



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1373 OF 2010

(Before Hon. Lady Justice Maureen Onyango)

TONNY MOSES ODERA.....CLAIMANT

VERSUS

MILLIE G. A. OTHIAMBO

JEFFREY MAGANYA

ANDIA ADEKA (SUED IN THEIR CAPACITY AS THE TRUSTEES

OF THE CRADLE – CHILDREN FOUNDATION).....1ST RESPONDENT

ERIC OGWANG.....2ND RESPONDENT

RULING

The application before me for determination is dated 6th July 2018 and seeks the following orders –

1. That this application be certified urgent and be heard ex-parte at the first instance.
2. That the Court be pleased to grant an interim stay of execution of the Award delivered on 18th August 2016, the resulting decree and the warrants of attachment and or sale of movable property issued on 21st June, 2018 pending the hearing and determination of this application inter partes;
3. That the Court be pleased to grant an interim stay of execution of the Award delivered on 18th August, 2016, the resulting decree and the warrants of attachment and or sale of movable property issued on 21st June, 2018 up to the date when Civil Application No. Nairobi 145 of 2018 (UR 121/2018) comes up for hearing by the Court of Appeal.
4. That the warrants of attachment and sale of movable property issued on 21st June 2018 to Fantasy Auctioneers be recalled and cancelled.
5. That the costs of this application and those of Fantasy Auctioneers be borne by the Claimant.

The grounds upon which the application is anchored are set out on the grounds in support of the application which also summarise the facts of the case as follows –

1. The Respondent being dissatisfied with the Award delivered by this Court on 18th August 2016, has filed a Notice of Appeal and intends to appeal against the whole of the said Award.
2. The Respondent has similarly filed an application for an injunction to stay execution under Rule 5(2)(b) of the Court of Appeal, being Civil Application No. NAIROBI 145 of 2018 (UR 121/2018).
3. The application in the Court of Appeal has been certified urgent and is due to be heard any time now. In the event that an interim stay of execution is not granted, the application will be rendered academic despite the fact that the Court of Appeal has certified the same as urgent;

4. In the meantime, on 22nd June 2018, the Claimant through Messrs. Fantasy Auctioneers proclaimed against the property of the Respondent herein in execution of a decree of Kshs.902,449.90.

5. The said auctioneers gave the Respondent seven (7) days within which to settle the decretal sum plus auctioneer's costs of Kshs.106,122.50 failing which they will proceed to attach and sell the Defendant's motor vehicles;

6. The seven days have since lapsed and the Respondent's assets could be attached for sale any time.

7. Since the attachment, it has come to the attention of the Respondent that the execution process and the procuring of the warrants was contrary to section 94 of the Civil Procedure Act. The whole execution process is a nullity and the warrants issued to Fantasy Auctioneers should therefore, be recalled and cancelled.

8. The attachment is illegal and should be nullified.

9. If the threatened attachment proceeds as proposed by the Claimant or his agents, the Defendant will suffer substantial and irreparable loss as its business operations will substantially and adversely be affected, it being an NGO that focuses on Children's rights;

10. The Defendant has an arguable appeal with good prospects of success.

11. It is in the interests of fairness and justice that this Honourable Court do grant the prayers sought.

12. The costs of this application and the Auctioneer's costs arising out of the illegal attachment be borne by the claimant.

The application is supported by the affidavit of MICHAEL WASONGA, the Acting Executive Director of the 1st respondent.

The claimant opposes the application and filed a replying affidavit in which he deposes that this application is brought in bad faith in an effort to defeat the cause of justice. He deposes that the court is *functus officio* as a similar application has been filed in the Court of Appeal.

At the hearing of the application, Mr. Namachanja for the applicant/judgment debtor submitted that the applicant has filed a notice of appeal and an application for stay in the Court of Appeal. That in the interim there was a proclamation and a warrant issued to Fantasy Auctioneer. That what the applicant is challenging is execution process of the warrant. He submitted that by letter dated 17th May 2014 counsel for the claimant withdrew the Bill of Costs and requested the Deputy Registrar to issue the warrants as they wished to execute the warrants first. He submits that under Section 94 of the Civil Procedure Act there ought to have been a certificate for that purpose. That mischief intended to be addressed by the section is the judgment debtor being bombarded by execution process.

He relied on the case of **DIAMOND TRUST -V- SURJIT SINGH SEHMI**. He submitted that the same position is taken in the case of **BJP (K) LIMITED -V- E. A. EXPLORATION LIMITED**. He submitted that withdrawal of taxation is not abandonment of decree. He submitted that Article 159 which the claimant sought to rely upon does not aid a person in clear breach of statutory provision, that a court has no discretion to overlook a breach of the Act.

For the claimant, Mr. Raballa submitted that the claimant has withdrawn the Bill of Costs and that the court was being invited to interpret Section 94 of the Civil Procedure Act, which gives courts mandate to direct that a decree be executed first then costs be paid at a later date. He submitted that this is at the discretion of the court and that the section does not provide for an application to be made to the court. He submitted that the section can apply under the present circumstances by the court applying its discretion under Article 159 of the constitution.

He submitted that the applicants have come to court with unclean hands, that they have locked their offices and carried away the vehicle that was proclaimed. That this reflects their conduct in this matter. That they have been putting one hurdle after another, frustrating execution process in breach of the law.

He submitted that there is an application pending in the Court of Appeal seeking stay of execution, that the present application ought to have been made in the Court of Appeal. He submitted that there have been four applications seeking the same orders. He submitted that the reason the claimant withdrew the Bills of Costs and stay of taxation was the spurious actions of the applicant. He submitted that the respondent is trying to benefit from a situation it created. That the respondent was not willing to deposit the decretal sum in court even after making a proposal to do so.

Mr. Raballa submitted that granting a stay of execution in this court would create confusion should stay be denied in the Court of Appeal.

Determination

I have considered the application, the grounds and affidavit in support thereof. I have also considered the grounds of opposition to the application as set out in the replying affidavit and in the notice of preliminary objection filed by the claimant. I have further considered the authorities relied upon by the applicant.

It is an admitted fact that the applicant has filed several applications for stay which were all dismissed by this court. It is further not denied that there is an application for stay pending in the Court of Appeal. A copy of the application is attached in the affidavit supporting the application.

I do not wish to delve into the merits of the application. It is obvious from the pleadings and facts that an application is pending before the Court of Appeal for stay of execution of the same decree that the applicant seeks to stay in the present application. It is an abuse of court process to have two separate applications seeking to stay the same decree in this court and in the Court of Appeal.

Order 42, Rule 6 and 7 do not provide for concurrent applications for stay of execution. The applicant having moved to the Court of Appeal after having made successive applications in this court all of which failed, this court is *functus officio* and cannot make any further orders except in execution of a decree arising from an order or judgment of the Court of Appeal.

For these reasons the court declines to determine the application dated 6th July 2018 with the result that it is dismissed with costs.

DATED AND SIGNED AT NAIROBI ON THIS 31ST DAY OF JULY 2018

MAUREEN ONYANGO

JUDGE