



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1314 OF 2011

(Before Hon. Justice Hellen S. Wasilwa on 25th May, 2015)

PETER MBUGUA KANOI1st CLAIMANT
PETER MUGAMBI LINTARI.....2ND CLAIMANT
PETER KIEMA KALUTU.....3RD CLAIMANT
FLORENCE M. MALA.....4TH CLAIMANT
JULIUS KIAUTHA KINITO.....5TH CLAIMANT
WILLIAM OKALIO EPAYE6TH CLAIMANT

VERSUS

COFFEE BOARD OF KENYARESPONDENT
JAMES KIMANI T/A CASH
GATE AUCTIONEERSINTERESTED PARTY/APPLICANT

RULING

1. The application before court is the one dated 27th November 2014. This application was filed under Certificate of Urgency and brought through a Notice of Motion brought under Order 51 Rules 1, 3, Order 51 Rule 15 of the Civil Procedure Rules, Section 3A and Section 63 (e) of the Civil Procedure Act and all other enabling provisions of law.

2. The Applicants sought orders that:

1. The Honourable Court be pleased to discharge and/or set aside/vary the ex parte orders granted against the interested Party/Applicant on the 17th day of November 2014.

2. The judgment debtor do honour their commitment of paying the interested Party/Applicant/Auctioneer Kenya Shillings Two Million (Kshs.2,000,000/=) as duly earned fees in the first phase of attachment within seven days.

3. A declaration do issue to the effect that the amount in (2) above is not subject to taxation

before the Deputy Registrar as it had already been negotiated for and therefore undisputable.

4. A declaration do issue to the effect that the interested Party/Applicant/Auctioneer is entitled to be paid forthwith by the judgment debtor undisputable amount of Kenya Shillings One Million Fifty Thousand (Kshs.1,050,000/=) in the 2nd phase of attachment.

5. The interested party be served with the application dated 24th October 2014 together with the Responses from all parties to the suit within a reasonable time as the court deems fit.

6. The interested party be given leave to file and serve his response within a reasonable time as the court deems fit.

7. The Judgment debtor's application dated 24th October 2014 be fixed for hearing inter partes.

8. The costs of this Application be borne by the Respondents.

3. The application was grounded on the following grounds:

(1) The Interested Party/Applicant was duly instructed to carry out the execution to satisfy the decree in the claim herein.

(2) The decretal amount was Kshs.17,882,095.70/=

(3) The attachment was done in two phases: 1st phase and 2nd phase.

1st phase of Attachment

(a) The interested party did the proclamation on the 7th day of January 2014 for the recovery of the said amount Kshs.17,882,095.70/=.

(b) The interested party carried out the physical seizure of the proclaimed goods on the 30th April 2014 wherein he attached two motor vehicles: KBR 299U and KBN 196E.

(c) Auctioneers fees was agreed to be Kenya Shillings Three Million Two Hundred Thousand (Kshs.3,200,000/=). There was no contention in respect of this amount.

(d) The end of the 1st phase of attachment was on the 15th day of May 2014.

(e) The judgment debtor paid the Auctioneer/Interested Party Kenya shillings Two Hundred Thousand (Kshs.200,000/=) in cash and Kenya Shillings One Million (Kshs.1,000,000/=) by way of RTGS.

(f) The judgment debtor has to date defaulted to pay the auctioneer a balance of Kenya Shillings Two Million (Kshs.2,000,000/=) which is undisputable, due and payable to the said auctioneer in the first phase of attachment.

2nd phase of Attachment

(a) On 15th July 2014, Applicant through the law firm of Koceyo & Company Advocates acting on behalf of the claimants was given instructions to proceed with execution for the recovery of Kshs.6,797,889/=.

(b) The auctioneer did the physical seizure of the proclaimed property on the 18th day of October 2014, wherein two motor vehicles: KBN 196E and KBU 893T which to date are in the yard.

- (c) The auctioneers fees agreed upon in phase 2 of the attachment was Kenya Shillings One Million Fifty Thousand (Kshs.1,050,000/=.**
- (d) To date the said Kenya Shillings One Million Fifty Thousand (Kshs.1,050,000/=) has not been paid to the auctioneer.**
- (4) The judgment debtor has obtained orders restraining the interested party from selling the attached motor vehicles in the instant claim on grounds that the decretal amount has been paid in full.**
- (5) The interested party has not received any formal instructions and/or communication from the Claimant's advocates confirming that the decretal amount has since been paid.**
- (6) The auctioneers fees indisputable in the first phase of attachment of Kenya Shillings Two Million (Kshs.2,000,000/) has not been paid.**
- (7) The auctioneers fees in the 2nd phase of attachment of One Million Fifty Thousand (Kshs.1,050,000/=) has not been paid.**
- (8) On or about the 17th day of November 2014, the judgment debtor through its advocates misrepresented and misled the court into believing ex parte that the decretal amount had been paid in full.**
- (9) The claimant's advocate was not in court to confirm the position.**
- (10) The judgment debtor deliberately and unfairly concealed very material facts to the court that there were two phases of attachment and that the undisputed amount of Kenya Shillings Two Million (Kshs.2,000,000/=) due and payable to the auctioneer had not been paid.**
- (11) The judgment debtor also concealed to the court that Kenya Shillings One Million Fifty Thousand (Kshs.1,050,000/= due and payable to the auctioneer had not been paid.**
- (12) The interested party had not by then been enjoined in the proceedings and was therefore not able to defend his position.**
- (13) The court on misrepresentation of facts by the judgment debtor that the decretal amount had been paid in full and that the only issue which was contentious was the payment of auctioneers fees issued ex parte orders that the interested party do proceed to taxation in the event that parties failed to negotiate.**
- (14) Had the court known all the material facts, it would not have issued the orders which it did which are now adversely affecting the auctioneer herein.**
- (15) The Auctioneer stands to be prejudiced as his undisputed fee has not been paid and yet the judgment debtor was able to get a stay of execution.**
- (16) The attached motor vehicles are depreciating in value and if the instant application is not heard urgently, the auctioneer stands to be prejudiced.**
- (17) It is fair and just that the interested party be given a chance to respond to the application dated 24th October 2014 to enable him defend his position.**
- (18) It is fair and just that the judgment debtors application dated 24th October 2014 be heard on merit.**

4. The Respondents filed their replying affidavit in respect of this application on 29/1/2015. The affidavit was filed by one Marjory Mwangi, the Legal Officer of the Respondent herein. In their affidavit, the Respondent avers that they never committed to pay the exaggerated auctioneer charges of 3,200,000/= but that they had issued an unsigned cheque of this amount to the auctioneer to bar them from continuing with execution.

They contend that the bill was contested and required it to be taxed. They aver that they are willing and ready to settle any auctioneers fees subject to taxation of the same since there is a dispute as to the amount claimed.

5. I have considered the averments of both parties and the issue for determination is whether the Judgment Debtor made a commitment to the auctioneers, the Interested Party to pay them Kshs.3,504,777 less discount of Kshs.304,777 leaving a balance of 3,200,000/=.

6. The question this court must answer is whether there was such a commitment and if there is proof of the said commitment. The Applicants have submitted that there was such a commitment by virtue of the fact that the Judgment Debtor issued an unsigned cheque of 3,200,000 to the Auctioneer in abide to stop them from continuing with the execution process and on the same date gave the Auctioneer 200,000/= in cash. The Judgment Debtor also paid a further 1 million by RTGS to the Auctioneer to offset the said fees note raised by the Interested Party. What is now owing is 2 million according to the Interested Party – the Auctioneers on the 1st phase of the attachment and Kshs.1,050,000/= on 2nd phase.

7. Is an unsigned cheque a commitment as submitted by the Applicants?. The Applicants contend that by his action, the Judgment Debtor made them believe that they had agreed to this figure of 3,200,000/= million. They site Section 120 of the Evidence Act Cap 80 Laws of Kenya and state that the Judgment Debtor is estopped by his act from denying the commitment to pay the 3.2 million Kenya Shillings as auctioneers fees as the Auctioneers believed him.

8. The Applicants cited several authorities amongst them **Brown vs Westminster Bank Limited, Queens Bench Division (Commercial Court) [1964] 2 Lloyd's Rep 187 Legal Decisions Affecting Bankers 2986** where the issue of estoppel was considered. The learned Judge stated as follows at page 21:

“...if a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts and that it was a true representation and that the matter was intended to act upon it in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were represented”.

9. The Court of Appeal at Nyeri – in **Civil Appeal No. 17 of 2013** also dealt with a similar application where the learned Judges made a finding that:

“The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what was implied by a previous action or settlement of that person”.

The Court of Appeal proceeded to find that the parties in the appeal having agreed on the threshold of fees to be charged in an election petition as 400,000/= the Respondent could not go against this agreement and tax this bill higher than the agreed amount.

10. In the instant case, the Judgment Debtor did issue the auctioneers with an unsigned cheque of 3.2 million as payment of auctioneers charges. This act made the execution process to be stayed and the Auctioneer believed that the amount will be settled once the cheque is signed. The Respondents have not denied this cheque was issued. They only contend that they issued the cheque to stop the execution process. By virtue of this action however, the execution process was stayed. There were also warrants of attachment signed by the Deputy Registrar indicating the fees to be paid dated 23/12/2013 way before the cheque was issued.

It is this court's finding that by the Judgment Debtor issuing this cheque – whether signed or not was to be used as a lien by the Auctioneer as proof that that is what was owed to him and it would be paid later on.

11. On the same date, cash 200,000/= was paid to the Auctioneer. It is apparent that the Auctioneer acted on this understanding that the fees had been agreed upon and therefore he stayed the execution.

I therefore find this application has merit and allow it accordingly in the following terms:

(1) The ex parte order dated 17th November 2014 is set aside to the extent that the Auctioneers fees will not be taxed but shall be paid as already agreed upon by the parties being:

(i) 3,200,000 in 1st phase of attachment less 1.2 million already paid.

(ii) 1,050,000/= is the 2nd phase of attachment.

(2) As concerns the application dated 24/10/2014, I make a finding that the same is overridden by the ruling herein and the consent of the parties dated 29/1/2015. Any attached property should therefore be released to the Judgment Debtor upon payment of the Auctioneers charges. The Respondents to pay costs of this application.

Read in open Court this 25th day of May, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Nyakinywa for Claimants

Wanga for Respondent