



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1369 OF 2015

MWANGI MURAGE MWANIKI.....CLAIMANT

VERSUS

NAIROBI GLORY PALACE HOTEL LIMITED.....RESPONDENT

RULING

1. On 26th May 2017, I delivered judgment in favour of the Claimant on the following terms:

- a) 12 months’ salary in compensation.....Kshs. 276,000
- b) 1 month’s salary in lieu of notice.....23,000
- c) House allowance for 10 years and 6 months.....378,000
- d) Salary for 11 days in June 2015 (23,000/30x11).....8,433
- e) Prorata leave for 2015 (23,000/30x1,75x5).....6,708
- Total.....692,141

Less amount owed to the Respondent.....(32,000)

Amount payable to the Claimant.....660,141

2. The Respondent subsequently moved the Court by way of Notice of Motion dated 19th June 2017 seeking the following orders:

- a) That the firm of Munyithya, Mutugi, Umara & Muzna Co. Advocates be granted leave to come on record for the Respondent in place of the firm of Gachugi Gichuki & Co Advocates;
- b) An order stay of stay of execution arising from the decree issued on 26th May 2017 and an order of stay of the proclamation and attachment of the Respondent’s property, pending the hearing and determination of an intended appeal;
- c) An order restraining the Claimant and/or his agents from advertising for auction or selling by public auction Motor Vehicle Registration No KBW 021F or any other property belonging to the Respondent;

d) An order extending the time for filing of Notice of Appeal and allowing the Respondent to file an appeal out of time;

e) An order enjoining Stephen K. Karuu trading as Kiiruyu Merchants Auctioneers in these proceedings and an order directing the said Stephen K. Karuu to surrender to the Respondent Motor Vehicle Registration No KBW 021F, the logbook and keys to the said Motor Vehicle together with Kshs. 140,000 being auctioneers fees paid to Kiiruyu Merchants Auctioneers.

3. The application, which is supported by the affidavit and further affidavit of Shaukat Noorany sworn on 19th June 2017 and 7th July 2017 respectively, is based on the following grounds:

a) That on 26th May 2017, judgment was entered against the Respondent in the sum of Kshs. 660,141;

b) That on 15th June 2017, the Claimant through his agents, Kiiruyu Merchants Auctioneers issued the Respondent with a proclamation notice for the decretal amount of Kshs. 668,885 intending to sell the Respondent's Motor Vehicle KBW 021F, Toyota Crown after expiry of seven days from the date of proclamation. However, on the same date, the said Auctioneers seized the said Motor Vehicle, its keys and logbook.

The Respondent's manager was also forced to give Kshs. 140,000 to the Auctioneers and to surrender the Motor Vehicle;

c) That the Respondent was not notified by its Advocates of any judgment entered against it nor was it notified of any decree issued by the Court against it.

d) That the manner in which the decree was issued was illegal and in total disregard of the provisions of the Civil Procedure Rules. Specifically;

i) The decree was never sent to the Respondent's Advocates for approval before execution by the Court as required under Order 21 Rule 8;

ii) The proclamation notice was issued on 15th June 2017, an inventory taken and the Respondent's property seized on the same day without giving the Respondent sufficient notice as indicated on the proclamation;

iii) The Auctioneers used excessive force in carrying out the execution by forcing the Respondent's manager and employee to hand over the keys and logbook to Motor Vehicle Registration No KBW 021F. The Respondent's manager was also forced to give to the Auctioneers Kshs. 140,000 in cash.

e) That the whole process of execution leading to the surrender of Motor Vehicle Registration No KBW 021F was illegal;

f) That if an order of stay of execution is not issued, the Respondent is likely to suffer substantial loss since the Claimant is not a person of means who would be in a position to reimburse the decretal sum once expended;

g) That the Respondent is aggrieved by the judgment of this Court and intends to appeal against it to the Court of Appeal;

h) That the time for filing the Notice of Appeal has lapsed but this is an excusable mistake as the Respondent was not notified by its former Advocates that judgment had been entered against it;

i) That the Respondent has instructed the firm of Munyithya, Mutugi, Umara & Muzra Co

Advocates to take over this matter in place of the firm of Gachugi Gichuki & Co Advocates;

j) That the intended appeal is not frivolous and is arguable on several grounds;

k) That unless the orders sought are granted, the Claimant will proceed to execute against the Respondent thereby causing substantial loss to the Respondent and rendering the appeal nugatory.

4. The Claimant's response is contained in a replying affidavit sworn on 3rd July 2017. He depones that after judgment, his Advocates endeavoured to communicate with the Respondent's Advocates but there was no response. A decree was issued on 29th May 2017 upon which his Advocates instructed Kiriiyu Merchants Auctioneers to proceed with execution. The Auctioneers obtained warrants of attachment on 7th June 2017 and proceeded to proclaim the Respondent's goods.

5. The Claimant states that the execution process was conducted in accordance with the law.

6. This is an omnibus application seeking orders ranging from leave to come on record post judgment and to file notice of appeal out of time to stay of execution pending appeal. The application went before **Wasilwa J** on 19th June 2017 and she granted *ex parte* orders as follows:

“I will grant interim order of stay and extend time within which to file a notice of appeal. The same be filed within 3 days.”

7. The first question for determination is whether the application is properly before the Court. From the court record, there is no evidence that the firm of Munyithya, Mutugi, Umara & Muzra Co Advocates was granted leave to come on record at the *ex parte* stage. There is however evidence that by the time the *ex parte* orders were granted, the firm of Gachugi Gichuki Co Advocates had consented to the firm of Munyithya, Mutugi, Umara & Muzna Co Advocates to take over the matter.

8. In the absence of any objection by Counsel for the Claimant, the Court assumed the firm of Munyithya, Mutugi, Umara & Muzna Co Advocates to be properly on record. I will also assume that leave to extend time for filing the notice of appeal was properly granted.

9. That settled, I now proceed to consider the Respondent's application on merit. Order 42 Rule 6 of the Civil Procedure Rules sets out the following conditions for grant of stay of execution:

a) That the application has been made without undue delay;

b) That substantial loss will accrue to the Applicant unless stay of execution is ordered;

c) That the Applicant is ready and willing to post appropriate security for due performance of any order that may ultimately be binding on them.

10. In the circumstances of this case, it seems to me that the application has been brought within reasonable time. I will therefore turn to the question of substantial loss. The Court was referred to the decision in ***Antoine Ndiaye v African Virtual University [2015] eKLR*** where in holding that the onus of proving substantial loss lies with the Applicant, **Gikonyo J** stated the following:

“Real and cogent evidence must be placed before the court to show that the Respondent is not able to refund the decretal sum should the appeal succeed.”

11. The Respondent states that the Claimant, who earned a monthly salary of Kshs. 20,000 while in its employment, would not be in a position to refund the decretal amount in the event that the appeal succeeds. None of the parties presented any substantiation on the Claimant's financial capability.

12. It seems to me therefore, that this application turns on a delicate balance between the Respondent's

right of appeal against the Claimant's right to enjoy the fruits of his award. This being a money award, the substratum of the appeal can easily be expended if execution proceeds. On the other hand, the Claimant has a lawfully obtained award in his favour. Taking all this into account, I am inclined to grant a conditional stay of execution in the following terms:

- a) The Respondent shall pay to the Claimant 50% of the decretal sum within the next fifteen (15) days from the date of this ruling;
- b) The balance of 50% shall be deposited in an interest earning account in the joint names of the Advocates for the parties within the next thirty (30) days from the date of this ruling;
- c) Motor vehicle registration No KBW 021F, its keys and logbook shall be released to the Respondent upon satisfaction of conditions (a) and (b) above;
- d) Failure to comply with any of the conditions of stay herein stated will lead to an automatic lapse of the stay.

13. Regarding the Respondent's complaint that the execution herein was illegal

I have this to say; execution is a legal process and in the absence of evident irregularity, the Court will not interfere. The Respondent makes a number of allegations against the Auctioneer which have not been proved. Moreover, the Auctioneer who is not a party to these proceedings had no chance to respond. In the circumstances, I will make no order on the issue of the fees paid to the Auctioneer by the Respondent.

14. The costs of this application will be costs in the appeal.

15. Orders accordingly

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 25TH DAY OF AUGUST 2017

LINNET NDOLO

JUDGE

Appearance:

Miss Oswera for the Claimant

Miss Jin for the Respondent