



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1133 OF 2013

(Before Hon. Justice Hellen S. Wasilwa on 26th June, 2019)

SAMWEL CHEGE NJOGU.....CLAIMANT/RESPONDENT

VERSUS

EASY COACH.....RESPONDENT/APPLICANT

RULING

1. The application before this Court was filed by the Respondent on 12th April 2019 seeking the following orders:

1. Spent

2. THAT this Honourable Court be pleased to issue an injunction compelling the Claimant, his representative and agents namely Icon Auctioneers to release the impounded attached staff bus Motor Vehicle Mitsubishi registration number KBK 960D together with a wheel spanner and jerk pending the hearing and determination of this application.

3. THAT this Honourable Court be pleased to issue an injunction compelling the impounded attached staff bus Motor Vehicle Mitsubishi registration number KBK 960D together with a wheel spanner and jerk pending the hearing and determination of the intended appeal.

4. THAT this Honourable Court be pleased to issue an Order of stay restraining the Claimant, his representatives and agents namely Icon Auctioneers from selling disposing off, vandalising and or in any way alienating the attached staff bus Motor Vehicle Mitsubishi registration number KBK 960D together with a wheel spanner and jerk pending the hearing and determination of the application herein.

5. THAT this Honourable Court be pleased to issue an Order of stay restraining the Claimant, his representatives and agents namely Icon Auctioneers from selling disposing off, vandalising and or in any way alienating the attached staff bus Motor Vehicle Mitsubishi registration number KBK 960D together with a wheel spanner and jerk pending the hearing and determination of the intended appeal.

6. THAT thus Honourable Court finds that the warrants of attachment and sale against the Respondent/Applicant held by the Claimant's representatives and agents Icon Auctioneers were obtained fraudulently and unprocedurally and the same be nullified pending the hearing and determination of the Intended Appeal.

7. THAT the costs of this application and the costs of the illegal and unlawful attachment be borne by the Claimant/ Applicant.

2. The application is supported by the affidavit of Kennedy Muema, the Respondent's legal officer and premised on grounds that:-

1. The Respondent being aggrieved by the Judgment of this Court, in favour of the claimant in the sum of Kshs. 200,727.46 plus costs taxed at Kshs. 128,636, filed a Notice of Appeal on 4th July 2008 and applied for certified copies of typed proceedings and Judgment for purposes of filing an appeal.

2. The Claimant proceeded to secretly extract and obtain warrants of attachment so as to execute against the Respondent by impounding and attaching the Respondent's motor vehicle registration no. KBK 960D together with a wheel spanner and jerk.

3. Despite having knowledge of the Respondent's premises and registered office, the Claimant, his representative and agents Icon Auctioneers did not serve the Respondent with any Proclamation Notice, Warrants of Attachment and Sale. The Respondent

discovered that the Claimant obtained warrants of attachment after he forcefully seized the motor vehicle.

4. It is yet to be served with the proclamation notice, warrants of attachment or any execution documentation by the Claimant and that the manner the execution has been carried out is illegal.

5. The Respondent is willing to put the decretal sum of Kshs. 200,727.42 plus the taxed costs of Kshs. 128, 636 in Court or in a joint account between the Claimant's advocates and the Applicant's advocates pending the hearing and determination of the appeal.

6. That the Respondent stands to suffer irreparable loss and damage should the claimant not be restrained by an injunction compelling the release of the attached Motor Vehicle Mitsubishi , wheel spanner and jerk.

3. In response to the application, the Claimant filed a Replying Affidavit sworn by the Claimant on 18th April 2019. He avers that Icon Auctioneers informed him that they obtained the warrants of attachment and sale of the Applicant's goods in a procedural and lawful manner. Further, that they proclaimed the Applicants goods on 21st March 2019 but the Applicant refused to sign the proclamation.

4. The parties canvassed the application by way of written submissions.

Respondent's submissions

5. The Respondent submitted that execution was carried out fraudulently and unprocedurally as it was only issued with execution documents on 11th April 2019 upon demand by it to justify the reasons for the auctioneer's actions. It relied on the Section 23 (b) of the Auctioneers Act, which provides that a licensed auctioneer shall act in accordance with prescribed rules.

6. It submitted that the auctioneers did not serve the Respondent with any proclamation notice as required by law and they did not serve any notice as provided under rule 12 (1) (b) & (c) of the Auctioneer Rules. It submitted that as a result of the auctioneer's actions it suffered loss of storage, loss of business for 6 days and legal costs of Kshs. 58,000/=.

7. It submitted that there was no evidence by the Claimant demonstrating service of proclamation notice and warrants of attachment and the auctioneer did not swear an affidavit to prove it attempted to serve the notices upon it. Therefore, the Claimant and his agents failed to abide with the Auctioneers Act and Auctioneer Rules. It urged the Court to find that the actions of both Claimant and his agent were malicious and intended to deny the Respondent its rights under Article 50 (1) of the Constitution.

Claimant's submissions

8. The Claimant in his submissions argued that the Applicant had not placed any evidence to prove that the warrants of attachment and sale were obtained fraudulently and unprocedurally. He submitted that it is the Court that issues warrants of attachment and sale hence stating that they were fraudulently obtained amount to accusing the Court for fraudulently issuing the warrants of attachments and sale.

9. It urged the Court to find that the warrants of attachment and sale were obtained procedurally and therefore should dismiss the Application and the Applicant be liable to pay costs of attachment.

10. I have considered the averments of both Parties. The main reason for the attachment of Motor Vehicle KBK 960D was to realize judgment for Kshs.200,727.46 plus costs of Kshs.128,638/=.

11. In seeking orders to compel the Claimant and his agent, Icon Auctioneers to return the impended motor vehicle, the Respondent/Applicants have indicated that they are willing to deposit the entire decretal sum of 200,727.42 plus costs of 128,636 in Court or in a joint account pending the hearing and determination of the appeal.

12. Depositing of the decretal sum and costs will in my view secure the Claimants interest in case of any eventuality. In the circumstances, I will allow the application and order the Claimant/Respondent herein to release the attached motor vehicle to the Respondent/Applicant.

13. The Respondent is directed to deposit the entire decretal sum plus costs in a joint interest earning account held in the joint names of Counsel on record within 7 days.

14. Auctioneers costs if any be borne by the Respondent.

15. Costs of this application abide outcome of the Appeal.

Dated and delivered in open Court this 26th day of June, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kilonzo holding brief Kanyiri for Respondent – Present

Claimant – Absent