and quashing notices of **BETABASE AUCTIONEERS** dated 15th and 16th July, 2020 respectively in execution of the decretal sum of Kshs.16,255,894.33/-.

The Applicant further seeks unconditional stay of execution of the decree pending lodgement, hearing and determination of the Respondent's intended Appeal to the Court of Appeal.

The Respondent commission further seeks to have Orders for the release of the certified copies of the typed proceedings for use in the intended Appeal.

Both Applications are supported by the Affidavits of **BETTY SUNGURA NYABUTO**, the Respondent's Secretary/CEO sworn on 21st July, 2020 and 10th August, 2020 respectively in which she reiterates the grounds on the face of the motions.

The two Applications are vehemently opposed by the Claimant herein who filed Replying Affidavits dated 11th August, 2020 and 18th August, 2020 in which she avers that since this Court rendered its decision 2 years ago there have been two orders of conditional stay of execution issued whose terms have never been complied with by the Respondent/Applicant.

She further maintains that in the instant Application the Applicant now seeks to sanction and legalize its non-compliance with court orders.

The Affiant further maintains that the Applicant's reasons for non-compliance are inexcusable and it is therefore not entitled to the orders it now seeks in the instant Applications.

She further contended that the Applicant is yet to comply with the orders of this Court that required it to deposit half of the decretal sum in Court on or before 11th August, 2020 and therefore has no audience before this Court.

It is the Claimant's argument that the Applicant ought to comply with the Orders granted by this Court on 4th August, 2020 before approaching this Court to hear its Applications.

She urged this Court to find the Applications as filed by the Applicant devoid of merit and accordingly dismiss them with costs to the Claimant.

Parties agreed to dispose of the Applications by way of written submissions.

Submissions by the Parties

In its submissions the Applicant maintained that its failure to comply with the conditional stay orders of this Court as directed on 5th July,

2019 was occasioned by the delay at the Court's Registry to finalize the issuance of the typed proceedings.

The Respondent further submitted that its failure to comply with the second conditional order of depositing the decretal sum in Court as directed was occasioned by conditions beyond its control following the COVID-19 pandemic.

It further submits that it is nonetheless very keen on pursuing its Appeal at the Court of Appeal instituted vide the Notice of Appeal and that the Appeal would be rendered nugatory if the Orders sought in the instant Applications are not granted as it will not be able to recover the decretal sum from the Claimant in the event the Appeal is successful. It further maintained that the Applicant is at risk of sale by auction as the Claimant has since proceeded with the process of execution.

The Applicant further argued that the warrants of attachment and sale dated 15th July, 2020 and proclamation notice dated 16th July, 2020 are illegal by dint of the provisions of Section 21 (4) of the Government Proceedings Act. To buttress this argument, the Respondent/Applicant relied on the cases of **Pravin Bowry v EACC (2015) eKLR**, **Republic vs PS Ministry of Internal Security ex parte Fredrick Manoah Egunza (2012) eKLR** and **Nahashon Omwoha & 66 Others v AG & Others (2017) Eklr**.

The Respondent further contends that this Court is bound to Order for the unconditional stay of execution pending lodgement, hearing and determination of the Respondent's Appeal at the Court of Appeal by dint of the provisions of Article 59 (1) of the Constitution of Kenya as read with Section 8 of the National Gender and Equality Commission Act.

The Respondent urged this Court to exercise its unfettered discretion and allow its Applications as filed in the interest of justice to prevent its Appeal being rendered nugatory.

It further argued that this Court is required under the principle of proportionality and equality of arms and has a duty to create a level playing field and balance the respective interests of parties. For emphasis the Respondent relied on the case of **Harit Sheth T/A Harit Sheth Advocates v Shamas Charania (2010) eKLR**.

The Respondent further contended that continued attachment of public assets entrusted to the Respondent would gravely work against Public Policy.

It is on this basis that the Respondent/Applicant urged this Court to allow its Applications in terms of the reliefs sought therein.

Claimant's Submissions

The Claimant on the other hand submitted that the Warrants of attachment and proclamation notices are legal that the Applicant cannot invoke the provisions of Section 21 of the Government Proceedings Act as it is not protected by the said provision. To buttress this argument, the Claimant relied on the case of **Tom Ojienda & Associates v National Land Commission & Another (2019) eKLR** where the Court held that even though the Applicant was an independent commission it cannot rely on the provisions of the Government Proceedings Act to be shielded from execution.

Further reference is made to the case of **Ikon Prints Media Company Limited v Kenya National Highways Authority & 2 Others (2015) eKLR** and **Greenstar Systems Limited v Kenyatta International Convention Centre (KICC) & 2 Others (2018) eKLR** where the Courts affirmed that independent commissions do not necessarily mean the Government.

The Claimant further submitted that the Respondent herein is indeed not "*the Government*" or "*Government department*" for the purposes of the Government Proceedings Act and is therefore not exempted from the normal Civil execution by dint of Section 21 of the Government Proceedings Act.

The Claimant further submitted that the assertion by the Respondent/Applicant that it can only settle the decretal amount in the event an Order of mandamus is issued is similarly not true as it is clear from the above citations that the Respondent being an independent commission is not protected under the Government Proceedings Act and thus there was no need for the Claimant to make a Judicial Review Application as an Order for Mandamus does not form part of the execution process. For emphasis the Claimant cited the case of **Republic v County Secretary (Mombasa County Government) & Another Ex-parte Onyango Malombo Robinson T/A O.M Robinson & Co. Advocates (2018) eKLR**.

In the circumstances the Claimant urged this Court to find that the proclamation, attachment and imminent auction are procedural and legal.

The Claimant submitted that the grounds given by the Respondent/Applicant in support of the application are unsatisfactory and untrue. It was his position that it was the Respondent/Applicant's duty to comply with the conditional orders or explain to Court the difficulties it was experiencing. However, the Respondent did neither hence should be punished by dismissing the two applications.

The Claimant relied on the case of **Kenya Union of Savings and Credit Cooperatives [KUSCCO] Limited v Nairobi City Council [now Nairobi City County & 2 Others] [2015] eKLR** where it was held that it was not the duty of the Court to condone deliberate disobedience of its orders nor waver from its responsibility to deal decisively and firmly with the approved contemnors.

The Claimant further submitted that making the application for stay of execution two years after the judgment was delivered amounted to inordinate delay. It was his position that seven months' delay after the lapse of the first order of stay also amounted to unreasonable delay.

It was the Claimant's submissions that the Respondent/Applicant did not need the approval of the Attorney General or Exchequer for budgetary allocation hence any assertion to the contrary is nonfactual. According to the Claimant, the import of article 249 (2) and (3) was

that the Respondent/Applicant was an independent commission subject to no one's control or directions as was held in the case of **Judicial Service Commission v Salaries and Remuneration Commission & Another [2018] eKLR**.

Nevertheless, the Claimant contended that if indeed the Respondent/Applicant was facing financial constraints in satisfying the decree, it ought to have moved this Court for the appropriate orders that would enable it settle its obligations while staying afloat as was held in the case of **Republic v County Chief Officer, Finance & Economic Planning, Nairobi City County ex parte David Mugo Mwangi [2018] eKLR**. In that case the Court further observed that a party's financial difficulties was not a reason to evade its responsibilities.

According to the Claimant, failure to obtain typed proceedings did not automatically warrant the grant of an order for stay or extension of time as was held by the Supreme Court in the case of **County Executive of Kisumu v County Government of Kisumu & 8 Others [2017] eKLR**. In the Claimant's view, the Respondent/ Applicant was supposed to give satisfactory reasons for the delay in obtaining typed proceedings. The Respondent/Applicant did not adduce any evidence to prove its assertion that the Registry had been understaffed or that the file was misplaced.

In conclusion the Claimant urged this Court to dismiss the applications with costs.

Analysis and Determination

After considering the Applications filed, Affidavits filed, submissions by the respective parties and authorities cited therein, there is only one issue for determination being whether the Applications dated 21st July, 2019 and 10th August, 2020 are merited.

The Respondent/Applicant has put in lengthy submissions urging this Court to allow its Application for unconditional stay of execution pending the lodging, hearing and determination of the intended Appeal at the Court of Appeal.

This Court did on 4th August, 2020 issue conditional stay to the Respondent/Applicant that it deposits half the decretal sum in Court on or before end of 11th August, 2020.

The Applicant did not comply with the said Orders and instead now seeks to be allowed unconditional stay pending the lodging, hearing and determination of its intended Appeal.

It now seeks to hide behind the provisions of Section 21 of the Government Proceedings Act arguing that execution cannot issue against it being an independent commission.

I have considered arguments by both parties on this issue and agree

with Claimant's submissions that the Respondent is not covered by the provisions of Section 21 of the Government Proceedings Act that the section refers strictly to the 'Government' and/or Government departments and as such independent commissions cannot rely on the said provision. Reference is made to the case of **Tom Ojienda & Associates v National Land Commission & another (2019) eKLR**, where the Court was called upon make a decision on whether or not the National Land Commission, a commission established under Chapter 15 the Constitution of Kenya 2010, like the respondent herein, is protected from execution proceedings by dint of Section 21 of the Government Proceedings Act. The Judge held as hereunder, from paragraphs 22 to 24:

"[22] Having given consideration to the submissions and the authorities cited by learned counsel herein, I take the view that, inasmuch as the Respondent is independent, and clothed with requisite constitutional powers to sue and be sued in its own corporate name, it is not "the Government" or a "Government Department" for purposes of the Government Proceedings Act. Indeed, it was in recognition of this independence that it engaged the services of the Applicant herein to offer it legal representation. Consequently, my considered view is that the Respondent is amenable to the usual legal consequences flowing from such processes, including execution of ensuing decrees. This is because there is no such protection afforded by its organic legislation, the National Land Commission Act, to shield the Respondent from the execution process.

[23] Moreover, it is telling that whereas the Government Proceedings Act was amended by the Government Proceedings (Amendment) Act, 2015 to include County Governments, Parliament, in its wisdom, did not consider it apposite to extend the same shield to independent commissions such as the Respondent.

Further in the case of **Ikon Prints Media Company Limited v Kenya National Highways Authority & 2 Others [2015] eKLR** the Court held that: -

"Foremost though, it is important to point out that it would not be tenable to invoke the Government Proceedings Act (Cap 40) as a bar to any execution herein. The 1st Respondent is a body corporate with perpetual succession and a common seal. It is a corporate entity capable of subsisting independently. It is dependent on Government funding but it is not government or servant of or agent of Government for the purposes of the Government Proceedings Act. The 1st Respondent is an independent judicial person capable of being sued and suing. Its litigation does not involve the Government. Any judgments decreed against the 1st Respondent are not judgments against the government but against an independent juridical body..."

In the circumstances, I find that the warrants of attachment, proclamation notices and the imminent proclamation are procedural and legal.

Justice is a double edged sword. It cuts both ways. A person seeking justice must also be prepared to do justice. The Respondent cannot

seek this Court's protection if it is not willing to abide by this Court's Orders.

The upshot is that the Applications as filed by the Respondent/Applicant are devoid of merit and are accordingly dismissed with costs. The Respondent/Applicant is further directed to deposit the decretal sum as directed on 4th August, 2020 within 7 days from the date hereof failing which the Claimant/Decree Holder is at liberty to continue with execution.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13TH DAY OF NOVEMBER 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