



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURRU**

**MISC. APPLICATION NO.9 OF 2018**

**KENYA NUT COMPANY LIMITED..... APPLICANT**

**VERSUS**

**DAVID NGIMOE MATOGORO.....RESPONDENT**

**RULING**

The ruling herein relates to two applications dated 14<sup>th</sup> August, 2019 and 30<sup>th</sup> July, 2019 and both filed by the applicant, Kenya Nut Company Limited.

Application dated 30<sup>th</sup> July, 2019 is seeking for orders that;

*Pending hearing and determination of the application dated 19<sup>th</sup> June 2018 Direct “O” Auctioneers or any other auctioneers and agents acting on behalf of the respondent herein be restrained from proclaiming the, attaching, reposing and or selling by private treaty or public auction the applicant’s movable property in execution of the judgement and decree in Naivasha CMCC No.550 of 2015.*

*The respondent to pay costs.*

The application is supported by the affidavit of Linda Aluvale Advocate and on the grounds that on 29<sup>th</sup> July, 2019 Direct “O” Auctioneers attached motor vehicle KAT 425C belonging to the applicant and there is eminent danger that this vehicle shall be sold unless stopped by the an order of the court.

The applicants application dated 19<sup>th</sup> June, 2018 seeking stay of execution is still pending inter-parties hearing and the court directed the applicant’s advocates to prosecute the same vide court ruling delivered on 11<sup>th</sup> July, 2019 and if the orders sought herein are not allowed the due application shall have been overtaken by events and the intended appeal shall be rendered nugatory.

In the application dated 14<sup>th</sup> August, 2019 the applicant is seeking for orders that;

*Pending the inter-parties hearing of the applicant’s application dated 30<sup>th</sup> July 2019 interlocutory order of injunction prohibiting Direct “O” Auctioneers from leasing, dismantling or committing acts of waste over the motor vehicle registration number KAT 425C.*

*Pending the hearing and determination of the applicant’s application dated 19<sup>th</sup> June, 2018 mandatory order of injunction do issue compelling Direct “O” Auctioneers to forthwith release and return motor vehicle registration number KAT 425C to the applicant unconditionally.*

*Costs of the application be met by the respondent.*

The application is supported by the affidavit of Ezekiel Ochineg and on the grounds that on 29<sup>th</sup> July 2019 the Auctioneers attached the property of the applicant being motor vehicle registration number KAT 425C while ferrying workers in Naivasha town.

On 2<sup>nd</sup> August, 2019 the court directed that pending the hearing of application dated 30<sup>th</sup> July, 2019 the auctioneers not to proclaim, attach or reposes by selling or through private treaty or public auction the movable property of the applicant in execution of judgment in Naivasha CMCC No.550 of 2015. Despite the subject order the auctioneers proceeded to attach the motor vehicle belonging to the applicant. The vehicle KAT 425C is used to transport the employee of the respondent and now is forced to hire alternative transport at a cost of Ksh.8, 000.00 per day.

The court had directed that application dated 30<sup>th</sup> July, 2019 be heard on 23<sup>rd</sup> September, 2019 and the continued detention of the vehicle is prejudicial to the applicant.

The respondent filed his Replying Affidavit on the grounds that the orders sought by the applicant are incapable of being granted as the application dated 19<sup>th</sup> June, 2018 has already been heard and determined and the applicant has not met the conditions for the grant of the orders sought. There is abuse of court process.

No prejudice shall be suffered if the orders sought are not issued as the dispute herein relates to injury he suffered while at work on 29<sup>th</sup> August, 2012 while working for the applicant and judgement was delivered on 20<sup>th</sup> March, 2018 and which is now stopped by the various orders sought by the applicant.

The court in its ruling on 11<sup>th</sup> July, 2019 vacated the interim orders and thus allowed the respondent to execute judgement. The application before court should be dismissed with costs.

Both parties addressed the application by written submissions.

The applicant submitted that they stay of execution herein under the principles laid out in Order 42 Rule 6(2) of the Civil Procedure Rules. The applicant herein has satisfied that substantial loss shall be the result if stay orders are not allowed; the application is made without undue delay. There is application dated 19<sup>th</sup> June, 2018 seeking stay of execution which has not been prosecuted and if stay of execution is not allowed the applicant shall suffer loss and damage.

On 10<sup>th</sup> July, 2019 the court delivered ruling in which it found that the application dated 10<sup>th</sup> December, 2018 had no foundation and a nullity on the basis that the firm filing the application on 14<sup>th</sup> March, 2019 could not make representations on behalf of the applicant. The court erred in making this finding as the correct position is that the Notice of Change of Advocate as filed on 8<sup>th</sup> November, 2018 and Notice of Change of Address file don 19<sup>th</sup> march, 2019.

While the applicant's advocate were preparing to file an application for the review of the court Ruling the auctioneers attached the motor vehicle and if allowed to proceed with execution there shall be loss and damage.

The applicant has filed a list of cases.

In response the respondent submitted that following court ruling on 11<sup>th</sup> July, 2019 the interim orders were vacated and this allowed execution to proceed. Warrants of Attachment were properly issued by the court and the auctioneers followed due process to execute the judgement of the court.

The respondent also submitted that the applicant was directed to prosecute application dated 19<sup>th</sup> June, 2018 which they have failed to address to date and there is delay without reasons and the possibility of the

intended appeal being successful does not exist save there shall be prejudice to the respondent if he applicant is allowed to prosecute the various applications and counter-application.

The respondent has also filed a list of authorities.

In addressing the two applications before court, it will be useful to revisit the court Ruling delivered on 11<sup>th</sup> July, 2019 as referenced by Ms Aluvale Advocate in her affidavit in support of application dated 30<sup>th</sup> July, 2019.

In the court ruling it related to two applications dated 10<sup>th</sup> August, 2018 and 19<sup>th</sup> June, 2019 and both seeking for orders that;

*Pending the hearing and determination of this application, Direct "O" Auctioneers or any other auctioneers acting on behalf of the respondent herein be restrained from proclaiming, attaching, repossession and/or selling by private treaty or public auction the applicant's moveable property as set out in the proclamation of attachment of movable property dated 13<sup>th</sup> June 2018 in execution of the decree of this court dated 13<sup>th</sup> June 2018 in Naivasha Chief Magistrate Civil Case No.550 of 2015.*

And that;

*1. Pending the hearing and determination of the application dated 19<sup>th</sup> June 2018 Direct "O" Auctioneers or any other auctioneers acting on behalf of the respondent herein be restrained from proclaiming, attaching, repossession and/or selling by private treaty or public auction the applicant's moveable property as set out in the proclamation of attachment of movable property dated 13<sup>th</sup> June 2018 in execution of the decree of this court dated 13<sup>th</sup> June 2018 in Naivasha Chief Magistrate Civil Case No.550 of 2015.*

Respectively.

Upon consideration of the two applications the court directed as follows;

***Accordingly, the application dated 10<sup>th</sup> December 2018 has no foundation and is a nullity ab initio. The applicant is at liberty to move the court as initially intended under application dated 19 June 2018 which shall be addressed on its merit. Interim orders granted vacated with costs to the respondent.***

There still remains application dated 19<sup>th</sup> June, 2018 not addressed. This application as set out by the applicant in the Affidavit of Mr Ochieng and Ms Aluvale relates to seeking orders of stay of execution of the judgement in Naivasha CMCC No.550 of 2015 pending the hearing and determination of the intended appeal by the applicant herein.

From 11<sup>th</sup> July, 2019 there is no effort shown as to what steps are taken to prosecute this application.

As of 11<sup>th</sup> July, 2019 nothing stopped the respondent from executing judgement in Naivasha CMCC No.550 of 2015. The averments by Ms Aluvale that the ruling of the Court delivered on 11<sup>th</sup> July, 2019 had errors and the applicant wishes to file application for review is without any material support. The applicant thus sat back and until the respondent through the due process of the court obtained the necessary orders for execution. The Auctioneers equally obtained Warrants of Attachment regularly and with due process and pursuant to the judgement of the court in Naivasha CMCC No.550 of 2015.

The lapse by the applicant to prosecute application dated 19<sup>th</sup> June, 2018 cannot be cured by filing applications and counter-application seeking to stall the process of execution as to do so as currently done

in application dated 30<sup>th</sup> July, 2019 and replicated in application dated 14<sup>th</sup> August, 2019 is in abuse of the court process. Such abuse is apparent and should not receive the sanction of the court.

Since 2<sup>nd</sup> August, 2019 the applicant has enjoyed various interim orders to date. Where stay of execution is urgent and necessary to ensure the applicant has secured its rights of appeal, this is not demonstrated by failing to address the pending application and dated 19<sup>th</sup> June, 2018.

**Accordingly, application dated 30<sup>th</sup> July, 2019 and 30<sup>th</sup> August, 2019 are hereby found to be in abuse of the court process and hereby dismissed. Costs awarded to the respondents. The costs due to Direct “O” Auctioneers shall be met by the applicant upon assessment by the Taxing Master/officer of the court.**

**Orders accordingly.**

Delivered at Nakuru this 21<sup>st</sup> day of November, 2019.

**M. MBARU JUDGE**

In the presence of: .....

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