



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 240 OF 2015

(Before D. K. N. Marete)

JOHN WAFULA SIMIYU.....CLAIMANT

VERSUS

THE STAR PUBLICATION LIMITEDRESPONDENT

RULING

This is an application by the respondent dated 20th December, 2016. It seeks the following orders of court;

1. *This application be certified urgent and be heard ex-parte at the first instance.*
2. *Pending inter partes hearing of this Application, this Honourable Court be pleased to restrain the Claimant, its agents and/or servants including Lifewood Traders from advertising for sale, selling, transferring or dealing in any manner whatsoever with the properties that are the subject of the notification of sale dated 19th December 2016 or in any manner proceeding with the execution of the Judgment of Honourable Justice D.K.Njagi Marete dated 17th June 2016 and of any decree that may ensue from the said judgment;*
3. *Pending inter partes hearing of this Application, this Honourable Court be pleased to order the Claimant, its agents and/or servants including Lifewood Traders to return to the Respondent the properties it attached pursuant to the notification of sale dated 19th December, 2016;*
4. *This Honourable Court be pleased to reinstate the order to say of execution of its judgment dated 17th June 2016, issued vide it Ruling dated 28th September, 2016;*
5. *This Honourable Court be pleased to restrain the claimant, its agents and/or servants including Lifewood Traders from advertising for sale, selling, transferring or dealing in any manner whatsoever with the properties that are the subject of the notification of sale dated 19th December 2016 or in any manner proceeding to levy execution of the judgment of Honourable Justice D.K.Njagi Marete dated 17th June 2016 and of any decree that may ensue from the said judgment;*
6. *This Honourable court be pleased to order the claimant, its agents and/or servants including Lifewood Traders to return to the respondent the properties it attached pursuant to the notification of sale dated 19th December 2016;*

7. Costs of this application be provided

It is grounded as follows;

- a) On 28th September 2016 and following an interpartes hearing of the respondent's application for stay of execution pending appeal, this Honourable court delivered a ruling allowing the said application;
- b) Without specifying any timeline for doing so, the Court also ordered the deposit of Kshs.660,000/- as security pending hearing and determination of the intended appeal. The said deposit was made on or about 5th December 2016;
- c) However, it came to the respondent's advocates' attention that on 28th November, 2016, the order for stay of execution may have been vacated *ex parte*, during a mention and without any formal application;
- d) The respondent's advocates received the mention notice for the 28th November 2016 on 5th December 2016, purportedly and irregularly served by registered post contrary to the rules of this court;
- e) On 19th December 2016 and pursuant to the Claimant's/his counsel's instructions, auctioneers known as Lifewood Traders descended on the respondent's offices in Eldoret, attached and removed properties in purported execution of the Judgment of this Court dated 17th June 2016. The sale of the said properties is scheduled for 28th December, 2016.
- f) If any event, the removal of the respondent's goods by the auctioneers is contrary to the provisions of the Auctioneers Act & Rules which authorize removal only upon expiry of the period of notice without payment. The same also constitutes an offence under rule 14 of the Auctioneers Rules;
- g) The Applicant is apprehensive that it shall suffer substantial loss unless the orders are granted by this Honourable Court;
- h) It is in the interest of justice and fairness that this Honourable Court do grant the prayers sought.

The claimant/respondent in a Replying Affidavit sworn on 13th January, 2017 opposes the application and prays that this be dismissed with costs.

At the hearing of this application on 30th January, 2017, Mr. Mwangi submitted that following the *inter partes* hearing of the respondent's application for stay of execution, this court granted the application. There was a further order for a deposit of Kshs. 660,000.00 being security by the respondent.

The claimant, being dissatisfied with this order chose to seek an *ex parte* stay of the order, instead of appealing against it. The order was vacated on 28th November, 2016 at a mention to the detriment of the respondent.

It is the respondent's further case that the mention notice was irregularly served by registered post in violation of Order V Rule 8 of the Civil Procedure Rules which requires personal service. The respondent further submits that the forwarding letter of the notice was received at their offices on 5th December, 2016, a week after the mention. The effect of this therefore was that the orders were vacated without their representation and to their great prejudice. This irregularity is not justified in the claimant's replying affidavit in this application.

The respondent also cites irregularity of the auction process subsequent to the lifting of the orders of

court. The claimant waited until 19th December, 2016 to have auctioneers descend on the respondent's premises and take away her property. This was irregular and offends Rule 12 of the Auctioneers Rules which requires a proclamation and issue of a seven day notice to satisfy the sum due. It also requires that on the expiry of the seven days the auctioneer notifies the place of goods and that this cannot be sold at the place they are found. He submits that the claimant is irregularly holding on to his clients properties and therefore frustrating her running of business.

The respondent submits that she has deposited the amount of security in court on 5th December, 2016. The claimant cannot therefore execute when this order is satisfied. Moreover, the court did not issue timelines for the deposit. He therefore urges the court to allow the application so as to enable the respondent to pursue a meaningful appeal.

The claimant/respondent in opposition relied on his replying affidavit sworn on 13th January, 2017. It is her case that stay of execution was granted to the respondent subject to a deposit of security. A mention date was set for confirmation of compliance and this was served onto the respondent's through registered post. This method of service has been employed in all previous cases in this cause and no issues have arisen.

It is the claimant's further case that the option was pursued in accordance to Auctioneer Rules- annexure 5 which exhibits a proclamation. There is also a notice of attachment dated 8th December, 2016 which took care of the seven day notice. The notification of sale – JWS8 indicates where the goods are held.

The claimant/respondent further submits that the respondent's have not made a deposit of the decretal sum and the issue is the stage at which they would do this. It is his case that the respondents were always aware of the vacation of the court order and that this application is made in bad faith. It is an indicator that the respondent is a person of means and capable of complying with the judgment of this court. He therefore prayed that this application be dismissed with orders to the respondent to comply with judgement as ordered, including issue of a certificate of service.

Mr. Mwangi, counsel for the respondents in rebuttal of the claimant/respondent's submissions denied that he was aware of the vacation of the stay orders and indeed there is no evidence of service of the same. These were also obtained *ex parte*. Again, the evidence of the proclamation at JWS5 is doubtful in that there is no indication of service and acknowledgment of the same by the respondent. The arrangement in this appears to be a concoction by the auctioneer and inauthentic.

I allow the application. This is because the respondent/applicant's casts a shadow on the efficacy of service of the mention date by the claimant. She was not timely notified of the mention in court so as to appear and present her case. This nullifies all action appurtenant to the stay of execution orders made on 28th November, 2016.

I am therefore inclined to allow the application with orders that each party bears their own costs of the application.

Delivered, dated and signed this 21st day of February, 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Mwangi instructed by Mohammed Muigai Advocates for the Respondent/Applicant.
2. Miss Soita instructed by Mwakio Kirwa & Company Advocates for the Claimant/Respondent.