



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU
CAUSE NO. 26 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

ELIJAH MIDIGO OCHIENG & 4 OTHERSCLAIMANT/RESPONDENT

VERSUS

THE TRUSTEE, KENYA LAKE CONFERENCE &

S.D.A. CHURCH E. A. UNION LIMITED.....RESPONDENTS/APPLICANTS

R U L I N G

By a Notice of Motion filed under certificate of urgency on 9th July, 2015 the Respondents seek the following orders:-

1. The application be certified as extremely urgent and be heard ex-parte at first instance.
2. There be stay of execution pending the hearing and determination of this application.
3. The Warrants of Attachment herein issued to PAYWOOD AUCTIONERS be recalled and/or withdrawn.
4. The execution herein levied against the Respondent/applicants herein be declared illegal null and void.
5. The Advocate for the Respondents/Claimants herein do personally bear the auctioneers costs (if any) and also the costs of this application.
6. This court do declare that the decree herein issued has been fully settled.
7. The Advocate for the Respondents do pay into court Kshs.70,000.00 being further court fees collected on behalf of the the court, from the Applicant.
8. The costs of this application be provided for.

The application is made under S.11(1)(c),(d), (3) of the Industrial Court Act and S.3, S.3A Order 21 Rule 7, Order 22 Rules 1,2,7, and 13 of the Civil Procedure Act and Rules and all enabling provisions of the law. It is supported by the affidavit of KILLION MINGUSA AGALLO and on grounds that the decretal sum has been settled.

In the supporting affidavit it is deponed that the Respondents settled the decretal sum by way of RTGS in the sum of Shs.2,474,655.30 after deducting statutory deductions in the sum of Shs.562,717.30. Mr. Agallo further states that costs assessed at Shs.473,767.00 were also paid into the Account of the Claimants' Advocates by RTGS. The decretal sum was transferred on 19th December, 2014 while costs were transferred on 26th June, 2015. Both payments were made to account number 01120012937501 in the name Otieno C.O. Ayayo & Co. Advocates at Kisumu Branch as advised by the Claimants' Advocates to the Respondents' Advocates Ms Abisai & Company Advocates by letter dated 4th December 2014. The calculations for statutory deductions was communicated to the Claimants' counsel by letter dated 18th December 2014. The supporting affidavit states that the Respondent's goods were proclaimed on 6th July, 2015 by MAYWOOD AUCTIONEERS. That the value of the property proclaimed is in excess of Shs.20,000,000 while the sum indicated in the warrants are Shs.1,117,097.76. The auctioneer presented his bill for the sum of Shs.356,000.

It is deponed in the supporting affidavit that in February, 2015 the Claimant's Advocates made an application to the Deputy Registrar to arrest the deponent and other chief officers of the Respondent for failing to pay the decretal sum even before costs were assessed and further that the Claimant's bill of costs dated 9th December, 2014 contained an item No. 70 of Shs.70,000/= on account of further court fees which was allowed by the taxing officer.

The deponent avers that the execution is malicious, unwarranted and is intended to punish the Respondents and satisfy the ego of Claimants. He prays that this application be allowed with costs and Claimants be condemned to pay the auctioneer's costs.

Mr. KILLION MINGUSA AGALLO swore a further affidavit on 30th July, 2015 in which he depones that he is the treasurer to the Respondents and personally made the payments of Shs.2,474,655.30 on 21st December, 2014 and a further Shs.473,767 on 26th June 2015 from Account No. 01128076282900 in the name of S.D.A. CHURCH KENYA LAKE CONFERENCE to OTIENO C.O. AYAYO AND COMPANY ADVOCATES by Swift/RTGS.

In response to the application each of the Claimants filed a replying affidavit in opposition to the notice of motion filed by the Respondent in which they state that the Respondents have not satisfied the decretal sum as no proof has been submitted by the Respondents of payment of Shs.539,917.30 to Kenya Revenue Authority or any payment to NSSF and NHIF. They further allege that the Respondents did not inform the Claimants counsel about payment by RTGS.

The application was first heard exparte on 9th July, 2015 and temporary stay of execution was granted pending hearing of the application inter parties. On 21st July, 2015 I directed counsel for the parties to discuss the matter in view of the documents attached to the affidavit in support of the application which confirmed payments transferred to Claimants advocates account. I also dismissed an application by the Claimants advocate to cross examine the deponent of the affidavit in support of the application.

The parties were however unable to agree and I directed that they file written submissions on the application. The Respondents submissions in support of the application were filed on 31st July, 2015 while those of the Claimants opposing the application were filed on 7th August, 2015.

In the written submissions the parties reiterated the contents of the affidavits filed in support and opposition of the application. The Respondents insisted that they had paid the decretal sum together with costs by direct transfer into the Claimant's Advocates account while it was submitted for the Claimants that out of the total decretal sum of Shs.3,048,372.60 only Shs.2,475,041.84 has been received leaving a balance of Shs.573,330.76, taxed costs of Shs.473,767 and further court fees of Shs.70,000/= all totalling Shs.1,117,097.76 for which the Claimants applied for execution. The Claimants pray that further auctioneer's fees be added to the decretal sum.

The Claimants pray that the application be dismissed.

I have carefully considered the application, the affidavits in support thereof, the replying affidavit and the

written submissions filed by both parties.

It is not in contention that the Respondents paid the sum of Shs.2,474,655.30 into the account of the Claimants counsel as communicated to the Respondents Advocates by the Claimants Advocate's letter dated 4th December, 2015. I also do not have reason to doubt that the Respondents paid Shs.473,767 into the Claimants' Advocate's account as reflected in the SWIFT/RTGS APPLICATION FORM dated 26th June, 2015 and as also reflected in the bank statements attached to the further affidavit of Killion Mingusa Agallo but which the Claimant's Counsel has not acknowledged. I have also perused the copies of KRA P9A forms and the KRA PAYE payment receipt for Shs.539,917.30 dated 15th January, 2015 and I am satisfied that payment was duly made to KRA for PAYE for the Claimants in the sums deducted from the decretal sum. I have further perused the statements from NSSF and NHIF and I am satisfied that the Respondents remitted the sums reflected therein.

The foregoing being the case, I find the Respondents have fully paid the decree in respect of both the decretal sum and the taxed costs.

The Claimants have made a further claim of Shs.70,000/= on account of additional court fees which the Respondents state they have already paid as it was included in the taxed costs. I have perused the bill of costs on record together with the proceedings of the taxation and confirm that item number 70 in the bill of costs is for a sum of Shs.70,000/= on account of additional court fees. The payments were made on 19th December, 2014 and 26th June, 2015 respectively for decretal sum and taxed costs. This means that at the time of attachment on 7th July, 2015 the full decretal sum including costs had been received by counsel for the Claimants and the attachment was therefore wrongful.

For these reasons, I allow the application by the Respondents dated 8th July, 2015 and make the following orders:-

1. I declare that the decree has been fully settled
2. I declare the execution levied against the Respondents/applicants illegal, null and void.
3. I order the Warrants of Attachment issued to MAYWOOD AUCTIONEERS recalled and/or withdrawn.
4. I declare that no further court fees are due from the Respondents in the sum of Shs.70,000/= or any other sum.
5. I order that the Claimants Advocates personally bear the Auctioneers costs and the Respondents' costs of this application as the decretal sum and taxed costs were paid into the Claimants' Advocate's account at the request of the Claimants Advocates.

Dated Signed and delivered this 4 day of November, 2015

MAUREEN ONYANGO

JUDGE