



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 895 OF 2012

(Before Hon. Lady Justice Hellen S. Wasilwa on 3rd July, 2018)

LUKA LUNAYO.....CLAIMANT/DECREE HOLDER

VERSUS

NYPD RESTAURANT.....1ST RESPONDENT/JUDGEMENT DEBTOR

UPSTATE KENYA AUCTIONEERS.....2ND RESPONDENT

AND

CHARLES GOKO WAITHAKA t/a

ICE ON FIRE BAR AND RESTAURANT.....OBJECTOR

RULING

1. The Application before Court is one dated 13th April 2018 filed under Order 22 Rule 50 & 51, Order 46 Rule 2 and Order 51 of the Civil Procedure Rules (2010), Sections 3A of the Civil Procedure Act Cap 21 Laws of Kenya and all other enabling provisions of the laws seeking Orders:-

a. That this application be certified urgent and be heard exparte in the first instance.

b. That pending the hearing and determination of this application inter parties, the court does order that the status quo Ante and orders subsisting prior to the delivery of the ruling by Hon. Justice H. Wasilwa on 19th March 2018 in this matter do prevail.

c. That pending the hearing and determination of this application, the 2nd respondent, its servants, agents and/or employees acting on the institutions of the Claimant/Decree Holder be restrained by an order of injunction from proclaiming, attaching and/or selling by way of Public Auction the objector's goods.

d. That pending the hearing and determination of this application inter parties, the court does order a stay of execution of the ruling delivered herein on 19th March 2018 and any consequential decree or order thereon.

e. That upon hearing of this application inter parties, the Honourable court be pleased to grant the objector/applicant leave to appeal against the ruling delivered on 19th March 2018.

f. That pending the hearing and determination of the intended appeal, the Court does order that the status quo Ante and orders subsisting prior to the delivery of the ruling on 19th March 2018 in this matter do prevail.

g. That pending the hearing and determination of the intended appeal, the court does order a stay of execution of the ruling delivered on 19th March 2018 and any consequent decree or order thereon.

2. The Application is supported by the Affidavit of one Charles Goko Waithaka and is premised on the following grounds:-

1. The Objector herein filed objection proceedings under Certificate of Urgency on 27th November 2017 seeking for an order restraining the 2nd Respondent who had proclaimed the Objector's goods at the behest of the Claimant/Decree holder from carrying on with the intended attachment.

2. That the Objector was granted a temporary order on 29th November 2017 stopping the proclamation, attachment and/or sale of the Objector's goods pending hearing and determination of that application.

3. That the matter proceeded for hearing and ruling was delivered on 19th March 2018 dismissing the application.

4. That the 2nd Respondent again served the Objector with a proclamation notice on 10th April 2018 that gave the objector 7 days to pay up with instructions from the Claimant/Decree Holder.

5. The Objector is aggrieved by the ruling of the Court which allows the 2nd Respondent to proclaim, attach and/or sell goods belonging to him and hence intends to appeal and has commenced the appeal process by preparing a Notice of Appeal as well as the intended Memorandum of Appeal as he is bound to suffer substantial loss unless the execution of the said ruling and the resultant proclamation sought to be appealed against are stayed.

6. That the Respondents will not suffer any incurable prejudice should the application herein be allowed therefore. Unless this Court intervenes with an injunctive order, the Objector's rights will be violated and will suffer irreparable loss if the 2nd Respondent acting on the instructions of the Claimant/Decree holder goes on to attach, proclaim and/or sell the objectors goods.

3. The Claimant filed his Replying Affidavit where he avers that this Application is merely an afterthought solely meant to delay the course of justice and to deny him enjoyment of the fruits of his lawfully obtained judgment as the objection is frivolous and vexatious and it has not shown any grounds upon which he seeks to challenge the findings of the Honourable Court in rejecting the objection application.

4. He further avers that the Applicant only comes to Court when the proclamation is done hence the Court should find that the Applicant is an indolent litigant that should not find favour in the discretion of the Court as he is not truthful and this Application is merely an afterthought aimed at delaying the Court process. He states that he has suffered great hardship and injustice in the hands of the applicant by failing to pay him his salary and continues to frustrate his efforts despite having obtained justice from this Court.

5. He further states that the Application is fatally defective and should be dismissed with costs and it would be in the interest of justice that the Applicant's Application be dismissed and litigation must come to an end as the Applicant has not shown any prejudice or irreparable loss he is bound to suffer in the event that the Application is not allowed.

6. The Applicant filed his further affidavit where he states that the suit was wrongly instituted from the onset as evident from the parties sued and this goes against the legal grain and for justice to prevail, he is to be allowed to vent his issues in the Appellate Court. He avers that the Objector has no linkage with the Judgment Debtor and the proclaimed goods were in the Objector's premises and in no way are the property of the judgment debtor who is a total stranger to the Objector.

Submissions

7. The Claimant filed his submissions where he submits that the Applicant's Application is purely aimed at prejudicing and delaying the execution process and finalization of this matter as he is not being honest and truthful to this Court since the Application is merely an afterthought solely meant to delay the course of justice and to delay his enjoyment of the fruits of his lawfully obtained judgment.

8. He submitted that the objection is an abuse of the Court process. He relied on the case of **Lalji Bhimji Sangani Builders & Contractors Vs Nairobi Golf Hotels Kenya Limited Nairobi HCCC No 1900 of 1995.**

9. He avers that the Applicant has not attached any tangible evidence in terms of receipts to show that he has legal and equitable ownership of the attached goods, he also states that the Applicant should show the damages it would suffer if the stay is not granted. It is not enough as alleged by the Applicant that he is aggrieved by the ruling delivered on 19th March 2018 and that the intended appeal will be rendered nugatory.

10. He therefore urges the Court to hold that the right to appeal is in itself *per se* not a guarantee of success. In addition to the Applicant taking steps to appeal by attaching a draft Notice of Appeal and Memorandum of Appeal is not a demonstration and willingness and desire to have the intended appeal prosecuted speedily by taking steps towards this purpose.

11. He submits that the Applicant is totally undeserving of the discretion of this Honourable Court in its favour as the application has no merit and it has not given good reason why he is seeking the orders of execution when no Notice of Appeal has been filed and no proceedings applied for to demonstrate the intention of filing an appeal hence pray that the Applicant's application be dismissed with costs to the Claimant.

12. I have examined all the averments of both parties. The Objector's proceedings were filed by the Objector herein, which this Court dismissed. The Objector being dissatisfied by this Court's ruling of 19/3/2018, seeks a stay of execution in this matter pending an Intended Appeal.

13. The Applicant also seeks leave of this Court to appeal against this Court's ruling of 19/3/2018.

14. Order 42 rule 6(2) of the Civil Procedure Rules provides circumstances under which this Court can stay its orders as follows:-

“(2) No order for stay of execution shall be made under subrule (1) unless:

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

15. Order 43 rule 1 (3) of the Civil Procedure Rules on the other hand states that:-

“An application for leave to appeal under this section of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally or at the time when the order is made or within fourteen (14) days from the date of such order”.

16. Now concerning the Application of leave to appeal, I note that I delivered my ruling on 19/3/2018. The 14 day window for which this Application was to be made expired on 4/4/2018. Order 43 rule 1(1) is couched in mandatory terms and this Application being made on 13.4.2018 was made outside the required time and as such cannot lie.

17. On issue of stay, since there is no appeal filed and following the denial of leave to appeal by this Court, the stay cannot hang in the air. The stay ought to be hinged upon certain occurrences.

18. It is therefore my finding that the Application for stay and for leave to appeal is not merited and the same is dismissed accordingly.

19. Costs to the Decree Holder.

Dated and delivered in open Court this 3rd day of July, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ngethe holding brief for Nyangara for Decree Holder – Present

Maina for Objector/Applicant – Absent