



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 223 OF 2014

BRIAN M. LEWELACLAIMANT

VERSUS

BOOLMAT E.A. CO. LTD1ST RESPONDENT

HABO GROUP OF COMPANIES2ND RESPONDENT

RULING

INTRODUCTION

1. On 10/10/2014, I entered judgment in favour of the claimants in the sum of Ksh.456,555.70. Thereafter he obtained decree and certificate of costs but his effort to execute bore no fruit after the auctioneers appointed failed to find any attachable assets belonging to the respondent.

2. He has now brought the Notice of Motion dated 14/11/2016 seeking the following orders

(a) That the Directors of the respondents Boolmat (EA) CO. Ltd, and Habo Group of Companies namely Benedict Velani Awiti, Rachel Atieno Adulo and Hezron Awiti Bollo be examined on oath as to the judgment debtors' means and assets and to produce its books of accounts and other documentary evidence showing the same.

(b) That in default of the said directors complying with the above order, this Honourable Court be pleased to order that the said directors be held personally liable to settle and satisfy the award dated 10th October 2014 plus interest and costs.

(c) That the costs of this application be awarded to the claimant.

3. The Motion is supported by the affidavits of the claimant and his counsel dated 14/11/2016 and 10/1/2017 respectively. The gist of the affidavits is that the respondents has duly been notified of the judgment entered against her and has deliberately defaulted to settle the decree. That efforts have been made towards executing the decree against the respondent but the auctioneers have not found any attachable goods belonging to the respondents.

4. The Motion is opposed by the respondents by the affidavits of Benedict Velani Awiti sworn on 15/12/2016 and 26/1/2017. The gist of the affidavits is that the execution herein was done prematurely before service of 10 days notice of the entry of the judgment herein and before the taxation of costs as

required under Order 21 rule 9 (C) of the Civil Procedure Rules and the Advocates Remunerations Order. In addition it is deponed that the Motion herein is premature because the auctioneer has not returned the warrants of attachment and as such the Motion does not meet the conditions precedent to granting the prayers sought.

5. The applicant has however, objected to the affidavits and submissions by Bosire and partners on ground that the new firm of Advocates did not follow the procedure for replacing another Advocate after entry of judgment.

ANALYSIS AND DETERMINATION

6. There is no dispute that I entered judgment against the respondents on 10/10/2014 and that the said judgment is still in force. There is also no dispute that execution has been commenced but no goods belonging to the respondents have been found and attached by the auctioneers in execution of the decree. The issues for determination are:

- (a) Whether the law firm Bosire and Partners is properly on record and if not whether the respondent's affidavit and the submissions are valid.
- (b) Whether the execution of the decree was prematurely done.
- (c) Whether the Motion herein is prematurely brought.
- (d) Whether the officers of the judgment debtor cited should be examined under oath as prayed in the Motion.

Change of Advocates after Judgment

7. There is no dispute that the law firm of Amunga & Company Advocates filed a Notice of Appointment for the defence on 9/7/2014 and continued to be on record even after judgment was entered on 10/10/2014. There is also no dispute that the law firm of Bosire & partners filed a Memorandum of Appearance on 14/12/2016 and later a Notice of change of Advocates on 16/12/2016. No leave was sought and obtained by the respondents to change Advocate after judgment as required by order 9 rule 9. Without such leave, the appointment of the new firm of advocates could not take effect and file any documents on behalf of the judgment debtor. Consequently, I find and hold that the law firm of Bosire and Partners is improperly on record and all the documents filed by it on behalf of the Judgment debtor are invalid and hereby expunged from the record. Likewise all the submissions made herein by Bosire Advocates are also invalid.

Premature execution

8. There is no dispute that taxation of costs was never done by the taxing master in this case before execution was done. According to Mr. Mwakireti learned counsel for the claimant, the execution was properly done because the costs were ascertained by the deputy registrar before the execution. I have carefully perused the record and the provisions of Order 21 rule 9 (c) and order 49 rule 2 of the Civil Procedure Rules (CPR) which deal with costs. Under Section 94 of the Civil Procedure Act, execution cannot be done before costs of the suit have been determined. Order 21 rule 9 provides that costs of a suit may be ascertained by agreement of the parties fixed by trial court or magistrate, certified by the Registrar under Section 68A of the Advocates (Remunerations) Order; or taxed by the court.

9. In this case the costs were allegedly ascertained by the Deputy Registrar before the execution. No law was cited by the claimant as basis upon which the Deputy Registrar ascertained the costs after the judgment. The only provision of the law which empowers the Registrar of the court to ascertain costs without filing or taxing a bill of costs and without notice to any party is rule 68A of the Advocates Remuneration Order.

10. The registrar can only exercise the said power in a matter where the Registrar has entered a final judgment under Order 49 rule 2 of the CPRs and upon receipt of an application in writing. The judgement contemplated under Order 49 rule 2 include judgment entered as a consequence of non-appearance, default of defence and failure to serve under Order 10; consent judgment and costs where suit is withdrawn or discontinued under order 25 rule 3.

11. After careful consideration of the facts of this case, it is clear that the Deputy Registrar had no authority to ascertain costs of the suit in favour of the claimant otherwise than taxation of a filed bill of costs or by consent of the parties. The reason for the foregoing view is that the final judgment on this case was not entered by the Registrar under Order 10 or Order 25 rule 3 or by consent of the parties. The judgment was entered by the judge after trial and costs had to be taxed unless otherwise agreed upon by the parties. In view of the foregoing procedural defect, the costs ascertained by the Deputy Registrar of the court was therefore invalid, and that renders the execution premature and unlawful.

Premature Application for examination of officers

12. In view of the foregoing finding that the execution of the decree against the respondent was done prematurely before determination of the costs, it is obvious that the application to examine the officers of the respondents under oath is also premature.

DISPOSITION

13. The Notice of Motion dated 14/11/2016 is struck out for being prematurely brought. The memorandum of appearance and all other documents filed herein by the law firm of Bosire & partners and all his submissions are expunged from the record for being presented by an Advocate who is not properly on record. Each party to bear his or her own costs.

Dated, signed and delivered this 19th May 2017

O. N. Makau

Judge