



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 262 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 11th November, 2020)

JOSEPH KAHORO MUNDIA T/A UPSTATE

KENYA AUCTIONEERS.....AUCTIONEER/APPLICANT

AND

AGGREY ONYANGO OBER.....CLAIMANT

VERSUS

STEELMAKERS LIMITED.....RESPONDENT

RULING

1. The Application before Court is the Respondent/ Applicant's Notice of Motion dated 14th September, 2020 seeking orders that:-

a) Spent.

b) Pending the hearing and determination of the application inter-partes or further orders of this Honourable Court, the Court be pleased to grant to the applicant an interim stay of execution of the judgment and decree of this Honourable Court dated 13th December, 2018.

c) This Honourable Court be pleased to quash the second Respondent's illegal proclamation of the applicant's movable properties and restitute the same to the applicant and at the Respondent's cost.

d) The execution and proceedings to enforce the judgment and decree herein be declared a nullity.

e) This Honourable Court be pleased to cancel, set aside, recall and lift the warrants of attachment and sale herein for cancellation for having been issued irregularly.

f) This Honourable Court be pleased to interpret the implementation of its judgment of 13th December, 2018 with respect to whether the dues owing to the 1st Respondent are subject to statutory deductions as per the law.

g) The 1st Respondent bear the 2nd Respondent's costs.

h) The costs of this application be provided for.

2. The application is based on the following grounds:

a) The 1st Respondent's application for execution was filed out of time and the said application should have been preceded by a notice to the applicant to show cause why execution should not issue.

b) In spite of the foregoing, the Claimant/1st Respondent has unlawfully instructed the 2nd Respondent to proclaim and he has

indeed proclaimed vide notice (s) dated 18th August, 2020 and 10th September, 2020 the Applicant's goods including but not limited to its tools of trade and other assorted equipment and motor vehicle with a view to auction the same at any time and without notice to the Applicant.

c) The 2nd Respondent on 10th September, 2020 unlawfully cause the applicant's motor vehicle registration no. KCB 677E to be removed from the Applicant's premises and caused the same to be detained at the Athi River Police Station where it remains to date, exposed to the elements and accruing unlawful and unnecessary storage charges.

d) There is a material error apparent on the face of the record of the warrants of attachment and execution issued on 10th August, 2020 by this Honourable Court. The said warrants condemn the applicant to pay to the 2nd Respondent an amount in excess of Kshs. 500,000 while a careful consideration of the same reveals that a total of Kshs. 293,788/- inclusive of costs and interest.

e) The 2nd Respondent's warrants of attachment and execution were obtained through misinformation and by placing reliance on fictitious calculations which warrants have been used to threaten, harass and indeed attempt to extort the applicant in a bid to force it part with an exorbitant and fictitious sum of monies.

f) The 1st Respondent is opposed to the applicant withholding statutory deductions from its dues.

3. The application is supported by the affidavit of James Murigi, the Applicant's General Manager sworn on 14th September, 2020. The affiant deposes that the warrants were issued almost 20 months after delivery of judgment and that they were issued irregularly having been procured more than a year after the date of judgment.

4. He deposes that the applicant has never been served with a notice to show cause why execution should not issue. He further deposes that the Applicant, through its advocates has previously attempted to settle the award but the 1st Respondent rejected the same in entirety on the basis that statutory deductions can't be applied against such payment.

Respondents' case

5. The 1st Respondent filed an undated Replying Affidavit sworn by Muthoni Njogu, an advocate of the High Court of Kenya. The affiant deposes that subsequent to the delivery of Judgment, there was correspondence with the Applicant's former advocates Legau Advocates to the effect the Applicant do good of the decretal amount.

6. The affiant deposes that they received a Notice of Appointment from Messrs. Wawira Ogode that taking conduct of the suit without leave of the Court and after judgment had been delivered. She avers that the Applicant's advocates intimated revision of the legal costs downwards vide their letter dated 12th March, 2019 which they responded to vide their letter dated 5th April, 2019 that they could not reduce the costs.

7. She avers that there being no response on numerous letters on payment of the decretal sum they requested the Court to issue Warrants of Attachment to the 2nd Respondent on 20th September, 2019. She avers that taxation was undertaken with full knowledge of the Applicant as exhibited on record having been served on all documents.

8. She confirms that on 10th September, 2020 the auctioneer attached motor vehicle KCB 677E but the vehicle was detained at Athi River Police Station until 11th September, 2020. She avers that the vehicle was never released to them.

9. She avers that Order 22 Rule 18 (1) of the Civil Procedure Rules stipulates that the decree holder is only required to serve a notice to show cause before execution to judgment debtor only if the warrants of execution are obtained a year after the date of obtaining the decree and not on the date of delivery of Judgment as the Applicant contends.

10. She avers that there was no counter offer to their communicate, if indeed they intended to pay the decretal amount.

11. She contends that the decree was issued on 18th September, 2019 and warrants of execution issued on 10th August, 2020 which is one month to the lapse of the one year. She therefore contends that the 1st Respondent is within the one year period and is not under any obligation to issue a notice to show cause to the Respondent. She contends that the one year period starts running from the date of the decree and not the date of judgment.

12. She avers that this matter is a purely civil matter and any alleged erroneous figures can only be rectified by the Court that issued the decree in this matter. She avers that the motor vehicle is under lawful attachment having followed due process of the law and that the Respondent is at complete loss and wonders what law or regulations Athi River Police Station is detaining the motor vehicle. She avers that it is only fair and just for the Court not to grant the prayers sought.

13. The 2nd Respondent filed a Replying Affidavit sworn by Joseph Kahoro Mundia, the 2nd Respondent on 28th September, 2020. He deposes that he received instructions from Messrs. Njogu & Associate Advocates to undertake execution on their behalf. He avers that the matter went through rigours of taxation for purposes of taxing the costs and a Ruling delivered on 25th October, 2019.

14. He confirms that on 10th September, 2020 they managed to attach motor vehicle registration number KCB 677E and in a strange turn of events, the Plant Manager, Mr. Toor Shiv alerted two police officers who were manning the premises and the officers in tandem called the

Deputy Officer who requested Mr. Toor to accompany them to the police station in order for him to have a look at the Court warrants of attachment.

15. He avers that they proceeded to the police station and the Deputy Officer Commanding the Station (OCS) directed that the motor vehicle be booked in the Occurrence Book as well as be detained until the following date 11th September, 2020 at 1.00pm when they were to collect it.

16. The affiant avers that on 11th September, 2020 they were ready to collect the motor vehicle only to be informed that the Deputy OCS was absent and the OCS would handle the matter and that the OCS declined to release the motor vehicle on premises that the figures were erroneous on the face of the warrants of attachment.

17. He avers that the causation of the motor vehicle being detained at the police station was a well-orchestrated action by the Applicant to delay the sale of the motor vehicle.

18. In response to the 1st Respondent's Replying affidavit, the Applicant filed a Further Affidavit sworn on 6th October, 2020. He deposes that they have never been served with the decree dated 18th September, 2019.

19. She avers that the 1st Respondent's advocate in a letter dated 5th April, 2019 unequivocally stated that no statutory deductions were to follow the satisfaction of judgment. He avers that the discrepancy in the amounts was raised with the Respondents but to no avail.

20. He avers that it was well within the Applicant's rights to alert law enforcement officers to intervene and adjudicate over an attachment and proclamation that was void ab initio. He however denies influencing the OCS Athi River Police Station or any other officer to detain the motor vehicle.

21. The application was heard by way of written submissions and only the Applicant and 1st Respondent filed their submissions.

Applicant's submissions

22. The Applicant submitted that the parties suffer from doubt, difficulty and ambiguity and have differed in their interpretation of whether or not the Court's award is subject to statutory deductions. It further submitted that it is deserving of an order to recall, quash and rectify the warrants of attachment because the tabulation of figures contains an apparent error or omission on the part of the Court which is self-evident and does not require elaborate argument to be established.

23. It argued that the Court of Appeal in **National Bank of Kenya Ltd v Ndungu Njau [1997] eKLR** held that a review may be granted whenever the Court considers it necessary to correct an apparent error or omission on the part of the Court and that this must be self-evident and not require an elaborate argument to be established.

24. It further submitted that the Court in **Kioko Joseph v Bamburi Cement Ltd [2017] eKLR** held that Section 19 (1) (f) of the Employment Act allows an employer to make deductions which are authorised by any written law from his salary including damages under section 49 of the Employment Act.

25. It argued that it is prepared to settle the award of this Court pursuant to the Court's direction on withholding of statutory dues on the award. It reiterated that there was an error in tabulating the sum of costs, award and interest and that the actual sum of the award plus costs should be Kshs. 293,778/-.

1st Respondent's case

26. He submitted that the power to grant an interim order for stay of execution is discretionary and that Applicant's actions do not warrant stay of execution. He argued that the conduct of the Applicant not to make good the decretal amount is improper and that granting interim orders for stay of execution undermines the integrity of this court. He submitted that no payment has been made since delivery of Judgment.

27. He submitted that the letter referred to in paragraph 4 of the Applicant's Further Affidavit was without prejudice and hence is not admissible in Court. They submitted that they have no problem with the imposition of statutory charges as provided in law by Section 49 (2) of the Employment Act.

28. He argued that the application for execution was not filed out of time and as such the warrants of attachment issued were regular and hence there is no need to issue notice to show cause as to why execution should not issue. He relied on Order 22 Rule 18 (1) of the Civil Procedure Rules and submitted that the warrants of attachment to the 2nd Respondent were granted on 20th September, 2019 and they could not be effected due to the taxation process. He cited the decision in **Rose Chepkorir v Mwinyi Mohammed Riva & another [2015] eKLR** that the period of one year runs from the date of the decree and not the date of judgment.

29. With respect to the warrants of attachment, he submitted that the same were regular and obtained procedurally and within the timelines provided under Order 22 Rules 17 and 18 of the Civil Procedure Rules. He submitted that the motor vehicle being illegally and unlawfully held at the Police Station be released to the 2nd Respondent as this is purely a civil matter.

30. He confirmed that there was an error in the face of the record of the warrants of attachment and execution taken out by the 2nd Respondent and that this error is only for the total summation of as the figures therein are accurate.

31. He argued that the errors on the total summation of the warrants can be rectified and such cannot make the execution and proclamation illegal. He relied on the decision in **Yasmin Mohammed Ali v RBS Limited; Bhupesh Lakhani & another (Objectors) [2019] eKLR** where the Court withdrew the warrants of attachment issued in error and issued one reflecting the figure in the decree holder's application.

32. Therefore, he urged the Court to withdraw the warrants of attachment issued in error and issue warrants of attachment to reflect the correct figure with no costs to the decree holder and the Applicant be compelled to make good of the decretal amount.

33. He submitted that Rule 7 of the Auctioneers Rules provides that the auctioneer shall recover his costs from the judgement-debtor who in this case is the Applicant and that only when the judgment debtor cannot be found shall he fall back on the judgment-creditor.

34. He submitted that the position on the party to bear the auctioneers costs in case of stay of execution is that such costs be agreed upon and if not agreeable should be taxed. In support of this position, he relied on the case of **Muganda Wasulwa t/a Keysian Auctioneers v National Cereals & Produce Board [2015] eKLR**.

35. He urged the court to dismiss the application with costs.

36. I have examined the application herein. The Applicants seek an order for stay of this Court's judgement and execution of the same. The judgement being sought to be stayed is dated 13/12/2018.

37. Order 42 rule 6(1) of the Civil Procedure Act states as follows:-

“6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside”.

38. The order and rule indicate instances when a Court can grant stay orders. The issue of prompt filing of the application is necessary. The Applicants must also indicate they are going to suffer irreparable harm if the orders are not granted. The Applicants should also be willing to adhere to any conditions relating to security as Court orders.

39. In this application however, the Applicants have not demonstrated any of the above conditions for stay. There is no condition also precedent upon which stay should be granted against.

40. The Applicants contend that they have a problem with calculations. They should have demonstrated where the miscalculations are and which they have also not demonstrated. I therefore find the application for stay is not warranted.

41. In order to avoid miscarriage of justice however, I refer this issue of calculation to the Deputy Registrar for further directions and thereafter execution to proceed within 7 days. The Applicants will pay costs of this application and of the Auctioneers.

Dated and delivered in Chambers via zoom this 11th day of November, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE