



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 971 OF 2013

(Before Hon. Lady Justice Hellen S. Wasilwa on 29th September, 2016)

ANDREW MWANJALA MWANDAWIRO.....CLAIMANT

VERSUS

SDV TRANSAMI KENYA LIMITED.....RESPONDENT

RULING

1. Before Court is an Amended Notice of Motion brought under Section 1A, 1B, & 3A of the Civil Procedure Act and Order 42 Rules 6 and Order 51, Rule 1 of the Civil Procedure Rules. The Application is dated 27th July 2016 drawn and filed by Muriu Muigai & Co Advocates being Advocates for the Defendant/ Applicant.

2. The Application seeks orders that:

1. The Orders issued on the 13th June 2016 be set aside or varied in such a manner as the Court may determine.

2. Pending the hearing and determination of this application, there be a stay of execution of the Order delivered by the Deputy Registrar of the Court in this case on the 13th June 2016.

3. This Honourable Court be pleased to issue an order of temporary injunction to restrain the Plaintiff whether by himself, his agents or through Mutrix Auctioneers from selling in any other manner the Applicant's moveable property attached as per the proclamation of attachment dated 13th June 2016 until the hearing and determination of this Application.

3. The Application is based on the following grounds and on the annexed affidavit of Lugadiru K. Maurice:

1. On 14th December 2015, a judgment by the Honourable Lady Justice Hellen S. Wasilwa was delivered as against the Defendant to pay the sum of Kshs 1,036,800.00 in favour of the Plaintiff for unlawful termination.

2. In satisfaction of the said decretal amount, the Defendant through their Advocates forwarded cheque no 040626 for the sum of Kshs 729,986.65 less statutory deductions. The said amount has been duly received by the Plaintiff.

3. The Plaintiff however in total disregard of payment by the Defendant obtained warrant of attachment on 13th June 2016 and proceeded to instruct a firm of Auctioneers by the trade name of Mutrix Auctioneers to dispose of the Defendant's movable property by way of public auction.

4. That the Auctioneer has proceeded to issue a proclamation of attachment on 13th June 2016 to which a public auction has been scheduled thereafter upon the expiry of seven (7) days from the date of proclamation.

5. That the said proclamation of attachment is contrary to the Orders given on the 13th of June 2016 which provide for a 14 day notice. The Proclamation of attachment provides for 7 days notice.

6. As a consequence therefore, the Defendant is apprehensive that there will be a scheduled auction after the lapse of 7 days from the date of the proclamation of attachment.

7. The Defendant having satisfied the decretal amount is bound to suffer irreparable loss if the orders sought are not granted.

4. In Response the Claimant has filed a Replying Affidavit dated 27th June 2016 and deponed to by Andrew Mwanjala Mwandawiro.

5. That the Application before Court is an afterthought meant to delay and frustrate the execution of the orders issued on the 13th of June 2016 and deny the Claimant the true fruits of his judgment.

6. That the Court on the 31st of March 2016 addressed its mind to the matters attendant to the Claimant's deductions and the allegations that the statutory deductions were forwarded to the necessary authorities is utterly scandalous, misconceived and false.

7. That on the 22nd of January 2016 the Respondent made an application for review to challenge the judgment delivered on the 14th of December 2015 principally on the limb of statutory deductions, and the Court dismissed the application on the 31st of March 2016.

8. That the payment issued for Kshs.729,986.65 was but a partial settlement of the decretal amount awarded by the Court and there is still a balance of Kshs.306,813.35 owing.

9. That the Applicant herein has failed to state and prove specific details as to where pecuniary or tangible loss is shown to the satisfaction of the Court.

10. That the Application therefore has no merit, frivolous, misconceived, incompetent, bad in law and the same is for dismissal.

11. They pray that the Application be dismissed with costs.

12. Both parties relied on their pleadings when submitting in Court.

13. The Applicant reiterated that the deductions were statutory and the execution should not proceed.

14. Having considered the submissions of both parties, I note that, the award I made for the Claimant was for Kshs.1,036,800/= plus costs. An award of Court for payment of terminal dues will usually be subjected to statutory deductions because an employee must of right pay taxes.

15. When it comes to damages, this is also a benefit accruing to an individual and all benefits accruing to a Kenyan are all subjected to tax. This provision is found under the Income Tax Act Section 3(2) and (c) which states as follows:

“(2) Subject to this Act, income upon which tax is chargeable under this Act is income in respect of:-

i. a pension, charge or annuity; and

ii. any withdrawals from, or payments out of, a registered pension fund or a registered provident fund or a registered individual retirement fund; and

iii. any withdrawals from a registered home ownership savings plan;

16. It is therefore my finding that the subjection of the awarded amount is in order and the Claimants should not execute on a valid tax deduction. The application before Court is therefore valid and I allow it and order that execution of the statutory dues by the Claimants be stayed and is ordered inapplicable.

17. The only addition that the Claimants are entitled to, are costs for which they may tax and execute or agree with the Respondents for payment.

18. Costs in the cause.

Read in open Court this 29th day of September, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kwabokha holding brief Miss Muse for Claimant - Present

No Appearance for Respondent