



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 886 OF 2010

JULIE TORIPIAN NJERU.....CLAIMANT

VERSUS

KENYA TOURIST BOARD.....RESPONDENT

AND

S.T. MUGACHA T/A GALAXY AUCTIONEERS.....INTERESTED PARTY/APPLICANT

RULING

1. By a Notice of Motion dated 21st February 2012, the Interested Party/Applicant craves for determination as to who between the Claimant and the Respondent should bear the auctioneers costs on the attachment of 9th June 2011.

2. The application, which is supported by the affidavit of Stanley T. Mugacha is based on the following grounds:

- a) That the Interested Party/Applicant who is an auctioneer, was issued with warrants of attachment and sale of the Respondent's moveable assets which assets he attached on 9th June 2011;
- b) That subsequently, the auctioneer was served with a court order staying execution and was thereby barred from proceeding with the attachment;
- c) That the auctioneer's fees is yet to be paid;
- d) That it is in the interest of justice that the application be allowed.

3. In his affidavit in support of the application, the Applicant depones that upon application by Ms Okoth & Kiplagat Advocates, he was issued with warrants of attachment and sale upon which he proceeded to attach the Respondent's moveable assets on 9th June 2011. Thereafter on the same day, he was served with a court order dated 11th May 2011, barring him from further executing against the Respondent.

4. The Applicant states that as at the time of proclamation, he had not been served with the court order of 11th May 2011 and only came to learn of it on information by Counsel for the Respondent.

5. The Respondent's response is contained in a replying affidavit sworn by its Company Secretary/Head of Legal and Corporate Affairs, Allan Njoroge Mbuthia, on 13th March 2012. He depones that on 23rd

May 2011, Counsel for the Respondent appeared before **Rika J** who granted an order of stay of execution.

6. Mbuthia states that the order was extracted on 24th May 2011 and served upon the Claimant's Advocates, Okoth and Kiplagat Advocates on the same day. On 9th June 2011, the Applicant appeared at the Respondent's premises to attach the property of the Respondent pursuant to warrants of attachment and sale issued by the Court.

7. Mbuthia further states that the Applicant was shown the order of stay of execution that was in force. However, the Applicant elected to ignore the order and proceeded with the attachment.

8. The Respondent maintains that because the Applicant acted contrary to a court order, he is not entitled to any costs. In the alternative, the Respondent states that the Claimant was wrong to issue execution instructions when there was an order of stay in force and the Claimant should therefore meet the Applicant's costs.

9. I heard the Applicant's application on 26th July 2017 and reserved a ruling date. Counsel appearing for the Claimant did not object to the application. Before I could deliver my ruling, the Respondent came back to Court by way of Notice of Motion dated 20th September 2017, seeking the following orders:

- a) That the application dated 21st February 2012 and heard on 26th July 2017 be re-opened;
- b) That the proceedings of 26th July 2017 relating to the application dated 21st February 2012 be re-opened and the Respondent allowed to place further evidence before the Court for completeness of record;
- c) That the Respondent be granted leave to place before the Court, the complete order of 23rd May 2011 with evidence of service upon the Claimant's Advocates effected on 24th May 2011;
- d) That delivery of the ruling reserved for 17th November 2017 be suspended pending hearing and determination of this application.

10. The application, which is supported by the affidavit of Margaret Miringu, Advocate sworn on 20th September 2017 is based on the following grounds:

- a) The application dated 21st February 2012 was heard on 26th July 2017 and a ruling reserved for 27th November 2017;
- b) The Respondent's main ground of opposing the application is that there was an interim order staying execution of the decree granted on 23rd May 2011, pending hearing and determination of the application *inter partes* on 21st June 2011;
- c) The Respondent urges that the proclamation by the Applicant was irregular and in contempt of court as there existed an interim order staying execution when the proclamation took place. The Claimant's Advocate was well aware of the interim order staying execution which was served upon him on 24th May 2011;
- d) The Respondent's Advocate inadvertently failed to photocopy both sides of the order with the result that the reverse side of the order of stay of execution, which had an acknowledgement by the Claimant's Advocate of receipt of the order, is not before the Court. The evidence of service of the order granted on 24th May 2011 which is evident on the reverse side of the order is missing from the bundle of documents annexed to the replying affidavit filed on 13th March 2012;

- e) The Respondent did not discover the error until after the hearing of the application on 26th July 2017;
- f) The date of service of the order and the fact that the Claimant's Advocate had notice of it are fundamental questions which will assist the Court in determining the issues in dispute;
- g) The Respondent will be greatly prejudiced if it is not allowed to correct the error by allowing this application;
- h) The inadvertent oversight on the part of Counsel ought not to be visited upon the Respondent;
- i) It is in the interest of justice that the orders sought are granted.

11. This application was urged before me on 11th October 2017 and its ruling is embedded herein.

12. The issue for determination before the court revolves around the question whether the Applicant and the Claimant were aware of the order of stay of execution granted on 23rd May 2011.

13. For good order, I will first deal with the Respondent's application dated 20th September 2017 which seeks to introduce new evidence after close of proceedings relating to the Applicant's application dated 21st February 2012. When Counsel for the Respondent appeared for mention before me on 1st September 2017, she submitted that the Respondent wished to produce a complete version of the order granted on 23rd May 2011.

14. In the formal application however, the Respondent seeks to introduce a whole set of new documents. The procedure adopted by the Respondent in this regard is what is commonly referred to as '*having a second bite at the cherry.*' The Court fully heard the parties on 26th July 2017 and to allow introduction of new evidence at this stage would be to engage in a miscarriage of justice. For this reason, the Respondent's application dated 20th September 2017 is disallowed.

15. With regard to the Applicant's application dated 21st February 2012, the Court found no evidence that at the time of attachment, the Applicant and the Claimant had notice of the court order staying execution. I therefore find that the attachment effected by the Applicant on 9th June 2011 was lawful and he is entitled to costs, to be paid by the Respondent within the next thirty (30) days from the date of this ruling.

16. The Respondent will also pay the costs of both applications.

17. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 17TH DAY OF NOVEMBER 2017

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JUDGE

Appearance:

Mr. Makumi for the Applicant

Miss Miringu for the Respondent