



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 320 OF 2014

(Before Hon. Justice Mathews N. Nduma)

ANDREW TUBEI MULATI.....CLAIMANT

VERSUS

DR. ENOCK WAMALWA KIBUNGUCHY.....RESPONDENT

R U L I N G

1. By a Notice of Motion application dated 22nd March 2018, the applicant seeks the following orders:-
 - (e) Declaration order that the parliamentary service commission is vicariously liable to satisfy the decretal amount herein as the acts leading to the decree issuing were done in the Respondent/Applicant's official capacity as member of parliament Likuyani.
 - (f) That the court do review and or set aside the warrants of attachment obtained by Life Wood Auctioneers as they were obtained without leave of court to issue before taxation.
 - (h) That the court do issue an order of stay of execution pending hearing and determination of **Kisumu Misc. Cause No. 17 of 2017 Andrew Tubei Mulati v Dr. Enock W. Kibunguchy** under Order 22 Rule 25 of the Civil Procedure Rules.
 - (j) That the proclamation and attachment (execution) be declared illegal, null and void for want of certificate of taxation and or leave of court.
 - (k) That Costs of the application inter alia.
2. The application is based on grounds set out on the Notice of Motion as follows:-
 - (a) That an attachment before taxation without leave of court has been done herein.
 - (b) That the proclamation has been done against the personal belonging of a member of parliament for work done officially.
 - (c) That the transaction leading to the decree issuing was pursuant to execution of official duties as member of parliament for Likuyani constituency.

(d) That no taxation of costs has taken place and no certificate of costs issued under order 22 rule 7 to be used for execution, without leave of court.

(e) That prejudice will be occasioned to the applicant as no certificate of taxation has been placed before the parliamentary Service Commission to have the vouchers drawn.

3. The application is further supported by an affidavit of the applicant sworn on 22nd March, 2018 which augments the aforesaid grounds.

Response

4. The application is opposed vide a replying affidavit of the Claimant/Respondent sworn on 4th April, 2018 and filed on 9th April, 2016.

5. The Claimant/Respondent stated that he obtained judgment against the Respondent on 20th July, 2017. The Claimant/Respondent obtained decree from the Deputy Registrar ELRC dated 29th August, 2017. That demand notices were sent by the Claimant's advocates to the advocates of the Applicant/Respondent dated 7th March, 2018; 4th September, 2017; 4th August, 2017.

6. That Employment and Labour Relations Court (Procedure) Rules, 2016 do not require one to seek leave of court to commence execution process.

7. The court made a ruling dated 26th November, 2017 in which the court determined that the contract of employment was between the Claimant and the Respondent and parliamentary service commission was not a party. Judgment was given as against the Applicant/Respondent and parliamentary commission was not a party to the suit. The Judge declined leave to join the parliamentary service commission in its ruling of 26th January, 2017. The Ruling was not appealed against and it stands to date.

8. Matters touching on gratuity were dealt with by the court on 21st February, 2018 when the court adopted tabulation presented by the Claimant/respondent in the sum of Kshs.88,931.25.

9. That there is no appeal pending against the judgment of the court. That the Applicant/Respondent has not offered security as required by law. That the applicant will suffer no prejudice if the application is not granted. That the Applicant only seeks to delay the Claimant/Respondent from enjoying the fruits of his judgment.

10. The application is frivolous, lacks merit and it be dismissed with cost.

Determination

11. The prayers sought by the Applicant/Respondent are untenable for want of any basis in law or fact. Judgment was obtained against the Respondent/Applicant and no other party. The question of bringing in parliamentary service commission to this matter is farfetched and without merit following the ruling of the court disallowing joinder of the commission on 26/1/2017. The Ruling was not appealed against.

12. The attack on the decree and warrants of attachment lack any factual or legal basis. The Applicant/Respondent is only employing delay tactics in this matter. No security has been furnished to show good faith.

13. Therein being no Appeal pending against the judgment of the court, the plea to stay or set aside the attachment and stop the pending sale is unwarranted. The application is dismissed with costs.

Ruling Dated, Signed and delivered this 20th day of September, 2018

Mathews N. Nduma

Judge

Appearances

Angu Kitigin & Co. Advocate for the applicant/Respondent

Sutel for Claimant/Respondent

Chrispo – Court Clerk