



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI
CAUSE NO.257 OF 2015

SAMUEL MUTUKU MUTUNGA.....CLAIMANT

VERSUS

STEEL MAKERS LIMITED.....RESPONDENT

AND

JOSEPH KAHORO MUNDIA T/A

UPSTATE KENYA AUCTIONEERS.....AUCTIONEER

RULING

The respondent, Steel makers Limited filed application dated 21st May, 2020 and seeking for orders of stay of execution of the judgement and decree dated 13th February, 2019 and the court to quash the auctioneers illegal proclamation of its moveable properties and the same be declared a nullity and that the auctioneers be directed to levy a fresh attachment in conformity with the Auctioneers Rules and directions of the court.

The application is supported by the annexed affidavit of James Murigi and on the grounds that on 5th October, 2020 the auctioneers purported to attach the respondent's goods at its Arthi river premises by affixing a proclamation of the attachment outside the premises and uttering on the attachment as schedule of moveable properties. The auctioneer did not access the respondent's premises and by extension was not privy to the availability or condition of the goods listed in the schedule nor was any employee of the respondent served with the proclamation.

Contrary to the due process and established procedure, the auctioneer has relied on a schedule of movable property contained in a prior proclamation dated 10

September, 2020 which attachment is the subject of an application in ELRC No.262 of 2015 and has a ruling date on 11th November, 2020.

Some of the goods purportedly attached are subject of a court order before the Business Premises Tribunal in BPRT 873 of 2018 and which order remains in force and there is an appeal thereof in ELC Nairobi Civil Appeal No.54 of 2019.

In the Supporting Affidavit, James Murigi avers that he is the general manager, administration of the respondent and with authority to support the application herein.

He avers that on 13th December, 2019 the court delivered judgement herein and warded the claimant ksh.339, 570 and costs. The respondent then engaged new advocates to act for them in this case.

On 5th October, 2020 he received a call from Arthi River plant with information that a proclamation of attachment notice had been affixed outside the premises by the auctioneers which was without notice and upon perusal of the same he discovered that it purported to disclose that the auctioneers had served the respondent with warrants of attachment and proceeded to inspect, value and proclaim the items listed therein.

Mr Murigi avers that in reality the auctioneers did not access the premises and instead relied on a list of goods which the same auctioneers had proclaimed on 18th August, 2020 and which is subject of Nairobi ELRC 262 of 2015 which is pending determination.

Several other items purported to be attached are also subject of a suit before Business Premises Tribunal 873 of 2018 and which is now subject of ELC Nairobi Civil Appeal No.54 of 2019 and pending determination.

These notice compared make it clear that the list of proclaimed items on the notice dated 5th October, 2020 is an exact replica of notices dated 18th August, 2020 and the notice dated 25th October, 2018 with regard to items of Motor vehicle KAT 848T and which is not available for further attachment.

Unless the orders sought are issued the respondent shall suffer loss and damage.

The claimant filed his Replying Affidavit and avers that judgement herein was delivered on 13th February, 2019 and the advocates were in communication to make good of the decretal sum awarded to him. Following failure to pay, he instructed auctioneers to proclaim in execution and warrants of attachment issued.

The respondent was given 7 days' notice by the auctioneers and failed to pay. The allegations that the proclaimed good are subject of other suits in ELRC 262 of 2015 and BPRET 873 of 2018 is without evidence. Such suits are different from the suit herein and should be treated separately.

The proclaimed good have no semblance with those proclaimed under the other suits and the application should be dismissed with costs.

In reply, the **Auctioneer filed the Affidavit of Joseph Kahoro Mundia** dated 14th October, 2020 and 10th November, 2020 and who practices in the name of Upstate Kenya Auctioneers and that on 2nd October, 2020 he received warrants of attachment in ELRC No.262 of 2015 for execution against the respondent and for the recovery of Ksh.516, 696 and costs of the attachment.

On 5th October, 2020 he proceeded to the respondent's premises at Arthi River and served the mandatory 7 days' notice upon Shir Toor of telephone number 0720633540 who was in the premises.

Upon the expiry of the 7 days he returned to the premises on 14th October, 2020 but could not access the premises. There are no attachments to Affidavit dated 10th November, 2020.

That the good attached following a proclamation are different and separate from the attachment tin BPRT 873 of 2018.

The respondent has not paid the decretal sum and have now moved to court seeking stay of execution and request the court to order that the officer commanding station, Arthi river Police Station to authorise and escort him to the respondent's premises to remove the proclaimed goods therein.

Parties filed written submissions.

Determination

The court has considered the applications, the affidavits in support and reply thereof and the written submissions.

These applications are filed post judgement. Order 9 Rule 9 of the Civil Procedure Rules allow new advocates to come on record post judgement with the consent of the outgoing advocates. There is consent herein filed allowing the respondent to be represented by new advocates past judgement.

The gist of the application herein is the notice dated 5th October, 2020 on the attachment of the respondent's goods by the Auctioneers at the Arthi river plant which is said to be unlawful and should be stopped and or commence afresh.

The complaint by the respondent is that the auctioneers only visited the respondents premises and affixed a proclamation of attachment outside the premises and attached a schedule of moveable goods without serving notice, without accessing the premises and by extension were not privy to the availability or condition of the goods listed in the schedule nor was any employee of the respondent served with the proclamation. The listed items in the schedule related to other suits and matters pending before other courts and tribunal particularly Nairobi ELC Civil Appeal No.54 of 2019; Nairobi ELCR No.262 of 2015; and BPRT 873 of 2018.

Auctioneers are regulated under the Auctioneers Act and the Rules thereto and particularly under Rule 12, an auctioneer, upon receipt of the warrant of attachment or instructions is required to inspect value and prepare an inventory of the proclaimed good and serve notice upon the judgement debtor.

In his affidavit, Mr Kahoro for the auctioneers avers that he issued notice and warrant of attachment upon the respondent but at his paragraph 2 of the Affidavit dated 14th October, 2020 he avers that the served warrants related to Nairobi ELRC No.262 of 2015. The Affidavit relates to proceedings under the instant suit ELRC Cause No.257 of 2015.

Such suit and warrants relates to a separate suit and matter from the instant suit.

To his Replying Affidavit dated 10th November, 2020 the attachments thereto and relating to the notice served and schedule of items proclaimed are not attached.

A keen perusal of the notices and schedule of good attached under Nairobi ELRC 262 of 2015 and BPRT 873 of 2018 these are a replica of what the auctioneer filed herein.

This is contrary to the applicable rules with regard to execution of this court judgements and orders; the process undertaken by the auctioneers to proclaim the respondents moveable properties is irregular and unlawful and contrary to the due process. Such cannot be sanctioned by the court.

The respondent has however remained indebted to the claimant who is justified to execute. Save for the irregular execution processes by the auctioneers the claimant is justified in issuing instructions in execution.

Accordingly, application dated 15th October, 2020 is found with merit and the respondent is allowed stay of execution and the process commenced vide notice dated 5th October, 2020 is hereby quashed. The claimant shall commence fresh process of execution in accordance with the law and the applicable rules. Each party shall meet own costs.

DELIVERED AT NAIROBI THIS 15TH DAY OF DECEMBER, 2020.

M. MBARU

JUDGE