



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
ELRC CAUSE 112 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 10th July, 2019)

MAXWELL AGUTU MAIGO.....DECREE HOLDER/RESPONDENT

VERSUS

KENYA NATIONAL TRADING CORPORATION LIMITED.....JUDGEMENT DEBTOR/APPLICANT

ELIUD CHAI WAMBU T/A CHADOR AUCTIONEERS.....AUCTIONEER/2ND RESPONDENT

RULING

1. The Application before Court is the one dated 19th March, 2019. The Application was filed under Certificate of Urgency through a Notice of Motion filed under Section 3A and 63 (c) & (e) of the Civil Procedure Act, Cap 21, Order 9 Rule 9 (a), Order 22 Rules 22, 41, 51, 59 (3), Order 40 Rules 1 (a), 4 (1) & (2) and Order 51 Rule 1 and all other enabling provisions of the law.

2. The Application seeks the following Orders that:-

1. This Honourable Court be pleased to certify this Application as urgent.

2. This Honourable Court be pleased to dispense with service in the first instance and the Application be heard ex-parte in the first instance.

3. This Honourable Court be pleased to grant leave to M.M Gitonga Advocates LLP to come on record post judgment for the Judgment Debtor/Applicant.

4. Pending the inter partes hearing of this Application, this Honourable Court be pleased to grant a temporary injunction restraining the Respondents herein by themselves or their employees, servants, agents, assigns or any other person whomsoever from detaining, selling, auctioning or dealing adversely in any way whatsoever with motor vehicles registration numbers KBR 2051) and KAY 079V and trailer registration number ZD 5216.

5. Pending the determination of this Application, this Honourable Court be pleased to grant a temporary injunction restraining the Respondents herein by themselves or their employees, servants, agents, assigns or any other person whomsoever from detaining, selling, auctioning or dealing adversely in any way whatsoever with motor vehicles registration numbers KBR 205U and KAY 079V and trailer registration number ZD 5216.

6. Pending the hearing and determination of this Application, this Honourable Court be pleased to order the release, return and restitution of motor vehicles registration numbers KBR 2051) and KAY 079V and trailer registration number ZD 5216 to the Applicant's possession and usage forthwith.

7. In the alternative to prayer 3 above, pending the inter partes hearing of this Application this Honourable Court be pleased to grant stay of execution of the purported decree issued on 18th June 2018.

8. In the alternative to prayer 5 above, pending the determination of this Application this Honourable Court be pleased to grant stay of execution of the purported decree issued on 18th June 2018.

9. This Honourable Court be pleased to set aside the warrants of attachment of movable property in execution of decree of money

issued on 28th February 2019 and revoke the notification of sale of motor vehicles registration numbers KBR 205U and KAY 079V and trailer registration number ZD 5216 issued by the 2nd Respondent and dated 13th March.

10. This Honourable Court be pleased to issue any further orders as it deems fit.

11. Costs of this Application be provided for.

3. This Application is premised on the grounds that:-

a) The 2nd Respondent under the instructions of the Claimant/Decree Holder, has unlawfully, negligently and irregularly attached and moved to his auction motor vehicles Registration numbers KBR 205U and KAY 079V and trailer registration number ZD 5216 in purported execution of a decree issued by this Honourable Court on 18th June 2018 and pursuant to warrants of attachment issued on 28th February 2019.

b) The said Auctioneer has since issued the Applicant with a Notification of Sale of motor vehicles registration numbers KBR 205U and KAY 079V and trailer registration number ZD 5216 dated 13th March 2019 as well advertised in the Star Newspaper publication of 15th March 2019 at page 32 thereof a Notification of Sale by Public Auction wherein he notifies the public of his intention to sell the said motor vehicles by public auction on 23rd March, 2019.

c) The 2nd Respondent has never issued a proclamation notice over the said motor vehicles and the impugned attachment that was brazenly undertaken on Thika Road through threats of violence and coercion is manifestly unlawful and irregular.

d) At the time of the said impugned attachment of motor vehicles the Applicant had already settled and paid in full the sum of Kshs. 3,195,632.57 that was due to the 1st Respondent under the Judgment of 18th June 2018 and therefore the Respondent were not entitled to attach the Applicant's motor vehicles aforesaid.

e) Under the said Judgment of 18th June 2018 the only outstanding amount due is half the costs of the suit that is subject to taxation as per the consent between the parties dated 2nd August 2018.

f) The Decree issued by this Honourable Court on 18th June 2018 and the Warrants of Attachment subsequently issued on 28th February 2019 for a decretal sum of Kshs. 1,441,280.00 were both issued on the basis of false misrepresentation and material non-disclosure by the 1st Respondent of the sums of money already paid to him by the Applicant.

g) The motor vehicle registration number KBR 205U is jointly owned by the Applicant and Industrial & Commercial Development Corporation and is therefore, by virtue of the legal and equitable interest of the said third party, not available for proclamation and attachment by the Respondents.

h) The joint ownership of motor vehicle registration number KBR 205U aforesaid notwithstanding, the 2nd Respondent has never issued any notice to the Applicant prohibiting him from transferring the share/ interest or charging it in any way.

i) The 2nd Respondent does not have a valid auctioneer's license for the year 2019 as at the time that he attached motor vehicles registration numbers KBR 205U and KAY 079V and trailer registration number ZD 5216.

j) The Applicant requires motor vehicles registration numbers KBR 205U and KAY 079V and trailer registration number ZD 5216 for its day to day operations and as such since their unlawful attachment aforesaid, the Applicant has suffered and continues to suffer insurmountable loss and damage which has adversely affected its operations.

k) The entire process of extraction of the decree aforesaid, the execution thereof up to the issuance of the Notification of Sale of motor vehicles registration numbers KBR 205U and KAY 079V and trailer registration number ZD 5216 is manifestly irregular, invalid and illegal and the Applicant is reasonably apprehensive that unless the Application filed herewith is certified urgent and heard ex parte in the first instance, the 2nd Respondent shall sell by Public Auction the said motor vehicles the manifest illegality thereof notwithstanding.

l) The Applicant has duly instructed the firm of M. M. Gitonga Advocates LLP to take up the conduct of this matter in place of M/S Mohamed & Kinyanjui Advocates.

4. The Application is supported by the Affidavit of **PANCRAS MURIUKI** sworn on 19th March, 2019, in which he reiterates the averments made in the Notice of Motion Application.

5. The Applicant also filed a Notice of objection to the attachment and sale of the Motor vehicles Registration Numbers KBR 205U and KAY 079V and trailer registration number ZD 5216 under Order 22 Rule 51 (1) as the same are illegally attached to the Judgment debtor having fully settled the full decretal amount.

6. The Claimant/Respondent opposed the instant Application by filing a Replying Affidavit sworn by **PATRICK WAIGANJO WACHIRA**, counsel on record for the Claimant/Respondent, in which he contends that the attachment of the said Motor Vehicles Registration Numbers KBR 205U and KAY 079V and trailer registration number ZD 5216 was lawful and in accordance with the decree issued on 18th June, 2018 and pursuant to the warrants of attachment issued on 28th February, 2019.

7. The Counsel further contends that that he has never received any payment to satisfy the decree on behalf of his client as alleged by the Applicant and further contends the annexure "PM3" annexed to the Application is a forgery.

8. He avers that due process was followed during proclamation and that his client is entitled to proclaim and sell the said Motor Vehicles and that the only sums received on 21st March, 2019 was Kshs. 181,551 being half of the costs of the Claim.

9. The Claimant/Respondent avers that there is no justified reason given by the Applicant to set aside the warrants of attachment of movable property as requested and thereby urging this Court to dismiss the instant Application with costs for lack of merit.

10. The Applicant filed a Further Affidavit deponed by PANCRAS KARUIKI MURIUKI, in which he reiterates the averments made in the Notice of Motion Application and the Supporting Affidavit.

11. He further contends that the Replying Affidavit filed herein is bad in law and ought to be struck out as it is deponed by Counsel on record for the Decree Holder yet Rule 9 of the Advocates Practice Rules prohibits an Advocate from swearing an Affidavit in contentious matters. Further it is not clearly indicated in the Affidavit that the same is sworn on behalf of the Decree Holder.

12. He avers that the firm of Waiganjo Wachira & Co. Advocates were properly informed of the settlement of the decretal sum and that the instructions to the Auctioneers by the said Advocates was made in bad faith and were merely done out of malice.

13. In disposing of the instant Application, the parties agreed to file written submissions.

Claimant's/Respondent's Submissions

14. It is submitted on behalf of the Claimant/Respondent that the instant Application ought to be dismissed as the attachment done was lawful and followed due procedure. The Claimant relies on the provisions of Section 44 (1) of the Civil Procedure Act, 2010 and Order 22 Rule 51 (1) of the Civil Procedure Rules.

15. The Claimant/Respondent further submitted that there was no consent entered into by the parties as alluded to by the Applicant and further that the consent was infact not signed by the firm of Waiganjo Wachira & Company Advocates and is infact not filed in Court and does not form part of the Court record.

16. The Claimant/Respondent further submits that the injunctive reliefs as sought cannot be granted as they are being sought at execution stage and allowing the same would be tantamount to an abuse of court process. The Claimant/Respondent for emphasis relied on the Authority of Stephen **Somek Takwenyi & Another Vs David Mbutia Githare & 2 Others Nairobi HCCC No. 363 of 2009** as was stated in the case of **Christopher Musyoka Musau Vs N. P.G. Warren & 8 Others (2013) eKLR**.

17. The Claimant/Respondent contends that they have a right to attachment of the Applicant's property and therefore the Applicant's prayer to repossess the Motor Vehicles be denied as was held in the case of **Green Island Ship Chandlers (K) Limited Vs Imperial Bank Limited (In Receivership) & Another (2018) eKLR**.

18. It is further submitted that the Replying Affidavit as deponed by Patrick Waiganjo Wachira sworn on 12th April, 2019 is merited and should not be struck out on the mere fact that it is sworn by an advocate on record. For emphasis the Respondent cited the case of **Kamlesh M.A Pattni Vs Nasir Ibrahim Ali & 2 Others (2005) eKLR**.

19. In Conclusion the Claimant/Respondent submitted that the instant Application is without merit, amounts to an abuse of the Court process and is to be seen as a mere intention by the Applicant to frustrate the Decree Holder from realising the fruits of his litigation. The Claimant/Respondent urged this Court to dismiss the same.

Applicant's Submissions

20. The Applicant on the other hand submitted that the instant Application is merited and that the Court ought to allow the same as prayed.

21. It is further the Applicant's submission that the purported proclamation of the Motor Vehicles was unlawful and unprocedural as they have fully settled the decretal sum. Further, that the Applicant was not issued with the requisite proclamation notice over the suit motor vehicles and trailer. The Applicant went on to submit that the Respondent has failed to avail requisite information on the notice as required by Rule 12 (1) (b) of the Auctioneers Rules, 1997.

22. It is further the Applicant's submission that the Court ought to proceed and set aside, recall and lift the warrants of attachment the same having been fruits of an illegality and amounts to an abuse of the Court process.

23. The Applicant contends that any fees owing to the Auctioneer should be met by the Claimant/Respondent as they are the ones who engaged the services of the Auctioneers despite the fact that the decretal sum was fully settled by then.

24. The Applicant further contends that the Replying Affidavit dated 12th April, 2019 ought to be struck out. The Applicant cited the provision of Order 19 Rule 3 (1) of the Civil Procedure Rules, 2010 and the following Authorities **Amina Adam & 3 others Vs Rosamma Alexander & 2 Others (1993) eKLR**, **Regina Waithira Mwangi Vs Boniface Nthenge (2015) eKLR** and **Gerphas Alphonse Odhiambo Vs Felix Adiego (2006) eKLR** for emphasis.

25. I have considered the averments of the Parties. I note that the consent for Claimants Waiganjo Wachira & Company Advocates have always been on record for the Claimant.

26. However, contrary to the norm, the Respondent's Counsel went behind the Claimant's Counsel and entered a consent with the Claimant on 2/8/2018 to pay the Claimant the decretal sum of Kshs.3,414,280 less 218,647 loaned to the Claimant by Respondent's Sacco to be paid in instalments as per the consent.

27. Costs were to be taxed. The Respondents proceeded to issue cheques to the Claimant directly drawn in Claimant's name without informing the Claimant's Counsel. Cheques were paid from 6/5/2015 to 18/10/2018. A further cheque of Kshs.118,551/= of 2/3/2019 was paid to the Claimant's Counsel.

28. Warrants of attachment were finally issued by this Court on 28/2/2019 because there was no information to the Claimant that the decree had been settled as between the Respondent and the Claimant directly. A proclamation was also carried on 13/3/2019 and notice of sale issued on 15/3/2019.

29. All this happened because of the manner in which the Respondent dealt with the Claimant in this case was contrary to practice. The Claimant's Counsel was kept in the dark hence the manner in which he proceeded to levy execution.

30. In the circumstances, the mess was occasioned by the Counsel for the Respondent who should personally bear Auctioneers costs in this matter and other costs leading to execution.

31. Costs were already taxed in this case at 237,102/= which should henceforth be paid to the Claimant's Counsel by the Respondents less what has been already paid.

32. Costs of this application be paid by the Respondent/Applicants.

Dated and delivered in open Court this 10th day of July, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for the Parties