



**REPUBLIC OF KENYA**

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

**PETITION NO. 47 OF 2016**

*(Before Hon. Lady Justice Maureen Onyango)*

**IN THE MATTER OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ARTICLES 20(1), (3) & (4), 21(1), 22, 23(1) & (3), 24, 27(1), (4) & (5), 40 AND 50 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE ENFORCEMENT OF THE BILL OF RIGHTS AND FUNDAMENTAL FREEDOMS**

**-BETWEEN-**

**CFC STANBIC BANK LIMITED (FORMERLY STANBIC**

**BANK LIMITED) GARNISHEE.....APPLICANT**

**AND**

**MUTIA MUINDU T/A MUTIBRA AUCTIONEERS.....1<sup>ST</sup> RESPONDENT**

**MAURICE M. MUNYAO & 148 OTHERS (suing on their own behalf and on behalf of the other members/beneficiaries of the Kenya Ports Authority Pension Scheme JOINTLY 2<sup>ND</sup> RESPONDENT affected by Averaging of the Pensionable Salary and Freezing of the Pensionable House Allowance (pursuant to the Order made by the Hon. Justice Maraga on 28<sup>th</sup> November 2007)**

**OKUYOSI TIMOTHY T/A TIPTOP AUCTIONEERS.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

This petition is filed by CFC Stanbic Bank Limited, (formerly Stanbic Bank of Kenya Limited) in a case arising from a garnishee order. The facts as presented in the petition and in the replying affidavits are convoluted, as each party seems to be arguing its case rather than setting out the facts.

From what I can gather from the pleadings, the joint 2<sup>nd</sup> respondents (149 of them) filed suit against 8 respondents sued in their capacity as Trustees of the Kenya Ports Authority Pension Scheme in **Mombasa ELRC Cause No. 116 of 2013 (formerly Mombasa High Court Civil Suit No. 41 of 2007)**. The case was heard and judgment entered against the respondents in the sum of Kshs.267,819,043.20 together with costs. The claimants thereafter commenced garnishee proceedings against the petitioner (CFC Stanbic Bank Limited) and a Garnishee Order Absolute issued against petitioner to pay the decretal sum out of Kshs.532,658,641.56 held by the petitioner on behalf of the respondents.

For reasons that are not the subject of this petition and which have not been clarified by the parties, the 2<sup>nd</sup> respondents instructed **MUTIBRA** Auctioneers who proclaimed and/or levied attachment upon the petitioner's goods in satisfaction of the auctioneer's costs. An application filed by the petitioner herein for stay of execution was apparently dismissed. Several other applications by the petitioner herein were also dismissed.

On the petitioner's application, **Mombasa ELRC Cause No. 116 of 2013** was transferred to Nairobi and registered as **Nairobi ELRC Cause No. 1262 of 2015**.

In the amended petition dated and filed on 25<sup>th</sup> May 2017 the petitioner seeks the following remedies:-

- a) That the Honourable Court be pleased to direct the Deputy Registrar of the Employment and Labour Relations Court, Mombasa to transfer the suit file that is **Misc. 2 of 2015 [Mombasa]** and place it before the Principal Judge in Nairobi for further directions, in accordance with the orders of the Hon. Mr. Justice Makau of the 19<sup>th</sup> February, 2016.
- b) Declarations do issue that the petitioner as garnishee is only liable to pay over the funds in the account of the judgment in satisfaction of the garnishee order absolute.
- c) The property of the petitioner as garnishee is not liable to attachment pursuant to a garnishee order absolute.
- d) That the Honourable Court be pleased to set aside and nullify the execution as against the Warrant of Sale of Property in execution of Decree for money dated 31<sup>st</sup> March 2016 and the proclamation dated 1<sup>st</sup> April 2016 issued by Tip Top Auctioneers.
- e) The Hon. Court be and is hereby pleased to award damages to the applicant for wanton breach of its constitutional rights as against the 1<sup>st</sup> and 3<sup>rd</sup> respondent auctioneers.
- f) The court be pleased to award exemplary and/or aggravated damages against the 1<sup>st</sup> respondent; and
- g) The auctioneer/1<sup>st</sup> respondent be ordered to pay all costs incurred by the applicant's advocates on a full indemnity basis.

Among the grounds upon which the petition is anchored are that the petitioner has a pending application in **Nairobi Cause No. 1262 of 2015** contesting the validity of the execution proceedings and that the Bill of Costs was taxed in defiance of orders restraining the taxation. The applicant further states that its application for stay was disallowed per *incurriam*.

The petitioner states that it is apprehensive of repeated discrimination and wanton violation of its constitutional rights, that the judge who ordered execution had previously recused himself from the matter and issued orders of stay on 15<sup>th</sup> November 2014, which have not been vacated or varied. The petitioner further states that it had applied for transfer of Mombasa Misc. Application No. 2 of 2015 to Nairobi and the orders were granted yet the file has been subjected to further prosecution in Mombasa in violation of those orders.

It is the petitioner's averment that its rights under Articles 20, 22, 27, 40, 50 have been violated. The Petitioner avers that it has suffered discrimination, that its reputation has been injured by the attachment and it has been exposed to unnecessary legal costs by hiring two law firms to defend it.

In his oral submissions, Mr. Gichuhi on behalf the petitioner submitted that the issue for consideration is whether the petitioner's property can be attached pursuant to the garnishee order, which was limited to monies held in the judgment debtor's account. It is submitted that there was an order of stay of proceedings on 5<sup>th</sup> December 2014, which was upheld, and that the Appeal lodged by the respondent was dismissed by the Court of Appeal, which ordered each party to bear its costs.

It is further submitted that even after paying the decretal amount the auctioneer did not seek costs from its instructing client but instead filed a Bill for taxation against instructing creditor and the bank. It is submitted that the auctioneer has not demonstrated why it cannot get its costs from the instructing client.

Mr. Gichuhi submitted that the petitioner's rights to property under Article 40 as defined under Article 260 was infringed and it is entitled to damages. He submitted that an auctioneer can only recover its costs from instructing client and the only money attachable is money in the account. He submitted that attaching a bank's property is trespass and courts have awarded damages for the same. He submitted that there is no decree capable of execution against the petitioner that a certificate of costs is not a judgment capable of execution and that the auctioneer should have extracted a decree. That for this reason, the proclamation was illegal and *void ab initio*. He urges the court to award damages of Kshs.3,000,000.

Both the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed responses to the petition. The 1<sup>st</sup> respondent filed a replying affidavit of **MUTIA MUINDU T/A MUTIBRA AUCTIONEERS** sworn on 6<sup>th</sup> May 2016 while the 2<sup>nd</sup> joint respondents filed an affidavit of **MAURICE M. MUNYAO**, one of the persons sued as the 2<sup>nd</sup> respondent. His affidavit is sworn on 14<sup>th</sup> September 2017.

The 1<sup>st</sup> and 2<sup>nd</sup> respondents also filed written submissions. At the hearing, Mr. Tindika captured the averments in the 1<sup>st</sup> and 2<sup>nd</sup> respondents' affidavits as well as the submissions in his oral submissions.

Mr. Tindika submitted that on 7<sup>th</sup> November 2014 an order was made by Justice Makau that the entire decretal sum in Mombasa Cause No. 116 of 2013 (now Nairobi Cause No. 1262 of 2015) be paid forthwith by the petitioner from funds held in the account of the Trustees of Kenya Ports Authority Pensions Fund but the petitioner failed to comply until the evening of 14<sup>th</sup> November 2014 after execution was levied against it on 13<sup>th</sup> November 2014. It is submitted that in the petitioner's application dated 26<sup>th</sup> November 2014 one of the prayers was to nullify the attachment. The petitioner has never moved the court to prosecute the application.

It is submitted that orders of 5<sup>th</sup> December 2014 were dealt with in Misc. 2 of 2015 where Auctioneer's Bill was taxed. In its ruling, the court was of the view that taxation proceedings were different and not affected by the stay orders. It is further submitted that the petitioner filed several applications in Misc. 2 of 2015, one of them being an appeal against the taxation. In the ruling delivered on 31<sup>st</sup> July 2016 the

application was dismissed. Two other applications dated 11<sup>th</sup> August 2015 and 6<sup>th</sup> October 2015 filed by the petitioner were also dismissed. It is submitted that orders sought to transfer the Misc. 25 of 2015 to Nairobi were granted on 10<sup>th</sup> March 2015 on condition that the petitioner deposits Kshs.21,763,126 in court within 15 days, a condition the petitioner has failed to comply with and neither has the petitioner applied to vary the orders. It is submitted that orders made on 7<sup>th</sup> March 2016 the court allowed Mutibra Auctioneers to proceed with execution upon the non-compliance by the petitioner.

It is submitted that the petition is misleading and deceptive as no constitutional rights of the petitioner have been violated. It is submitted that there is no reason why the petitioner did not comply with the garnishee orders in Cause 116 of 2013.

Mr. Tindika submitted that the Court of Appeal decision in **Appeal No. 38 of 2013** in which the Appeal was dismissed with each party bearing its costs is the subject of Appeal in **Supreme Court Appeal No. 3 of 2016**.

It is submitted that under the Civil Procedure Rules and also under White Book procedure, where a garnishee fails to comply with a court order to pay the decretal sum the decree holder has a legal right to proceed and enforce the garnishee order absolute by attachment against the garnishee and that is what the 1<sup>st</sup> and 2<sup>nd</sup> respondents did. It is submitted that the orders issued in **Misc. Application No. 2 of 2015** were sufficient to serve as a decree in accordance with the White Book.

Mr. Tindika submitted that these proceedings are *sub judice* and *res judicata*, and further that the court has jurisdiction to make sure that parties do not abuse the process of the court. It is submitted that if the bank is questioning the mode of execution it ought not file a petition but should have filed an application in **Misc. Application No. 2 of 2015**, that in any event there are 2 orders in the file made by Judges of this court. That the petitioner is asking this court to sit on appeal on decisions of two courts with competent jurisdiction. It is submitted that there was no trespass and damages cannot lie.

The respondents urge the court to dismiss the petition with costs.

Mr. Tindika further submitted that the petition is not supported by a valid affidavit, that the petitioner being a corporation, no authority has been filed in or with the affidavit in support of the petition and the petition is not supported by a valid affidavit and should be dismissed.

#### **Determination**

I have considered the pleadings, the written submissions and the oral submissions. As I stated from the outset, the petition herein is convoluted. The issues in the petition are issues that have been litigated in several suits between the parties, or arise from those suits, all of which have not been concluded.

The first remedy sought by the petitioner, that an order be issued directing the Deputy Registrar, Employment and Labour relations Court Mombasa to transfer file Misc. 2 of 2015 (Mombasa) and place it before the Principal Judge Nairobi for further directions, in accordance with orders of the Hon. Mr. Justice Makau of the 19<sup>th</sup> February 2016, is not a matter that should be subject of a petition. The order has already been made and the transfer of the file is an administrative function that does not require even an application, and definitely not a petition.

The declarations sought in prayer 5.1.2 being that the petitioner as garnishee is only liable to pay funds in the account of the judgment debtor in satisfaction of the garnishee order absolute and not liable to attachment pursuant to a garnishee order absolute are matters that are subject of both Mombasa Cause No. 116 of 2013 now Nairobi Cause 1262 of 2015 which as I understand from the pleadings and submissions, is pending before this court, and Mombasa Misc. 2 of 2015, which is also still pending and which the petitioner has sought to be transferred to Nairobi. Orders have already been made for the transfer of the file to Nairobi, but the petitioner has failed to comply with the conditions upon which the orders were granted. If the applicant is not satisfied with those orders, a petition is not the solution. It can only appeal against such orders or apply for review of the orders.

The prayers to set aside and nullify the execution of Warrant of Sale in execution of the decree for money dated 31<sup>st</sup> March 2016 and the proclamation dated 1<sup>st</sup> April 2016 by Tip Top Auctioneers cannot be subject of a petition. And no general or aggravated damages can issue for execution of decrees that have not been stayed.

More fundamentally, the subject matter of the petition is not employment related, nor is there an employment relationship between the parties. The petition is between a Bank and an Auctioneer over execution of a garnishee order.

Although the facts giving rise to the petition originate from orders of this court, this court can only handle the subject if brought within the suits pending in the court but not as an independent suit. This court therefore is not clothed with jurisdiction under Article 162 (2) to determine the same.

The petitioner has further not proved that any of its constitutional rights have been violated by the respondents to come within the principles in **Anarita Karimi Njeru -vs- Attorney General (1979) eKLR** as restated in **Mumo Matemo -vs- Trusted Society of Human Rights Alliance and Others (2013) eKLR**, that a petitioner who seeks redress under the constitution must state his claim with precision by reference to the provisions of constitutional rights violated and how they are violated.

As already pointed out earlier, the prayers sought are also subject of suits that are still pending determination in court.

#### **Conclusion**

In conclusion, I find the petition an abuse of court process with the result that it is struck off with costs to the 1<sup>st</sup> and 2<sup>nd</sup> respondents. No costs are due to the 3<sup>rd</sup> respondent who did not actively participate in these proceedings.

**DATED, DELIVERED AND SIGNED AT NAIROBI ON THIS 2<sup>ND</sup> MARCH 2018**

**MAUREEN ONYANGO**

**JUDGE**