



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 34 OF 2012**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 9<sup>th</sup> December, 2019)**

**GEORGE KANIARU.....CLAIMANT**

**VERSUS**

**OLIVE GARDENS LIMITED.....RESPONDENT**

**RULING**

1. The Application before Court is the Respondent/Applicant's Notice of Motion filed on 27<sup>th</sup> August 2019 seeking the following orders:

**1. Spent**

**2. Spent**

**3. THAT pending the hearing and determination of this application inter partes, the Honorable Court be pleased to grant stay of execution herein.**

**4. THAT the Claimant/Decree Holder by himself or through his proxies, agents, servants and/or employees, be restrained from adversely tampering with the assets within the property of the Respondent/ Judgment Debtor known as Olive Gardens Hotel to the detriment of the Judgment Debtor/Applicant's interest.**

**5. THAT the sum of Kshs. 911,377.00 paid by the Respondent in settlement of the decretal sum and the auctioneer's charges be deemed as full settlement of the Judgment issued in this matter.**

**6. THAT the proclamation levied on 6<sup>th</sup> August, 2019 be lifted for being unlawful and/or unprocedural.**

**7. THAT the costs of this application be borne by the Claimant/Decree Holder.**

2. The application is premised on grounds that:-

**1. The Claimant/Decree Holder, the Respondent, in brazen disregard and breach of the law has embarked on an adverse process of threatening his intention to auction the Applicant's property and/or assets starting from 26<sup>th</sup> August, 2019 in execution of the Judgment and decree issued on 21<sup>st</sup> September, 2017 despite the settlement of the entire decretal amount of Kshs. 911,377.00**

**2. The total sum paid to the Respondent was Kshs. 768,377 as the decretal amount and auctioneer charges of Kshs. 143,000.00.**

**3. The Respondent has embarked on the unlawful process of demanding payment of an alleged balance and loitering the suit property.**

**4. If the injunction is not granted, the Applicant will suffer great loss and damage with the unlawful carting away and auction of its toll of trade on the instructions of the Claimant.**

3. The application is supported by the affidavit of Kimani Macharia the Applicant's Finance Manager and Internal Auditor sworn on 26<sup>th</sup> August, 2019. He deposes that the auctioneers issued a Proclamation of attachment on 17<sup>th</sup> August, 2018 which quoted the auctioneer's costs as the sum of Kshs. 108,321.

4. He avers that the Applicant's contention is that the said auctioneers fees were exaggerated taking into consideration Rule 55 and the Fourth Schedule of the Auctioneers Rules (1997).
5. He avers that if the auctioneer's fees were collected correctly the entire amount owed by the Applicant would be Kshs. 52,380.10. He further avers that from its tabulated costs, it has settled the entire debt and in fact overpaid the sum.
6. He avers that the auctioneers have a fresh proclamation on 6<sup>th</sup> August, 2019 alleging that an outstanding sum of Kshs. 83,450.00 is owed by the Respondent and threatened to levy execution on 26<sup>th</sup> August, 2019.
7. He avers that the Respondent's auctioneers are harassing the Applicant since they know the Applicant operates a hotel and would not tolerate the auctioneers creating a spectacle.
8. In response to the application, the Respondent filed a Replying Affidavit sworn by Jovan Humprey Kariuki, a licenced auctioneer, sworn on 25<sup>th</sup> September, 2019. He confirms that on 17<sup>th</sup> August, 2018 he did proclaim the attachable assets of the Applicant and after expiry of the proclamation notice he moved in to attach the proclaimed goods.
9. He further confirms that the parties' advocates agreed on a sum which was to be paid in installments. He avers that the auctioneer's fees were agreed at an all inclusive sum of Kshs. 95,000 including attachment costs being labour, transport of 2 canters and hiring of security and their fees.
10. He avers that the Respondent's advocates on 27<sup>th</sup> September, 2018 advised them to proceed with the attachment for reason that the Applicant had failed to settle the agreed sum.
11. He avers that they attached the proclaimed goods and their cost of collection was an agreed sum of Kshs. 40,000. He avers that the Applicant further failed to comply with the agreement prompting the advocates and the Respondent to apply for fresh warrants which were issued on 6<sup>th</sup> November, 2019.
12. He contends that the Applicant for the fourth time failed to pay the amounts thus the Respondent directed them to proceed and collect the attached goods on 26<sup>th</sup> November, 2018. The Applicant then paid the sum of Kshs. 100,000 towards the decretal sum and that the cost of attachment plus the previous balance was Kshs. 80,000.
13. He contends that the Applicant on 27<sup>th</sup> November, 2018 issued them with a cheque and they deducted Kshs. 8,000. He contends that they further proclaimed the goods on 6<sup>th</sup> August 2019. Subsequently the Judgment Debtor paid a sum of Kshs. 18,000 as the auctioneer's fees but failed to pay the decretal sum.
14. It is his case that there exists a balance of Kshs. 80,000. He urges the Court to allow him tax his bill in order for the actual sum to be determined by the taxing master.
15. The application proceeded by way of written submissions and only the Applicant filed its submissions.

#### **Applicant's submissions**

16. The Applicant submitted that pursuant to section 34 (1) of the Civil Procedure Rules, this Court has jurisdiction to determine the issue herein as it relates to the discharge of the decree.
17. It submitted that the amount paid to the Respondent is full settlement of the decretal amount and auctioneers charges. It submitted that an interpretation of Order 21 Rule 1 of the Civil Procedure Rules means that the money payable under the decree in this matter is fully settled if the decretal sum is deposited into court or paid directly to the decree holder.
18. It relied on the decision in **Republic v Teachers Service Commission & another Ex parte William Wairagu Muigia [2016] eKLR** where the Court held that by virtue of Order 22 Rule 1 of the Civil Procedure Rules payment into court would ordinarily be deemed to be payment of the decree.
19. It argued that the Respondent is yet to certify the payments or adjustments made and is put under strict proof of the amount allegedly unpaid by the Applicant. It was therefore its submission that Kshs. 911,377 was paid to the Respondent.
20. It submitted that the Courts have held that interest stops accruing once two conditions have been met the decretal sum has been deposited in line with Order 22 Rule 1 of the Civil Procedure Rules and that the decree holder has been notified of the same. It relied on the case of **Odhiambo Owiti Company Advocates v Standard Assurance (K) Limited & 3 others [2016] eKLR** and submitted that no interest has accrued as the decretal sum was paid to the Respondent.
21. It submitted that it has satisfied the decretal amount and urged the Court to allow this application.
22. I have considered the averments of the Parties herein. In this Court's view, this matter can only be resolved through taxation where the taxing master will examine what is already paid and what is owing if any. In the circumstances, I refer this matter to the Deputy Registrar for further directions and consideration.

23. In the meantime, there will be stay of execution pending determination by the Deputy Registrar.

**Dated and delivered in open Court this 9<sup>th</sup> day of December, 2019.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Ngende for Respondents – Present

Claimant – Absent