



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI
CAUSE NO.201 OF 2014

HINGA MBUGUA CLAIMANT

VERSUS

KEROCHE BREWERIES LIMITED RESPONDENT

AND

GLADSOM AUCTIONEERS LTD ... INTERESTED PARTY/AUCTIONEER

RULING

The respondent, Keroche Breweries Limited by application and Notice of Motion filed on 15th February, 2017 is seeking for orders that;

Pending the hearing and determination of the application inter parties an order be issued restraining Gladsom Auctioneers from selling, disposing and or auctioning the respondent's motor vehicle No. KBV 274R;

Pending the hearing and determination of this application inter parties Gladsom Auctioneers be ordered to release forthwith the respondent's motor vehicle No. KBV 274G;

The warrants of attachment and the proclamation notice of 19th January, 2017 be set aside; and

The judgement of this court on 20th January, 2016 and the resultant decree be set aside.

The application is supported by the affidavit of Nicholas Kipchirchir Kechir and on the grounds that the Respondent was served with the suit papers and memorandum of claim in 2014 which were all forwarded to the advocates, Alex Karanja for the purpose of representing the Respondent in the suit. Unknown to the respondent, their advocates failed to enter appearance or file a defence to the Claimant. The Respondent sent several mails and inquiries to its lawyer on the status of the case and got responses with assurance that the matter was dealt with. The last such correspondence was on 21st April, 2015 when the lawyer asked for information about the suit. On 25th August, 2016 the Respondent received a Bill of Costs from the claimant's advocates and forwarded the same to its lawyers with instructions to defend the same and if possible file an appeal. There was no response. The Respondent has since 19th January, 2017 not received any response from the lawyers.

Further grounds in support of the application are that the auctioneers have acted maliciously in proclaiming 6 vehicles, some are for commercial transport, there are computers and unspecified furniture and to give such the value of Kshs.4 million is in bad faith. The vehicles alone are worth over Kshs. 10

million.

The actions of the respondent's advocate have deprived the Respondent the right to be heard in this case. On 27th January, 2017 the Respondent filed application seeking stay of execution and setting aside the judgement herein. A temporary order s was issued. On the scheduled hearing on 13th February, 2017 the advocate on record, due to human error was not present in court and application was dismissed for non-attendance. On equal date the Respondent filed application seeking to re-file the first application but on 14th February, 2017 the auctioneers impounded Respondent vehicles. Such conduct is illegal, malicious and should not be permitted to ambush a party and impound goods not proclaimed in the first instance.

The Claimant in reply filed Replying Affidavit sworn by Caroline Wanjiru Githae, the advocate for the Claimant and avers that the Respondent confirm that they were served with summons and were informed at all material times of proceedings herein. Judgement has since been rendered and the auctioneers were executing a valid judgement and orders of the court when they proceeded to the Respondent premises and issued a proclamation and warrants of attachment.

By its conduct, the Respondent has compromised its right to be heard. On 13th February, 2017 the Claimant was in court for the hearing to the respondent's application of 27th January, 2017 but they opted to be absent. The application was opposed and the court proceeded to dismiss this application.

Both parties made their oral submissions in court.

Determination

On 13th February, 2017 application dated 27th January, 2017 was dismissed.

This application was seeking for orders that;

The warrants of attachment and the proclamation notice dated 19th January, 2017 be set aside;

The judgement of this court delivered on 20th January, 2016 and the resultant decree be set aside.

These orders are similar to application herein and dated 15th February, 2017.

On 14th February, 2017 the Respondent filed application seeking for orders to re-issue and reinstate the orders issued on 27th January, 2017 which were vacated upon the dismissal of application dated 27th January, 2017. This application has since been withdrawn vide notice filed on 15th February, 2017.

The Respondent filed application herein seeking orders that;

The warrants of attachment and the proclamation notice dated 19th January, 2017 be set aside;

The judgement of this court delivered on 20th January, 2016 and the resultant decree be set aside.

These orders are a replica of what the court dismissed on 13th February, 2017. With the withdrawal of application dated 14th February, 2017 the court cannot seat and preside over the same matters twice as it is *factus officio*. The court has rendered itself and the dismissed application has not been reinstated. To seek as prayed would be to defeat the very purpose of the court integrity and basis of orders issued on 13th February, 2017 with the dismissal of the application and orders of setting aside warrants of attachment and the stay of judgement delivered on 20th January, 2016.

When the respondent's advocate appeared in court on 15th February, 2017 the order made was that;

The interim orders of stay be and are hereby granted;

The application be served upon the Respondent and to appear before ... on 21.2.2017 for further directions.

The orders of stay granted by the court on 15th February, 2017 related to the application seeking for;

That pending the inter parties hearing and determination of his application, there be a stay of any execution proceedings directed at or against the Respondent pursuant to the warrants of attachment dated 9th January, 2017 and the proclamation notice issued on 19th January, 2017 by Gadsom auctioneers, their servants ...

The above orders were dealt with finality on 13th February, 2017. To re-apply over the same matter and on similar facts, and without putting into account the orders of 13th February, 2017 is to set in motion a very dangerous precedent and ignore import of the same.

To therefore proceed as invited by the Respondent herein is sheer abuse of court process.

Before I conclude, on the substantive issue at hand, on the orders seeking to set aside the judgement of the court delivered on 20th January, 2016 and the decree thereof, the Claimant proceeded with his case on the basis that the Respondent was served with summons; there was no appearance or defence filed. There is admission by the Respondent that such summons were served and forwarded to their lawyers in 2014. On 25th August, 2016 the Respondent was served with a Bill of Costs and the same forwarded to the lawyers to deal and if possible lodge an appeal.

I find no inadvertence, error or mistake of Alex Karaja, Advocate. There is no such advocate appointed herein by the Respondent to act and attend at the hearing or file defence. To attribute non-attendance herein on a third party while summons were served upon the Respondent directly, the duty then became vested upon the respondents to follow and ensure they attended in person or their duly appointed advocates herein and not outside of these proceedings. In any event, Mr Kechir has not attached any evidence by the Respondent instructing any advocate to attend herein in the respondent's behalf. The duty to attend cannot be shifted to a third party after the fact. I find no diligence on the Respondent herein.

It is therefore not in dispute that since 2014 the respondents have been aware of this suit. The hearing proceeded on good basis that the respondents were aware of proceedings against them but opted not to attend due to no fault of the Claimant. Judgement has been rendered and where the Respondent finds fault, this should not be against the Claimant and the judgement herein but upon themselves to seek out with their lawyers as appropriate. To seek to set aside a valid judgement of the court on the basis that the respondents were aware of the same but took the option to forward to lawyers to deal, the moment pleadings and various documents kept on being sent directly to the respondents should have raised an alarm and a diligent party to court proceedings should have moved expeditiously to deal.

The respondents in the grounds supporting the application seeking stay sets out that;

1. The Respondent was served with the suit papers including the Memorandum of Claim and a Notice of Summons issued by this court sometimes in 2014; ...

5. The last correspondence between the Respondent and its lawyers was on 21st April, 2015 when the respondent's advocates asked for information in relation to the suit.

6. on or about 25th August, 2016 the Respondent received a bill of costs from the claimant's advocates and the same was forwarded to the respondent's advocates with instructions to defend and several queries regarding payment of the bill and appealing if possible. There was no response received from the advocates.

In the supporting affidavit of Mr Kechir, he does not go into these grounds to expound on what exactly was done in this regard by the respondent. As the person representing the respondent's case and supporting application for setting aside judgement herein, I find the same employ and devoid of any reasonable cause that warrant the court to award and find as prayed. Equally, the reasons advanced by the Respondent for court non-attendance at the hearing of the claimant's case are not sufficient to warrant the setting aside of the judgement herein. As the Respondent enjoys the right to be heard, the same right is due to the Claimant and hearing of the claim proceeded on good grounds and upon the court being satisfied that the respondents failed to attend for no justifiable reason.

Application dated 15th February, 2017 is hereby dismissed with costs to the claimant.

Dated, delivered and singe din open court at Nairobi on this 23rd March, 2017.

M. MBARU

JUDGE

In the presence of:

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