



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**PET 47 OF 2016**

**IN THE MATTER OF: CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ARTICLES 20 (1), (2), (3) & (4); 21 (1); 22; 23 (1), (3);**

**24; 27 (1), (2), (4), (5); 40 AND 50 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: THE ENFORCEMENT OF THE BILL**

**OF RIGHTS AND FUNDAMENTAL FREEDOMS**

**BETWEEN**

**CFC STANBIC BANK LIMITED (FORMERLY STANBIC**

**BANK OF KENYA LIMITED) GARNISHEE..... APPLICANT**

**VERSUS**

**MUTIA MUINDU T/A**

**MUTIBRA AUCTIONEERS.....1<sup>ST</sup> RESPONDENT**

**MAURICE M. MUNYAO & 148 OTHERS**

**(suing on their own behalf and on behalf**

**of the other members/beneficiaries of the**

**Kenya Ports Authority Pension Scheme affected**

**by averaging of the Pension Salary and**

**freezing of the Pension House Allowance**

(pursuant to the order made by the

Honourable Justice Maraga J.

on the 28<sup>th</sup> November, 2007).....JOINTLY 2<sup>ND</sup> RESPONDENT

OKUYOSI E. TIMOTHY T/A

TIPTOP AUCTIONEERS.....3<sup>RD</sup> RESPONDENT

**RULING**

1. The second respondent Maurice M. Muyeo and 148 others have raised preliminary objection to the Applicant's petition dated 8<sup>th</sup> April 2016 on grounds set out in the Notice dated 12<sup>th</sup> May 2016 and filed on 13<sup>th</sup> May, 2016. The grounds are as follows;

i. That the issue of the execution of the (Warrants of Attachment) and warrant of Sale of property in execution of decree for money dated the 31<sup>st</sup> March 2016, and proclamation dated 1<sup>st</sup> April 2016, issued by E. Timothy t/a Tiptop Auctioneers is an issue directly pending before the employment and Labour Relations Court Miscellaneous Civil Application Number 2 of 2015, Mombasa in the Notice of Motion Application filed by the applicants/Petitioner on the 6<sup>th</sup> April 2016 and of even date.

ii. That the Application and Petition herein have been filed in gross non-disclosure and concealment of all material facts.

iii. That the issues raised herein are pending before a court and/or courts of competent and concurrent jurisdiction(s) and thus this Honourable Court has no jurisdiction to intervene in a matter where proceedings are already pending before another court and/or Courts of competent jurisdiction.

iv. That the Application and Petition herein are in gross abuse of the due process of the court and law and this Honourable Court has jurisdiction to stop the said abuse of its process.

v. That the Petition and the application herein are geared towards illegally, unlawfully, unconstitutionally and/or wrongfully misleading the Honourable court to aid and abet the petitioner and applicant in disobeying the orders of the court issued in Employment and Labour Relations court Miscellaneous civil application Number 2 of 2015, Mombasa, which the petitioner and applicant has flagrantly disobeyed and is abusing the due process of the court to ensure further and/or consistent disobedience.

vi. That the issue of the alleged application for the committal of the auctioneer Mutia Muindu t/a Mutibra Auctioneer for the alleged disobedience of court order has already been argued before the Principal Judge in Nairobi Employment and Labour Relations court Cause Number 1262 of 2015 and thus the same is *resjudicata*.

vii. That the issues in the Petition and application herein are either *sub judice* or *res judicata* and thus this Honourable Court has no jurisdiction to hear the said Petition and application.

viii. That there are no constitutional issues raised in neither the application nor the petition but the applicant/petitioner is tainted with filthy hands and both the application and petition ought to be dismissed with costs to the second respondents.

2. The Petitioner filed an application dated 8<sup>th</sup> April 2016 together with the petition seeking interim orders set out in the Notice of Motion as follows;

i. The Honourable Court be pleased and hereby certify the Application herein as urgent and hear it ex-parte and service at first instance be dispensed with;

ii. The Honourable court be and is herewith pleased to issue an interim orders of injunction directed at the 1<sup>st</sup> and 3<sup>rd</sup> Respondents, restraining them whether by themselves, their directors, officers, employees, servants, agents or any person whatsoever authorized by them from violating the Applicant/Petitioner's Constitutional Rights by executing the warrant of sale of property in execution of decree for money dated 31<sup>st</sup> March 2016 and the proclamation dated 1<sup>st</sup> April 2016 issued by Okuyosi E. Timothy t/a Tip Top Auctioneers pending hearing and determination of the application herein inter parte and the delivery of the ruling on the application for contempt pending in ELRC case No 116 of 2013 (now 1262 of 2015) before the Hon Mr Justice Nderi Nduma.

iii. The Honourable court be and is herewith pleased to issue an interim order of injunction directed at the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents, restraining them whether by themselves, their directors, officers, employees, servants, agents or any other person whatsoever authorized by them from violating the applicant/petitioner's constitutional rights by prosecuting the proceedings in **Misc. Appl. No. 2 of 2015 (Mombasa)** pending hearing and determination of the application herein inter partes;

iv. The Honourable court be and is herewith pleased to issue an interim order of injunction directed at the 1<sup>st</sup> and 3<sup>rd</sup> respondent restraining them whether by themselves, their directors, officers, employees, servants, agents or any other person whatsoever authorized by them from violating the applicant/petitioner's constitutional rights by prosecuting the warrant of sale of property in execution of decree for money dated 31<sup>st</sup> March 2016 and the proclamation dated 1<sup>st</sup> April 2016 issued by Tip Top Auctioneers pending hearing and determination of the application herein inter parte;

v. The Honourable court be and is herewith pleased to issue an interim order of injunction directed at the 1<sup>st</sup> and 3<sup>rd</sup> respondent restraining them whether by themselves, their directors, officers, employees, servants, agents or any other person whatsoever authorized by them from violating the applicant/petitioner's constitutional rights by prosecuting proceedings in Misc. Appl. No. 2 of 2015 (Mombasa) pending hearing and determination of the petition herein; and

vi. The costs of this application be borne by the 1<sup>st</sup> and 3<sup>rd</sup> respondents.

3. Hon Aboudha J. W. granted interim orders directing the 1<sup>st</sup> and 3<sup>rd</sup> Respondents from violating the Applicant/petitioner's constitutional rights by executing the warrant of sale of property in Execution of Decree for money dated 31<sup>st</sup> March 2016 and the proclamation dated 1<sup>st</sup> April 2016 issued by Okuyosi E. Timothy T/A Tip Top Auctioneers and the delivery of the Ruling on the Application for contempt pending in Employment and Labour Relations Court cause No. 116 of 2013 (now 1262 of 2015) before Hon. Justice Nderi Nduma until 28<sup>th</sup> April 2016.

4. The 1<sup>st</sup> Respondent filed a replying affidavit to the petition and the Notice of Motion application dated 8<sup>th</sup> April 2016 sworn on 26<sup>th</sup> May 2016 and filed on 27<sup>th</sup> May 2016. The parties have since filed submissions in reply to the preliminary Objection which they wish to be determined first as follows; 1<sup>st</sup> and 3<sup>rd</sup> Respondents filed on 13<sup>th</sup> June 2016. 2<sup>nd</sup> Respondent on 20<sup>th</sup> June 2016; and the petitioners' filed on 11<sup>th</sup> July 2016.

### **Submissions by the 2<sup>nd</sup>, and 3<sup>rd</sup> Respondents**

5. The thrust of the preliminary objection by the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> respondents is as follows;

- That the court lacks territorial jurisdiction to hear and determine this matter since it ought to have been filed in Mombasa where the subject matter arose and all parties reside there.

- That section 11 to 18 of the Civil Procedure Act give direction on the filing of suits. Furthermore practice directions relating to filing suits, applications and references, Gazette Notice No. 300 of 19<sup>th</sup> February 2009 by Chief Justice Gicheru, as he then was provide that registries must strictly observe the provisions as to the place of suing by allowing only those that comply with the law and rejecting those that do not.

6. Therefore the court should pursuant to order VII rule 9 of the Civil Procedure Rules order the suit to be presented to Mombasa where it belongs. Furthermore, the petition herein ought to be an appeal against the decision of the Registrar or Magistrate. In this regard Rule 8 (1) of the Employment and Labour Relations Court (procedure) Rules 2010 provides

*“where any written law provide for an appeal to the court, an aggrieved person shall file a memorandum of appeal with the court within the time specified for that appeal under the written law”.*

7. That the written law in this case Rule 55(5) of the Auctioneers Rules which is couched in mandatory terms. In this respect the appeal ought to have been filed within 7 days. The issue for adherence to Rule 55(5) of the Auctioneers Rules was canvassed in the case of **Joel Titus Muasya T/A Makuni Enterprises –vs- Southern Credit Trading Corporation, Misc. Civil Application No. 544 of 2014** where L. Njagi J as he then was observed;

*“.....If for no other reason, I find that the application was not filed within the time stipulated, and this renders the application incompetent beyond redemption”*

8. That in the present case the applicant filed an appeal reference which was dismissed. It cannot purport to file an application seeking the same remedies it sought at the appeal, so late in the day and even so before a court of concurrent jurisdiction. The appeal may only be filed before a court of appeal. The appeal reference was determined by O. N. Makau J on 31<sup>st</sup> July 2015 in **ELRC Misc. App No. 2 of 2015. Mutia Muindi T/A Mutibira Auctioneers – Vs- (1) CFC Stanbic Bank Ltd (2) Maurice Munyao & 148 others**. The matter is therefore *res judicata* and the court ought not to entertain the same.

9. In the premise the respondents submit that the issues raised in the petition and notice of motion application are either subjudice on *res judicata* and are against abuse of the due process of the court and same ought to be dismissed or struck out.

10. In **Albert Chaurembo and 7 others – vs – Maurice Munyao and 148 others, Civil Application number 31 of 2014, Malindi**, Court of Appeal held;

*“In their own words, the applicants filed this application aware that the 3 applications were pending in the Industrial Court. That the only reason they filed the application is that; “Although the Application for stay in the Industrial Court had not been determined the Appellant are reasonably apprehensive that the Industrial Court will not allow those applications”.*

11. The Court of Appeal dismissed the speculative reasons given by the applicants for their apprehension and concluded;

*“it is to avoid this kind of awkward scenario that courts insist that a party cannot have similar applications being entertained simultaneously in two different courts”.*

12. This court has inherent powers to protect the abuse of its process. The instant Application clearly is an abuse of the due process of the court. This court must therefore jealously safeguard its process from being abused, which appears to be the process of the Applicants.

13. It is the further submission by the Respondent that the Applicants failed to disclose that;

- a. O .N. Makau J had in ELCRC Misc. Appl. No. 2 of 2015 Mombasa stayed the proceedings

therein on condition that the petition (Applicant) herein deposits the sum of Ksh. 21,703,126.00 in court within 15 days from the date of the said order, which the petitioner/applicant has not complied with to date.

b. That instead of complying with the said order the petitioner/applicant filed another application on or about the 3<sup>rd</sup> March 2016, seeking to stay the orders, herein above which application was dismissed by Rika J. on 7/3/2016.

14. It is therefore clear that the obvious intention of the petitioner/applicant is to avoid the consequence of failure to obey and/or breach of the court order.

15. That for the reason of non-disclosure alone, following the decision in **R -vs- Kesington included Tax Commissioner exparte princess Edmond De Polignac [1971] KB 486 of 509**, judgment of Warrington ....., where he said;

*“it is perfectly well settled that a person who makes an exparte application to the court, that is to say, in the absence of the person who will be effected by that which the court is asked to do, is under an obligation to the court to make the fullest possible disclosure of all other facts within his knowledge and if he does not make that fullest disclosure, then he cannot obtain an advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by him. That is perfectly in place and require no authority to justify it.”*

16. Finally, the petition is alleged to be based on the constitution of Kenya, 2010, but it raises no constitutional issue at all. In case of **Stephen Nyaragi Onsuna & Another –vs- Geroge Magole & 7 others (2014) eKLR** Lenaola J. cited the principle in Anarita Karimis case as follows ;

*“--- As a basic minimum, a petitioner is required to cite the provisions of the constitution which have allegedly been violated and the manner in which they have been violated and the remedy which he seeks for the violation”.*

17. In this regard, petitioner must:-

- a. Specifically set out the provisions in the Bill of Rights that have been allegedly violated.
- b. Provide the particulars of the alleged violation
- c. Provide particulars in which the respondent has purportedly infringed the rights.

18. The respondent submits that the petitioner has failed in all these respects and the application and the petition should be struck out.

### **Submissions by the Petitioner/Applicant**

19. The petitioner/applicant relies on the grounds set out in the notice of motion, the supporting affidavit and the pleadings in the petition. The applicant has made extensive written submissions in this regard and the thrust of the submissions is that;

20. The 2<sup>nd</sup> Respondent (**Maurice M. Muyao & 148 others**) sued successfully **Messrs Albert Chaurembo Mumba and 7 others** (sued in their capacities as the Registered Trustees of the Kenya Ports Authority Pensions Scheme) in Mombasa Industrial Cause No. 116 of 2011 and were in a Judgment delivered by O. N. Makau J. on 14<sup>th</sup> February, 2014 awarded Ksh.201, 981, 424.60 plus costs of the suit and interest to the 2<sup>nd</sup> Respondents herein.

21. The costs are at the heart of the complaints of violation of the bank’s constitutional right to property. The applicant/petitioner bank herein was never a party of the said proceedings. However, subsequently in

execution of the said decree arising from the judgment [obtained as against the Judgment-Debtor i.e. **Albert Chaurembo Mumba and 7 others**], the 2<sup>nd</sup> Respondent instructed the 1<sup>st</sup> Respondent auctioneer to realize the debt as against the Trustees.

22. The applicant/petitioner Bank came into this matter by way of garnishee proceedings instituted over funds obtained in bank accounts held by the Trustees of the Kenya Ports Authority, Pension scheme in the applicant/petitioner Bank.

23. The aforesaid judgment debt hitherto due and owing against the Trustees has since long been settled. The Trustees however being displeased with the whole and/or part of the judgement of the Hon. O. N. Makau, lodged an appeal to the Court of Appeal vide **Civil Appeal No. 38 of 2014**. The bank was not a Party.

24. It is submitted that in utter violation of the petitioner/applicant's lawful right to property, the 1<sup>st</sup> respondent has attempted to attach the Ganishee bank's property to realize the costs accruing from the realization of the debt vide instructions given to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents variously.

25. This is the basis of the present application seeking inter alia, to restrain the 1<sup>st</sup> and 3<sup>rd</sup> respondents from violating the applicant/petitioner's constitutional rights by executing the warrant of sale of property in execution of decree for money dated 31<sup>st</sup> March 2016 and the proclamation dated 1<sup>st</sup> April, 2016 filed by Okuyosi E. Timothy T/A TipTop Auctioneers pending hearing and determination of the petition and the delivery of the ruling on the application for contempt pending in **ELRC cause No. 116 of 2013 now 1262** of 2015 before Nduma J.

26. Secondly that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondent be restrained from violating the applicant/petitioner's constitutional rights by prosecuting the proceedings in Misc. Appl. No. 2 of 2015 [Mombasa] pending the hearing and determination of the petition.

27. The Bank objects to the preliminary objection raised stating that;

- Firstly the issue of territorial jurisdiction, raised is not a pure point of law within the meaning stated Sir by Charles Newbold P in **Mukisa Biscuit Manufacturing Company Limited –v- West End Distributors Limited** as;

*“..... a pure point of law is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”*

28. This is not the case in the present petition and application and the objections raised should be out rightly dismissed. Furthermore order 4 Rule 1(4) of the Civil Procure Rules 2010, concerns execution of affidavits in support of complaints and applications filed under the suit instituted by plaintiffs. That the provision is completely inapplicable in petitions. The preliminary objection has no merit and should be rejected out rightly. In any event pleadings in a petition under Constitution of Kenya (protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, under Rules 10 and 11 (Mutunga Rules) do not obligate a petitioner to file an affidavit.

29. Also section 20 of the Employment and Labour Relations Court Act, No. 18 of 2014 and Article 159(2) (d) of the constitution guides the court to disregard technicalities in determination of the suits before it. The applicant/petitioner has in any case filed a supporting and verifying affidavit dated 8<sup>th</sup> April 2016 sworn by a duly authorized officer being the Head, Legal Services, who disclosed his authority to bring this suit.

30. On the issue of geographical jurisdiction of the court, the applicant submits that, all judges of the court sitting in Mombasa being O.N. Makau and Rika J. previously recused themselves from the suit(s) i.e. in ELRC No. 116 of 2013 (now 1262 of 2015) which has since been transferred and placed before the

principal Judge in Nairobi from which the present petition and application emanates therefore presenting a peculiar set of circumstances. The objection lacks merit in this regard and should be dismissed.

31. As to whether the subject matter is *Res judicata* or Res subjudice, the applicant relies on Section 7 of the Civil Procedure Act, Cap 21 laws of Kenya and decision of court of appeal of Kenya in **C.A. No. 24 of 2014 Kenya Hotel properties Limited –vs- Willisden Investments Limited and 8 Others** where the court stated that for a court to deny a party audience on the doctrine of *Res judicata*, it must be satisfied that all requirements have been satisfied as follows;

- a. The matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit;
- b. The former suit must have been between the same parties or privies claiming under them;
- c. The parties must have litigated under the same title in the former suit;
- d. The court which decided the former suit must have been competent to try the subsequent suit and;
- e. The matter in issue must have been heard and finally decided in the former suit on its merit.

32. The Applicant submits that these requirements have not been met by the Respondents. The subject of the petition has never been brought before any other court, neither have any such issues ever been adjudicated upon on their merit.

33. As to the specificity of pleadings in a constitutional petition under Rule 10(2) (e) of the Mutunga Rules, the nature of violations could emanate from ongoing court proceedings as in this case.

34. In this matter, issuance of a notice of attachment as against a non party is and continues to be a threat to the Applicant's right to property as conferred under Article 40 of the constitution. This has been specifically pleaded and suffices for purposes of the requirement, under **Anarita Karimi Njeru vs Republic (No. 1) [1979] KLR 154**.

35. In **Galaxy Auctioneer Vs E. N. Nganga & Company Advocates and another (2004) eKLR**, Lenaola J. stated that an auctioneer can only receive his costs by addressing his claim against the instructing party to pay those costs or sue for them. Rule 7 of the Auctioneer Rules, 1997, underpins the principle. The Judge said;

*“the only way the auctioneer can recover his costs is by addressing his claim against the instructing party”.*

36. Furthermore the Court of Appeal in **Barclays Bank of Kenya Limited Vs Kepha Nyabera & 191 others and Another [2013] eKLR**, the court stated that a garnishee's property cannot be subject to adverse action in realization of a debt due to a judgement-debtor.

37. Most importantly the applicant submits, the court of appeal in **Malindi Civil Appeal No. 38 of 2014** (supra) equivocated the liability of costs in the subject dispute vide its judgement dated 26<sup>th</sup> February 2016 by holding that **‘each party’ to bear its costs in both the High Court and the Court of Appeal.** The 2<sup>nd</sup> respondent received the decretal sum of Ksh. 262,819,043.20 and has elected not to pay the 1<sup>st</sup> respondent but instead connived to attach the Applicant Bank's property in violation of its constitutional rights.

38. That the warrant of execution and proclamation is null and void as no decree was ever issued and bearing in mind the order of the court of Appeal in Civil Appeal No. 38 of 2014, (supra) that each party to bear their own costs. Applicant relies on **Mary Wambui Munene – Vs- Peter Gichuki Kingara & 2 others [2014] eKLR**, in which the Supreme Court of Kenya made reference to **Macfoy –Vs- United**

**Africa Co Ltd [1961] 3 All E.R.** as follows;

*“If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court to declare it to be so. And every proceeding which is founded on it is also bad and incurably bad; you cannot put something on nothing and expect it to stay there. It will collapse”.*

39. If the respondents were to regularize the realization of the costs proceedings and lawfully pursue the costs against the judgement-debtor, the Bank could only be lawfully liable as a garnishee if at all it held any funds to the order of a customer who was a judgment-debtor. This could not extent to bank’s property.

40. The Bank prays for the preliminary objection to the application and petition be dismissed with costs.

### **Determination**

41. The issues for determination are as follows;

- a. Whether the court lacks geographical jurisdiction to hear the matter.
- b. Whether the petition is *res judicata* and/or res-subjudice
- c. Whether the petition lacks material averments and ought to be struck out.
- d. Whether the petition is incompetent for absence of authority to execute the verifying affidavit.

42. The court has carefully considered the pleadings and the submissions by the parties and finds as follows;

### **Issue i**

43. With regard to the issue whether the court lacks territorial jurisdiction to adjudicate over the subject petition, the court wholly agrees with the submissions by the counsel for the applicant/petitioner that the Employment and Labour Relations Court wherever it is situated in Kenya has territorial jurisdiction to adjudicate on any matter covered under section 12 of the Employment and Labour Relations Act 2011, as amended by Misc. Amendment No. 18 of 2014. No territorial demarcation exists thus far. In any event the two Judges sitting in Mombasa had previously recused themselves in ELRC No. 116 of 2013 (now 1262 of 2015) consequent upon the matter was transferred to Nairobi. The petition emanates in this said suit and has aptly been filed in Nairobi. The objection is dismissed.

### **Issue ii**

44. As to whether the petition is *res judicata* and/or res-subjudice, the court is satisfied that the five (5) requirements set out herein before have not been met and this objection fails accordingly.

### **Issue iii**

45. The court is also satisfied that the petition does not lack material averments within the meaning of **Anarita Karimi Njeru case (Supra)**. The alleged violation of the Bank’s Right under Article 40 of the constitution is clearly set out in the petition and the Application. This objection fails accordingly.

### **Issue iv**

46. The court is also satisfied that sufficient authority is disclosed by the Head of Legal Services of the applicant/petitioner Bank to bring the petition and the application on behalf of the Bank.

47. In any event, the court agrees with the submissions by the counsel for the applicant/petitioner that there is no requirement for a supporting or verifying Affidavit in a constitutional petition in contradistinction to a civil suit commenced by way of a plaint and interlocutory applications thereof.

48. In conclusion all the preliminary objections are dismissed with costs.

**Dated and delivered at Nairobi this 23<sup>rd</sup> day of September, 2016.**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**