



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.2145 OF 2011

PETER MWANGICLAIMANT

VERSUS

RIFT VALLEY RAILWAYS LIMITEDRESPONDENT

AND

PETER G WAWERU T/A IDEAL AUCTIONEERS APPLICANT

RULING

- 1.The Ruling herein is with regard to applications dated 12th August, 2016 and 13th October, 2016.
- 2.In the application dated 12th August, 2016 the Respondent, Rift Valley Railways Limited is seeking for orders pursuant to the provisions of Order 22 rule 25, order 40 rule 1, order 51 rule 1 of the Civil Procedure Rules and section 3 and 11 of the Employment and Labour Relations Court Act that;
 1. ...
 2. *Spent*
 3. *Spent*
 4. *The court be pleased to grant permanent injunction restraining the claimant/Respondent whether jointly and/or by himself, his agent, servants and/or anyone claiming through him from attaching or selling the respondents assets as proclaimed by Peter G Waweru of Ideal Auctioneers on 1st August, 2016.*
 5. *The court be pleased to declare that the claimant/Respondent whether jointly and/or severally by himself, his agent, servants and/or anyone claiming through him, is not entitled to auctioneers charges for the purported proclamation carried out on 1st August, 2016.*
 6. *Costs be borne by the claimant.*

3.The application is supported by the affidavit of Eunice Arwa and on the grounds that judgement herein was delivered on 29th October, 2015 with the Claimant being awarded Kshs.2, 863,201.00. by a consent order on 14th april, 2016 in **Nairobi Court of Appeal Civil Application No.19 of 2016 (UR No 13 of 2016) – Rift Valley Railways (K) Ltd versus Peter Mwangi** the parties agreed to stay execution pending the hearing of the Appeal on condition that the Respondent deposits the decretal amount in a

joint interest earning account with a reputable bank in 30 days. Due to delays in opening the account at Equity Bank, the deposit was affected on 22nd July, 2016. Despite the Claimant being aware of the deposit he instructed the Applicant party and auctioneers on 1st August, 2016 to proclaim and attach Respondent goods in settlement of the decretal amount and related to auctioneer charges.

4. Further grounds in support of the application are that the applicant was instructed after the decretal sum had been deposited in terms of the consent. The auctioneer has proceeded to issue notice of sale and being the claimant's agent the same is illegal and meant to infringe on the respondent's property.

5. In the affidavit of Ms Arwa, she avers that as the Company secretary of the Respondent she is conversant with issues herein. Upon judgment of the court parties entered consent on stay of execution pending hearing of the appeal and the decretal sum was deposited albeit with delays by the bank. This delay was not due to the fault of the Respondent. The claimant's advocates being signatories to the joint account were aware of the deposit of the decretal amount. They however proceed to instruct Applicant auctioneers to proclaim the respondent's goods and advertise them for sale.

6. In reply, the Claimant filed Grounds of Opposition on 6th October, 2016 and on the grounds that this court is *functus official* and has no jurisdiction over this matter having rendered itself in judgement; the respondents has moved the Court of Appeal in this matter to determine the appeal and any dispute arising should go before this court and the application herein is misplaced.

7. The Respondent in the Further Affidavit file don 13th January, 2017 by Eunice Arwa avers that the Respondent being aggrieved by the judgment of the court moved to the Court of Appeal. A consent order was entered between the parties to stay judgement herein and that the Respondent to deposit the decretal sum in a joint account. Such deposit was done on 22nd July, 2016 but the Claimant proceeded to instruct auctioneers to proclaim its property for sale.

8. Ms Arwa also avers that the court should determine the party which ought to meet auctioneer costs as between the Claimant and Respondent. The Claimant by proceeding to instruct auctioneers to proclaim Respondent goods with the knowledge that there was a deposit in a joint account of the agreed decretal sum ought to meet such costs as the proclamation is unlawful.

The second application filed on 13th October, 2016 and filed by Peter G Waweru t/a Ideal Auctioneers (Applicant) seeking for orders that;

This court be pleased to determine who as between the Claimant and the Respondent in this cause should meet the auctioneers charge in respect to the Warrants of sale of property in execution of decree for money dated 29th July 2016 and subsequent proclamation and attachment of 1st August 2016.

9. The application is supported by the affidavit of Peter G Waweru and on the grounds that as a firm of auctioneers, the applicant was issued with Warrants of Attachment and Sale by the court on 29th July, 2016 and proclaimed against the judgement debtor on 1st August, 2016. Before the applicant could proceed with sale, the Respondent obtained injunctive orders on 15th August, 2016 stopping the same. The applicant has demanded fees from the Respondent who should pay in accordance with Rule 7 of the Auctioneers Act but has failed to adhere. The applicant should not be party to the dispute between the parties and seek its fees be paid.

Submissions

10. All the parties filed written submissions

11. The Respondent submits that judgement was delivered herein on 29th October, 2015. By consent order on 14th April, 2016 in **Nairobi Court of Appeal Civil Application No.19 of 2016 (UR No 13 of 2016)** –

Rift Valley Railways (K) Ltd versus Peter Mwangi. Upon the deposit agreed upon by the parties, the Claimant instructed the applicant to proclaim its property and issue notice of sale. The costs due should be paid by the claimant.

12. This court has jurisdiction to hear this matter and not *functus officio*. The order of injunction is derived from an order of this court. The application filed in the Court of Appeal dated 15th January, 2016 makes no prayer for injunction and current application is not similar to what is before the Court of Appeal. Order 40 rule 1 allow the filing of an application such as the one the respondents has in a case where there is threat of execution and sale of its property. There is good case for the grant of the orders sought in terms of **Giella versus Cassman Brown and Co. Limited (1973) EA**. The threatened attachment is unlawful and orders sought ought to issue as held in **Bolden Nielson versus Herman Phillipus Steya & 2 Others [2012] eKLR**.

13. The respondents also submits that the applicant's costs should be paid by the Claimant who with the knowledge of the deposit in a joint interest earning account went ahead to give instruction on attachment. The warrants of attachment and sale are not issued in good faith and the resulting costs were unnecessary and these ought to be paid by the claimant.

14. The Claimant submits that the current orders sought by the respondents emanates from the Court of Appeal presiding on 14th April, 2016 where a consent was entered and adopted as an order of the court. Where the consent order was not followed, the Respondent ought to have moved the appropriate court as this court is now *functus officio*. On the terms of the impugned consent order, the Claimant was right to move with execution. The orders sought lacks merits and should be dismissed.

15. The applicant submits that they obtained warrants from the court be executed against the judgement debtor and in terms of Rule 7 of the Auctioneers Act the due charges should be paid by such a party – judgement debtor. In **Civil Misc. Appl. 45 of 2012 Joseph Ng'ang'a & 2 others versus Lawrence Muriungi Gichunge & another**, the court held that a judgement debtor is bound to settle the decretal sum plus the consequent execution costs. That in a similar case as this one, the applicant auctioneers charges should be paid by the respondents as the judgement debtor.

Determination

16. I have gone through the applications and responses therein, the written submissions and the cited authorities.

17. The application by the Respondent is seeking an injunction against the Claimant from proceeding with sale of proclaimed goods by the applicant at the instructions of the Claimant and further that the court should determine who should pay the applicant auctioneer costs/charges/fees. The basis of the application is that following judgment herein, the respondents filed application with the Court of Appeal and on 14th April, 2016 parties entered consent order therein so as to have the decretal sum deposited in a joint account pending hearing of the matter before the Court of Appeal.

18. The consent order subject of deposit of the decretal sum in a joint interest earning account relates to **Nairobi Court of Appeal Civil Application No.19 of 2016 (UR No 13 of 2016) – Rift Valley Railways (K) Ltd versus Peter Mwangi**. No such consent order has been recoded to stay judgement herein. The respondents in submissions admit and has acknowledged that judgement herein was delivered on 29th October, 2015. There are no orders of stay of the judgement herein. To move the court on the basis of the consent order pursuant to a matter before the Court of Appeal in **Nairobi Court of Appeal Civil Application No.19 of 2016 (UR No 13 of 2016) – Rift Valley Railways (K) Ltd versus Peter Mwangi** is to invite this court to act outside of its powers. This court has no jurisdiction to act on matters and consent now filed and deposited with the Court of Appeal.

19. There is no order of stay herein. The consent orders agreed upon by the parties is not a subject matter herein. To thus move this court on this basis and seek to stop execution and sale over proclaimed goods by the applicant is in abuse of court process.

20.Application by the Respondent and the orders sought shall not issue.

21.On the above finding, On the costs due to the Auctioneers and the applicant herein, the proclamation and sale having been irregularly stopped by the Respondent when application dated 12th August, 2016 was filed on the basis of a consent order that is not issued by this court, the same should be paid by the Respondent. The Respondent cannot benefit from an irregularity.

Accordingly, Application dated 12th August, 2016 is hereby dismissed. Costs due to the auctioneers shall be met by the Respondent.

Dated and delivered in open Court at Nairobi this 9th day of February, 2017.

M. MBARU

JUDGE

In the presence of:

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