



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 74 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

ABYSSINIA IRON & STEEL LIMITED APPLICANT/RESPONDENT

-Versus-

KENYA ENGINEERING WORKERS UNION RESPONDENT/CLAIMANT

RULING

Background

This case was filed by the **KENYA ENGINEERING WORKERS UNION** seeking recognition for purposes of collective bargaining by the Respondent. Judgment was delivered on 25th February, 2014 by my Sister Wasilwa J. In the judgment the court ordered the Respondent to sign recognition agreement with the Claimant.

Dissatisfied by the Judgment the Applicant **ABYSSINIA IRON & STEEL LIMITED** filed an appeal in the Court of Appeal at Kisumu vide **Kisumu Civil Appeal N. 67 of 2014**. The time for filing appeal had however lapsed and the Applicant filed an application in the Court of Appeal seeking extension of time for filing appeal in **Civil Application No. 71 of 2014**. The court allowed the application but ordered that costs of the application abide the outcome of the appeal. By its judgment dated 31st May 2016, the Court of Appeal dismissed the appeal with costs. The costs were thereafter taxed by the Deputy Registrar of the Court of Appeal before being sent to this court for execution. This present application is in respect of execution for costs in **Civil Application No. 71 of 2014** and **Civil Appeal No. 67 of 2013**.

The Application

By an application dated 17th January 2017 under certificate of urgency the Applicant (who is the Respondent in the claim) seeks the following orders:

1. This application be certified urgent and heard ex-parte in the first instance.
2. An order for Committal to civil jail for a period not exceeding **six (6) months** for contempt of court do issue against the proprietor of **Demigen Auctioneers, Mr. George Omiti** for illegally attaching the Applicant's properties in disobedience of the Court Order issued on 10th November, 2016.
3. An order be issued summoning **Mr. George Omiti T/A Demigen Auctioneers** to explain the circumstances surrounding the illegal attachment of the Applicant's properties on 22nd December, 2016 in disobedience of the said order issued on 10th November, 2016.

4. An Order be issued revoking or in the alternative, suspending the license issued to **Mr. George Omiti T/A Demigen Auctioneers**.

5. The Respondent's Advocates, **M/s Otieno, Yogo, Ojuro & Company Advocates** do forthwith refund the Applicant the sum of **Kshs.521,279.00** and **Kshs.118,880.00** plus interest at the rate of 14% per annum from 22nd December 2016 until payment in full, being the purported amount of party & party costs and auctioneers fees paid to the said auctioneers to avert attachment.

6. The Respondent and the auctioneer do jointly and severally pay the costs of this application on a full indemnity basis.

The Application is grounded on the supporting affidavit of PRESTONE WAWIRE, Counsel for the Applicant and on the grounds on the face of the application.

In response to the application the Respondent filed two replying affidavits, one for GEOFFREY OTIENO YOGO, counsel for the Respondent and the other for GEORGE OMITI, an auctioneer trading as **Demigen Auctioneers**. The purport of the two replying affidavits is that the deponents were never served with any orders of stay of execution before the execution was carried out.

I heard the application ex parte on 10th November 2016, certified it urgent and ordered that there being no order for costs in the file the bill was taxed irregularly and the entire taxation process was irregular. I further directed the Deputy Registrar to explain why the taxation why there was taxation without an order of the Court.

In the explanation of the Deputy Registrar dated 16th November, 2016 it was explained that the taxation was pursuant to the provisions of section 4 and 108 of the Appellate Jurisdiction Act which provide that:

section 4

Any judgment of the Court of Appeal given in exercise of its jurisdiction under this Act may be executed and enforced as if it were a judgment of the High Court.

Section 108

(1) When making any decision as to the payment of costs, the Court may assess the same or direct them to be taxed and any decision as to the payment of costs, not being a decision whereby the amount of the costs is assessed, shall operate as a direction that the costs be taxed.

(2) For the purpose of execution in respect of costs, the decision of the court directing taxation and the certificate of the taxing officer as to the result of such taxation shall together be deemed to be a decree.

The application was argued on 1st March 2017. Mr. Wawire appeared for the Applicant while Mr. Yogo appeared for the Respondent. Both counsel submitted at length on the application.

In the affidavit of Prestone Wawire he has stated that the Applicant filed application for stay in both this court and in the Court of Appeal. As the Applicant has further explained in the supporting affidavit, the application herein was only filed because the application filed in the Court of Appeal could not be heard as the Court was on vacation. There is therefore danger of conflicting orders being made in respect of the same issue in this court and in the Court of Appeal.

This being an execution of a Court of Appeal decree, it is my opinion that this court is *functus officio* and that the Applicant should instead pursue the application filed in the Court of Appeal.

For the foregoing reasons the application is dismissed. There shall be no orders for costs on the application.

Dated, Signed and Delivered this 8th day of JUNE, 2017

MAUREEN ONYANGO

JUDGE