



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 44 OF 2014

BONFACE BANDARI CHIPA.....CLAIMANT

VS

MWADZOMBO JUMBALE AND 3 OTHERS.....RESPONDENT

RULING

Introduction

1. On 13.3.2015, this court delivered judgment in favour of the claimant in the sum of kshs 45,600/= plus costs and interest. Later the claimant filed his bill of costs which was taxed by the Deputy Registrar of the Court at kshs 27,000/= on 24.7.2015. When the claimant approached the respondent (Judgment debtor) for payment of the judgment debt, the latter accepted to pay only kshs 3,800/= on allegation that they had set off the rest of the judgment debt against a loan that had allegedly been advanced to the claimant. The claimant was not pleased and he applied for the decree and warrants of attachment which were issued to Mr. Okuyusi E. Timothy t/a Tip Top Auctioneers. The decretal sum plus costs and interest was kshs. 120,120/= as per the warrants of attachment issued by the court on 10.8.2015.
2. The auctioneer did proclamation on 11.8.2015 and raised his fees demand of kshs 26,520/=. As a result the respondent paid to the claimant, without involving the auctioneer kshs 106,116/= being the total sum indicated in the decree on 13.8.2015. The auctioneer was not amused and on 19.8.2015, he went to attach for the balance of the decretal sum of kshs 14,085/= plus his charges of kshs 26,520/=. He however did not succeed because he was met with life threatening resistance from goons mobilized by the respondents/judgment debtor.
3. Thereafter, the respondents (applicants) brought the Notice of Motion now before the court dated 25.8.2015 and obtained an interim order of stay pending the inter parties hearing and determination of the Motion. the motion basically seeks the following orders:
 - a. That the proclamation dated 11.8.2015 and/or any warrants of attachment issued herein be lifted and that the claimant bears the costs of the attachment.
 - b. Declaration that the proclamation dated 11.8.2015 for the sum of kshs. 120,120/= together with a fee note/invoice for kshs. 26,520/= are nullity, since has been fully settled.
4. The motion is supported by the affidavit sworn by Mr. Erestus Mzungu Chamanga on 25.8.2015. He deposed that after the judgment of kshs 45,000/= was pronounced by the court, his advocate wrote to the claimant proposing the mode of settlement but the claimant ignored and proceeded to tax his bill of costs on 27.7.2015 at kshs 27,000/=. That on 5.8.2015, the applicants offered a

settlement cheque to the claimant but he declined and said they should wait for the signed decree. That the decree for ksh 106,000/= was signed on 10.8.2015 and the claimant served them with the same on the day. That on 11.8.2015 the auctioneer proclaimed for ksh 120,120/= and on 13.8.2015, the applicants paid to the claimant directly, the sum of kshs 106,000/= vide a banker's cheque which he refused to bank. That the execution was unnecessary and it was an abuse of the court judgment meant to punish and intimidate the respondents.

5. The claimant has oppose the motion by his replying affidavit sworn on 5.10.2015. He deposed that on 27.7.2015 the respondent tried to pay him kshs 3,800/= as the net of his judgment debt of kshs. 45,600/= after deducting kshs 41,800/= to recover an alleged loan plus penalties. That the claimant declined the said payment and applied for decree and warrants of attachment in favour of Mr. Okuyosi E. Timothy t/a Tiptop Auctioneers. That the auctioneer did the proclamation on 11.8.2015 and on 12.8.2015, the applicant's chairman offered to settle the decretal sum. That on 13.8.2015, the counsel for the applicants gave him a cheque for kshs. 106,116/= with a free advise that he should forget any balance outstanding plus the auctioneers charges. That the claimant informed the auctioneer about the payment but told him to proceed with the execution for the balance. That on 19.8.2015, the auctioneer went to execute but he was met with violence and suspended the exercise. That there is still an outstanding balance of the decretal sum and the auctioneers charges and as such the execution is justified.

Analysis and Determination

6. There is no dispute from the court record that on 10.8.2015 the Deputy Registrar signed a decree for kshs 106,116/= and issued warrant of attachment for kshs. 120,120/= on the same date. There is also no dispute that the auctioneer did proclamation of the applicant's movable property on 11.8.2015 after which the applicants paid kshs. 106,116/= to the claimant on 13.8.2015 before the lapse of the 7 days period given in the warrant of sale of the proclaimed goods. There is also no dispute that the whole decretal sum stated in the decree issued on 10.8.2015 being kshs. 106,116/= was settled on 13.8.2015 but the sum of kshs. 120,120/= stated in the warrant of attachment dated 10.8.2015 has an outstanding balance of kshs. 14,004/= plus the auctioneers charges of kshs. 26,520/=. the issues for determination are:
 - a. Whether the execution done on 11.8.2015 was unlawful and a nullity
 - b. Whether the decree passed by this court has been fully settled
 - c. Whether the auctioneer is entitled to his costs before releasing the attached movable property.

Unlawful attachment

7. The applicants have admitted that proclamation for the decretal sum was done on 11.8.2015 after they were served with the decree by the claimant on 10.8.2015. The execution was authorized by warrants issued to the auctioneer by the Deputy Registrar of this court on 10.8.2015. The judgment was entered for claimant way back on 13.3.2015 and no appeal or review was sought. The execution on 11.8.2015 was therefore lawful and cannot be faulted. The decretal sum plus taxed costs were still owing to the claimant as at 11.8.2015 when the proclamation was done. No law or judicial precedent was cited as the basis for declaring the execution done on 11.8.2015 unlawful and a nullity. The first issue for determination is therefore answered in the negative.

Full settlement of the decretal sum

8. The court issued the decree on 10.8.2015. The decree was for sum of kshs 106,116/= made up of kshs.45,600/= as the principal, kshs 33,516/= being interest on the principal sum and kshs. 27,000/= as the taxed costs. In addition to the foregoing decretal sum the warrant of attachment added kshs 750/= as further costs plus kshs 1,500/= being the court collection fees which costs were lawfully incurred by the claimant. The total sum payable by the applicants on execution was therefore kshs. 108,366/=. The balance outstanding after payment of kshs. 106,116/= on 13.8.2015 is kshs.2,250/=. Consequently the answer to the second issue for determination is also answered in

the negative. The applicant must therefore pay to the claimant the said kshs. 2,250/= which is still owing.

Auctioneers charges

9. In view of the finding above that the execution done on 11.8.2015 was lawful, the auctioneers is entitled to his charges under the Auctioneers Act Cap 526 of the Laws of Kenya and the rules there under. Such charges can only be paid by the decree holder if the Judgment debtor is not found or if he has no attachable property. In this case the applicants have plenty of movable goods for attachment and indeed the auctioneer has attached. Consequently the applicants are directed to pay the auctioneer's charges for the execution done herein. Such charges are to be mutually agreed or taxed.

Disposition

10. For the reasons stated above, the applicants Notice of motion dated 25.8.2015 is dismissed with costs of **kshs.5,000/=** to the claimant.

Signed, dated and delivered at Mombasa this 12th day of February 2016

ONESMUS MAKAU

JUDGE