



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA
AT NAIROBI
CAUSE NO. 658 OF 2011
KENYA TEA DEVELOPMENT AGENCY LTD.....CLAIMANT
VERSUS
LEE KIMATHI.....RESPONDENT

RULING

1. By application dated 8th November, 2016 filed by Notice of Motion under the provisions of Rule 16, 27(c) and (g) of the Court Rules, the claimant is seeking for orders that;

1. *Spent.*

2. *There be a stay of execution of the judgement, decree and or warrants of attachment dated 4th November, 2016 herein pending the hearing and determination of this application.*

3. *The warrants of attachment dated 4th November, 2016 and all consequential orders therefrom be and are hereby set aside.*

4. *There be a stay of execution of the judgement and or decree herein pending the hearing and determination of the application dated 14th October, 2016 registered in the Court of Appeal at Nairobi as Civil Application No.235 of 2016 (UR 187/2016), Kenya Tea Development Agency Limited versus Lee Kimathi.*

5. ...

2. The application is supported by the affidavit of John Kennedy Omanga, the claimant's Company Secretary and on the grounds that the respondent has extracted warrants of attachment dated 4th November, 2016 and proceeded to execute for a sum of Kshs.5,565,717.00 and comprising of;

Decretal sum at Kshs.5, 000,000.00

Award Kshs.499, 994.00

Total Kshs.5, 499,994.00

Less paid Kshs.281, 073.00

Interest Kshs.343, 571.00

3. That the above computation of the decretal sum by the respondent is erroneous for the reasons that the sum of Kshs.499, 994.00 was awarded in favour of the claimant and not the respondent and the alleged payment of Kshs.281, 073.00 is unknown to the claimant as since judgement was entered no payments have been made by the claimant and that the interests of Kshs.343, 571.00 is illegal s no interest was awarded to the respondent.

4. The respondent has proceeded to execute against the claimant and Auctioneers have proclaimed its goods on 7th November, 2016. The claimant filed application before Court of Appeal on 14th October, 2016 and due for hearing and there is fear and threat of execution before the claimant can be heard on their case.

5. In reply, the respondent filed his replying affidavit and avers that the claimant filed a similar application dated 1st March, 2016 seeking orders as set out in the current application and a ruling was rendered on 13th October, 2016. The current application is therefore premised on matters the court has already addressed.

6. That on 14th October, 2015 there was judgement and the respondent awarded Kshs.5, 000,000.00 inclusive of interest and terminal dues and as a result procured auctioneers to execute. Upon the dismissal of the claimant's application of 1st March, 2015 and where stay of execution was declined, a draft decree was sent to the claimant who approved.

7. The application herein is made to buy time and thus not in good faith. Where the claimant has moved to the Court of Appeal this court becomes *factus officio* and stay of execution can only be addressed by the higher court.

Determination

8. By application dated 1st March, 2016 the claimant was seeking orders of;

1. ...

2. *Stay of execution of judgement, decree and all consequential orders arising therefrom pending interparties hearing hereof and final disposal of this application.*

3. *Court to order a stay of execution of judgement, decree and all consequential orders arising therefrom pending the lodging, hearing and determination of the appeal.*

9. The application as set out above and dated 1st March, 2016 was dismissed and reasons set out. That application was premised on the grounds that the claimant wished to prefer an appeal against the judgement.

10. In the current application, similar orders are sought on the grounds that the computation of judgement amounts are erroneous and that there is an application before the court of appeal. As such the only difference between the current application and the previous one is that there exists an application before the Court of Appeal.

11. The respondent case is that the computation and the decree sought to be executed is proper and based on the judgement of the court. That the sum of Kshs.5, 000,000.00 was awarded together with terminal dues, and the interests due.

12. For the issues before court, on the basis that there exists an application before the Court of Appeal and the parties have a hearing date, such will not be gone into save that the issue in contest and the computation and manner of awards in the judgement and hence leading to the current execution shall be

addressed.

13. In the judgement of the court delivered on 14th October, 2015 the orders were that;

- a. The respondent shall pay the claimant the sum of Kshs.499,994.00 at 7% per year from 19th December 2006 until payment in full;
- b. Amounts due above (a) shall be computed by the claimant and confirmed by the court in 14 days;
- c. The claimant shall pay the respondent his terminal dues as follows;
 - i. Notice pay at Kshs.172,000.00;
 - ii. Accrued leave at Kshs.92,273.00;
 - iii. Pension contributions at Kshs.16,800.00;
- d. The respondent is awarded damages at Kshs.5,000,000.00 for wrongful dismissal by the claimant;
- e. Each party to bear own costs.

14. The decree thus extracted by the respondent setting out dues owing and subject of execution as comprising an amount to Kshs.5,000,000.00 is correct; an amount of Kshs.449,994.00 as owing to the respondent is erroneous; an amount of Kshs.281,073 as having been paid is erroneous; and the amount of Kshs.343,571.00 as interest on decretal sum is erroneous. The judgement amount and award as set out is of the nature that the respondent was awarded compensation at Kshs.5,000,000.00; notice pay at Kshs.172,000.00; accrued leave at Kshs.92,273.00 and pension contribution at Kshs.16,800.00 only. To therefore proceed and execute against an amount that is erroneous and inclusive of amounts and sums not awarded is to go contrary to lawful orders of the court. The set out amount of Kshs.449,994.00; Kshs.281,073.00 as having been paid by the claimant and the sum of interest on decretal sum at Kshs.343,571.00 are amounts not awarded to the respondent. To include such in the decree as due and proceed to proclaim claimant's goods on this basis lack justification.

15. The decree of the court is specific and cannot be changed by the respondent *suo motto*. To do so is an error that cannot be justified.

16. As execution and warrants now issued against the claimant are based on matters pertinent herein and the subject of contest in this matter, the stay Sought by the claiming in this instant with regard to ... *there be stay of execution of the judgement, decree and or warrants of attachment dated 4th November, 2016 herein pending the hearing and determination of this application* is justified only to the extent that the warrants of attachment being premised on erroneous commutations of amounts awarded shall be lifted. By inclusion of sums that are not due, the respondent defeated the purpose of execution and proceeded in error and without a lawful decree as the amounts set out in the warrants are not in accordance with the court judgement.

In conclusion therefore, application dated 8th November, 2016 is hereby allowed in terms that;

- a. Warrants of attachment dated 4th November, 2016 are hereby not justified and hereby lifted;**
- b. The costs arising out of the execution of the warrants (a) above to be met by the respondent;**
- c. Costs of the application to be met by the respondent.**

Read in open court at Nairobi this 2nd day of February, 2017.

M. MBARU

JUDGE

In the presence of:

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