



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.414 OF 2013

TRANSPORT WORKERS UNION.....CLAIMANT

VERSUS

LOCHAB BROTHERS LIMITED.....RESPONDENT

RULING

The ruling herein relates to two (2) applications dated 21st December, 2017 and 4th January, 2018 and filed by the respondent, Lochab Brothers Limited.

The parties addressed the applications by way of written submissions.

In the application dated 21st December, 2017 the respondent is seeking for orders that;

1. *Spent*

2. *Spent*

3. *Spent*

4. ...

5. ...

6. *The court be pleased to set aside the execution proceedings as carried out by the claimant on account of being irregular and a nullity and any property attached pursuant thereto be released unconditionally to the respondent.*

7. *The time within which the respondent ought to have demanded for reasons from the Taxing Masters in respect of the taxation of the claimant's party and party costs and the filing of a reference be extended.*

8. *The costs of this application and the auctioneer's costs be sourced by the claimant.*

The application is supported by the annexed affidavit of Ranjit Singh Lochab and on the grounds that execution is being carried out by the claimant as it has been carried out by the claimant acting in person without the advocates who are on record. There is no amended decree extracted after judgment to enable execution proceedings to commence noting more than one year has since lapsed since judgement was delivered and execution cannot proceed through warrants of attachment and same but by notice to show cause being issued first. The claimant moved the court in person despite having an advocate on record. The attached asserts were never proclaimed or leave granted so as to attach the same. These irregularities are fatal to the execution proceedings by the claimant.

Other grounds in support of the application are that the claimant drew the party and party costs in person despite having an advocate on record and this is irregular. The bill of cost indicates it was served upon Mwongeri & Company Advocates instead of Magata & Company Advocates who were on record for the respondent at the time. There was therefore no taxation notice issued to the respondent.

The claimant has engaged in irregular process and thus the application and orders sought should issue.

In his affidavit, Mr Ranjit Singh Lochab avers that he is the director of the respondent is thus conversant with the matters herein. Upon

delivery of judgement in this matter on 28th March, 2014, the claimant applied for review and ruling delivered on 30th September, 2016 with the court allowing for a review. The respondent challenged the same to have it set aside but this application was never heard.

Mr Lochab also avers that the respondent's property was attached by Eshikoni Auctioneers on 19th December, 2017 being Motor vehicle No.KCG 363R and trailer registration No.ZC 5040. The auctioneers did not seek leave to attach these assets of the respondent in accordance with the Auctioneers rules, 1997.

The execution proceedings are irregular having commenced by the claimant filing the party and party costs in person despite having an advocate. No draft bill was served or notices issued to the respondent so as to attend taxation. This is contrary to the Civil Procedure Rules, 2010 on execution proceedings. Due to the nature of these irregularities, the orders sought should issue to the respondent.

With regard to application dated 4th January, 2018 the respondent is seeking for orders that;

1. Spent.
2. The respondent's motor vehicle registration numbers KAL 670K and KAD 664G be released on running attachment pending the hearing and determination of this application.
3. The court be pleased to set aside the execution proceedings as carried out by the claimant on account of being irregular and a nullity and find that the motor vehicles registration numbers KAL 670K and KAD 664G were unlawfully attached.
4. The respondent's application dated 2nd day of November, 2016 be granted a hearing date, the respondent be granted leave to file a further affidavit thereto and leave to amend the application to incorporate a prayer setting aside the *ex-parte* decision and proceedings relating to the ruling dated 30.9.2016.
5. Costs of this application be granted.

The application is supported by the annexed affidavit of Mr Lochab and on the grounds that the execution being carried out by the claimant is irregular as it has never been lawfully moved by the advocates on record. There is no amended decree to enable lawful execution proceedings to commence and it has been over one year since judgement was delivered herein.

In reply, the claimant filed a Replying Affidavit sworn by Dan Mihadi the General Secretary of the claimant union in response to the two applications by the respondent.

Mr Mihadi avers that upon filing the claim herein judgement was delivered and then reviewed by ruling on 30th September, 2016 awarding the claimant the sum of Kshs.2, 655,400.00 and the respondent has since complied with parts of this judgement by negotiating a Collective Bargaining Agreement with the claimant. The respondent filed application dated 2nd November, 2016 seeking a stay of the execution of the orders issued vide ruling of 30th September, 2016. On 8th November, 2016 the court allowed stay of execution of the orders of 30th September, 2016 pending hearing and on condition that the decretal sum of Kshs.2, 655,400.00 is deposited in court before 16th November, 2016 to which the respondent failed to comply with. The stay orders thus lapsed and the claimant was at liberty to execute the decree.

The application dated 2nd November, 2016 was overtaken by events when the claimant raised garnishee proceedings with no objections by the respondent. Some assets of the respondent were proclaimed on 6th December, 2017 and through the firm of Nyambegera & Co. Advocates the respondent wrote to the auctioneers and delivered two motor vehicles registration number KAD 664G and KAR 670K in exchange for motor vehicle registration number KCG 363R.

Mr Mihadi also avers that the Bill of Costs dated 17th March, 2017 related to the claimants' costs and notice was served upon the respondent. The respondent has failed to abide orders issued on 5th January, 2018 and the applications before court should be dismissed with costs.

In submissions, the respondent's case is that the execution process by the claimant is a nullity as there is no amended decree that has been extracted after the judgement was reviewed so as to allow to a lawful execution to proceed. The decree issued on 22nd May, 2014 has been for the last 3 years and in terms of Order 22 Rule 18 of the Civil Procedure Rules, 2010 a notice to show cause against execution ought to have issued and as held in **Mini Bakeries (K) Ltd versus George Ondieki Nyamanga [2014] eKLR**.

The attached assets were not proclaimed or leave granted to attach the same. The auctioneer who proceeded with attachment did not comply with the Auctioneers Rules. These irregularities are fatal to the execution proceedings.

The claimant has moved the court in person and proceeded to have the party and party costs taxed in the absence of the advocates on record and contrary to the Advocates Remuneration Order. No notice was issued to the respondent as required.

The respondent filed its application dated 2nd November, 2016 but due to a mistake of advocate, this application has not been prosecuted. The respondent should not be condemned unheard due to a mistake of the advocate as held in **Philip Kiptoo Chemwolo & Another versus Augustine Kudende [1986] KLR**.

The claimant also submits that there should have been an amended decree to warrant proper execution through the advocate on record. When the bill of costs came for taxation, the advocate requested somebody to hold his brief after notice had been served upon advocate for the

respondent.

The claimant also submits that since the respondent filed application dated 2nd November, 2016 there has been inordinate delay in having to prosecuted and also failed to attend court on 8th November, 2016 when conditional interim orders were granted and to which the respondent has failed to comply. The orders sought lack merit and should be declined with costs to the claimant.

Determination

Rule 32(2) of the Employment and Labour Relations Court (Procedure) Rules, 2016 allow for the use of the Civil Procedure Rules under the Civil Procedure Act, 2010 on execution of an order or decree of the court. order 22 Rule 18 thus applies in this regard where there is challenge to the claimant's proceeding with execution of the judgement and orders of this court and the respondent seeking to stay such proceedings and have the orders issued set aside.

On the admission by the claimant in the submissions that execution proceeded without an amended decree, which casts doubt on the entire process and to the extent of that admission, such process being flawed should not be allowed to stand. Order 22 Rule 18 of the Civil Procedure Rules, 2010 is clear to the extent that where there is an order and decree of more than one year, before attachment of any property of the judgement debtor, a notice should issue to show cause why such decree should not be executed.

In this case, judgement was entered on the 28th March, 2014 and reviewed by an order issued on 30th September, 2016. Following such order allowing for a review of the judgement, an amended decree and notice to the respondent ought to have issued. This was not the case here. There is no amended decree. The process which then followed in executing the reviewed judgement is flawed.

In **Republic v Commissioner of Police & 2 others ex parte Kenya Commercial Bank [2014] eKLR** the court held that;

It follows that without a Notice having been issued pursuant to the foregoing [Provisions of Order 22 Rule 18 of the Civil Procedure Rules] or such notice dispensed with the process of the execution was unprocedural and unlawful.

I have perused the Court file and whereas the warrants of sale were signed and sealed by the Court, the Warrants of attachment were not.

The execution proceedings thus put in motion by the claimant were unjustified and no rationale exists for the same. The motions of attachment of the respondent property did not have a basis. However in the court directions to ensure the completeness of the process and allow the parties to proceed on a fair ground, on 8th November, 2016 and on 5th January, 2018 the respondent was directed to deposit with the court the decretal sum which orders have not been complied with. Such non-compliance should not be encouraged and thus pending all else, the deposit of the judgement sum as reviewed by the orders of 30th September, 2016 should be complied with within fourteen (14) days from the date hereof.

Before conclusion, I note the respondent is seeking for orders that the application dated 2nd November, 2016 be granted a hearing date. Such application has been pending since 8th November, 2016 when the court delivered ruling allowing the respondent stay of execution and the order to deposit with the court the judgement amounts as reviewed. Going through the record, I find no effort by the respondent to urge this application. The duty is vested on the respondent to move the court in this regard to have this application fixed for hearing. To move the court as the claimant had done in this respect is to conflate issues herein.

Accordingly, applications dated 21st December, 2017 and 4th January, 2018 are hereby allowed to the extent that;

- a) the execution proceedings by the claimant are hereby set aside;**
- b) the process of taxation shall commence afresh;**
- c) the attached motor vehicle registration numbers KAL 670K and KAD 664G and property of the respondent shall be henceforth be released; Save that**
- d) the respondent shall deposit with the court the judgement amount in terms of orders of 30th September, 2016 being the sum of Kshs.2,655,400.00 within 14 days; and**
- e) Costs herein are awarded to the claimant.**

Delivered in open court at Nakuru this 30th day of April, 2018.

M. MBARU JUDGE

In the presence of:

Court Assistant: Nancy Bor

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