



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA AT KISUMU
APPEAL NO. 6 OF 2015

(Formerly Kakamega High Court Appeal No. 17 of 2009)

(Before Hon. Lady Justice Maureen Onyango on 9th October, 2015)

OTIENO NALWAYOCLAIMANT

VERSUS

MUMIAS SUGAR CO. LTDRESPONDENT

RULING

By a Notice of Motion filed under Certificate of Urgency on 11th March, 2015 the Applicant who is the Respondent in the Appeal sought the following orders:-

- (a) This application be certified as urgent and be heard ex-parte in the first instance
- (b) This Honourable Court be pleased to grant temporary stay of execution of Warrant of Attachment and Sale issued by this Honourable Court to Dasemy Auctioneers pending the hearing and determination of this application inter parties.
- (c) This Honourable Court to hold this matter has been fully settled by the Respondent.
- (d) This Honourable Court be pleased to recall and set aside the Warrant of Attachment and Sale issued to Dasemy Auctioneers for being overtaken by events.
- (e) Costs of this application be provided for.

The application is supported by the affidavit of Diana Barasa the Respondent's Legal Services Manager and the following grounds:-

1. The Appellant was fully paid for the decretal sum together with costs in HCA No. 17 of 2009 and

- Abdalla Shikuku Okello - v Mumias Sugar Co. Ltd No. 56 of 2009.
2. It is imperative that this case be marked as settled.
 3. The Notice of Warrant of Attachment and Sale issued by Dasemy Auctioneers have been overtaken by events as this suit is already settled.
 4. The defendant will suffer substantial loss unless they stay is grant
 5. This application is made without unreasonable delay and in the interest of justice
 6. The attachment of the defendant's property is irregular, unlawful and made in bad faith.
 7. The attachment is an abuse of the due process of the court.
 8. The attachment of the defendant's property is aimed at harassing the defendant.

The Appellant (Respondent in the Application) filed a replying affidavit of Moses Wanyama Onyango, counsel for the Appellant on 25th May, 2015.

I have carefully considered the application together with the supporting affidavit and exhibits attached thereto as well as the replying affidavit and the exhibits attached to the same. I have also considered the written submissions of both parties.

Background

The Applicant herein was the Respondent in *Kakamega HCCA No. 56 of 2009 (Abdalla Shikuku Okello v Mumias Sugar Co. Ltd)* and *Kakamega HCCA No. 17 OF 2009 (Otieno Nalwoyo v Mumias Sugar Co. Ltd)*. The two appeals were filed through Wanyama & Co. Advocates. Both appeals were successful. In Appeal No. 56 of 2009 the Appellant was awarded Kshs.43,500 while costs were agreed at Shs.82,000/= In Appeal No. 17 of 2009 the appellant was awarded KShs.103,500 and costs agreed at Shs.105,00. The Applicant issued two cheques of Shs.103,500 and Kshs.237,995 respectively in satisfaction of the decretal sum in the two appeals. However, counsel for the Appellants in the two causes extracted decrees as follows:-

Appeal No. 56 of 2009

(i)	Principal sum	Shs.43,500.00
(ii)	Interest on Principal sum from 26/5/2009 when judgment of lower court was delivered to dated (5 years)	Shs. 30,450.00
(iii)	Agreed party and party costs	<u>Shs. 82,000.00</u>
Total		Shs.155,950.00

Appeal No. 17 of 2009

(i)	Principal sum	Shs.103,500.00
(ii)	Interest on principal sum from 22/9/2009 when judgement of lower court was delivered to date (5 years)	Shs. 72,450.00
(iii)	Agreed party and party costs	<u>Shs.105,000.00</u>
Total		Shs.289,950.00

Counsel for the Appellants in the two cases applied the funds received from the Applicant to off-set the decretal sum in Appeal No. 56 of 2009 in the sum of Shs.,158,400/= the amount having gone up by additional court fees of Shs.2,450/= thus clearing the decretal sum in the said suit. The balance of Shs.79,395 was utilised to reduce the decretal sum in Appeal No. 17 of 2009 leaving an uncleared balance of Shs.100,505. The warrant of attachment that is the subject matter of the application herein is thus for the said balance of Shs.100,505.

In the written submissions the applicant argues that the judgement in the two appeals did not grant interest and that interest is not payable unless specifically awarded.

I have perused the judgement in both appeals. In Appeal No. 56 of 2009, the judgement was as follows:-

"In the result, I allow the appeal and set aside the judgement of the trial court. I instead enter judgement for the appellant against the Respondent. I award general damage of Kshs.40,000/= and special damages of Kshs.3,500/= with interest. Interest on general damages will accrue from today's date and interest on special damages will accrue from the date of judgement in the subordinate court. The Respondent shall pay the cost of this appeal and the cost of the proceedings in the trial court."

In appeal No. 17 of 2009, the judgement was as follows:-

"I award general damages of Kshs.100.000/= and special damages of Kshs.3,500/= as assessed by the trial court. The Respondent shall pay the cost of the appeal and the subordinate court proceedings".

From the foregoing it is clear that in Appeal No. 56 of 2009 the Judge expressly awarded interest from date of the lower court's judgement as specified therein while in Appeal No. 17 of 2009 the judgement is silent on interest. I agree with the Applicant that where the judgement is silent on interest a party cannot presume the same. Section 26 of the Civil Procedure Act provides for interest as follows:-

(1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.

(2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum.

The court did not provide for interest in this case and none is payable. For this reason the decree should be for the principal sum and costs only in the total sum of Shs.208,500 and not Shs.289,950.

The upshot is that the application succeeds in part and I make the following orders.

1. I recall and set aside the decree herein and the Warrant of Attachment and Sale issued to Dasemy Auctioneers.
2. I order that a fresh decree be drawn for the principal sum of Shs.103,500 and agreed party and party costs of Shs.105,000/= and credit be given for any amount that has been paid towards the same.
3. Each party shall bear its costs of this application.

Dated signed and delivered this 9th day of October, 2015

MAUREEN ONYANGO

JUDGE