



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1714 OF 2011

ESTHER MURINGI WAHOME.....1ST CLAIMANT

CATHERINE NGINA.....2ND CLAIMANT

CATHERINE KATUNGE.....3RD CLAIMANT

ESTHER GAICUGI.....4TH CLAIMANT

EUNICE NDINDA.....5TH CLAIMANT

JOSHUA WAMBUA.....6TH CLAIMANT

THROUGH KENYA CONCRETE, STRUCTURAL, CERAMIC TILES,

WOOD PLY AND INTERIOR DESIGN WORKERS UNION

-VERSUS-

THE CEMENTERS BUILDING AND

CIVIL ENGINEERING CONTRACTORS LIMITED.....RESPONDENT

RULING

1. The application before this Court is the Respondent's/Applicant's Notice of Motion dated 3.9.2018 seeking orders that:

a. Spent.

b. The firm of Mucheru Law LLP be allowed to come on record for the Respondent/Applicant.

c. Pending the hearing and determination of this application, the Claimants and or their union , the Kenya Concrete , Structural, ceramic Tiles Wood Ply and Interior Design Workers Union whether by themselves, their agents, servants, appointees and/or employees be restrained from executing any decree herein against the Respondent in any manner whatsoever.

d. The proclamation dated 20.8.2018 and the warrants dated 17.8. 2018 be withdrawn and/or lifted.

e. A declaration do issue that the decree herein including costs has been fully settled.

f. The costs of this application be met by the claimants.

2. The application is premised on grounds that the applicant has already settled the decree herein through the claimants' union and they are now attempting to levy execution again for the same amount. The application is supported by the affidavit sworn on 3.9.2018 the applicant's Director Mr. Dipak Halai who deposed that the Applicant paid all the claimants' dues through their union as shown in the annexed cheques being Kshs. 776, 510/- plus Kshs. 495,377/- being the taxed costs and on 22.8.2018, the claimants' Union wrote to it confirming that this matter had been finally settled. However, despite said settlement the claimants instructed Ms. Mbusera Auctioneers to execute the decree which had been settled as indicated in the proclamation notice dated 20.8.2018.

3. The claimants opposed the application by a Replying Affidavit sworn on 12.9.2018 by their counsel Mr. Enonda A.M. Dickson who deposed that his firm has always been on record for the claimants who sued in their individual capacity, and that he conducted the matter as such on behalf of them; that at no time did the claimants authorise any third party to execute the decree herein or seek any payments through the said trade union; that the application for execution filed on 5.8.2018 is fictitious and fraudulent as the said union was never on record for the Respondents ; and that the figures in the application are fictitious and do not include costs.

4. The counsel further deposed that the said application for execution stated that the same ought to be executed by Thomas Musila T/A Transfield Auctioneers but the attached proclamation is by Muhatia Pala Auctioneers; that they have been trying to have the decree executed and could not do so as the Judgment did not have figures to be affixed to the application , that their application for review was allowed on 25.7.2018 and that they proceeded to lodge an application for execution on 8.8.2018; that the Respondents have never received any payments from the Applicant or the Kenya Concrete, Structural Ceramic Tiles Wood Ply and Interior Designs Workers Union and that the cheques annexed to the application were not addressed to his law firm or the claimants.

5. The applicant filed written submissions to dispose of the application but the claimants relied on their Replying affidavit to oppose the application.

Applicant's submissions

6. The Applicant cited **JMM v PM [2018] eKLR** and submitted that stay of execution is a drastic action that will only be resorted to where the Judgment debtor stands to suffer irreparable harm if the decree-holder in whose name the decree is in favour proceeds to execute. It argued that the Claimant's proclamation dated 20.8.2018 and warrants dated 17.8.2018 ought to be withdrawn or lifted as they seek a second execution and unjust enrichment at its expense.

7. It further submitted that the allegation raised in the replying affidavit that the documents annexed to the application are forgeries and the figures set out therein are fictitious, is baseless since the documents can be proved by secondary evidence. It relied on **Faith Mumbua Kiio v Patel Devika [2018] eKLR** where the Court of Appeal held that section 67 as read with section 65 of the Evidence Act provides that contents of a documents must be proved by primary evidence though there are exceptional circumstances where it may be proved by secondary evidence.

8. It further argued that the law of stay of execution is clear under Order 22 Rule 22 of the Civil Procedure Rules and contended that it is not trying to deny the claimants the fruits of their judgment through this application. It maintained that the claimants are entitled to levy execution, however, once the same is fully settled, any attempt to do so again becomes unjust enrichment and ought to be withdrawn or lifted. Consequently, it prayed for the application to be allowed because the decretal sum herein is fully settled and the impugned proclamation and warrants are only intended to unjustly enrich the claimants.

Issues for determination

9. The main issues for determination are:

a. Whether the law firm of Mucheru Law LLP Advocates should be allowed to come on record for the Respondent/applicant.

b. Whether the proclamation of attachment dated 20.8.2018 and warrants dated 17.8.2018 should be withdrawn and/or lifted.

c. Whether the a declaration should issue that the decree has been fully settled

Leave to change the applicant's advocate

10. Every person has the constitutional right to have an advocate of his own choice to represent him in court proceedings. However there is a procedural bottleneck under order 9 Rule 9 Civil Procedure Rules when a party wishes to change his advocate after judgment has been passed in a suit. The said provision requires that any change of advocate after judgment is passed shall not take effect except by a court order upon an application with notice to all the parties or a consent signed by the outgoing advocate. Under Rule 10, the said application for leave can include other prayers provided the issue of representation is determined first.

11. In this case there is no consent signed by the outgoing advocate but the concerned party has filed the instant application seeking for leave to change advocate. No reasons have cited for the change of advocate and there is also no objection from the advocate being replaced. In therefore grant the leave to have the law firm of Mucheru Law LLP to come on record as the defence counsel herein.

Withdrawal and/or lift warrants and proclamation

12. The applicant contended that the whole decretal sum plus costs awarded to the claimants has since been settled vide cheques paid to their trade union, Kenya Concrete Structural, Ceramic Tiles, Wood Ply and Interior Designs Workers Union, on 22.8.2018. The claimants denied ever being represented by any trade union herein or ever receiving any payment of the decretal sum plus costs from either the applicant or the said trade union. They further questioned the authenticity of the alleged execution and payment of the decretal sum through the alleged trade union.

13. I have carefully considered the material presented to the court by the applicant and also perused the court record. It is clear that the claimants brought this suit through a firm of advocates which is still on record for them. In addition, the court record shows an application for execution for execution of the decree herein was filed by the said trade union on 9.6.2016 to issue warrants to M/s Transfield Auctioneers but not Muhatia Pala Auctioneers. The burden is therefore upon the applicant to prove that the said application for execution and the proclamation documents are genuine after the claimants contended that they are forgeries. In my view, the said burden of proof has not been discharged since the applicant did not even attempt to do so.

14. As regards the alleged payment of the decretal sum plus costs, again the burden of proof is upon the applicant to demonstrate that the claimants had appointed the Kenya Concrete Structural, Ceramic Tiles, Wood Ply and Interior Designs Workers Union to collect the decretal sum on their behalf. There is no evidence that the claimants ever appointed any trade union to act for them in this matter either before or after the judgment was passed. There is also no evidence of any leave given by the court allowing the alleged union to come on record on behalf of the claimants. It follows that any purported dealings between the applicant and the said union are lacking any basis in law and cannot be a reason for lifting the execution warrants issued to the claimant through M/s Mbusera Auctioneers.

15. Order 22 Rule 1 of the Civil Procedure Rules provides:

“(1) All money payable under a decree or order shall be paid as follows—

(a) into the court whose duty it is to execute the decree;

(b) direct to the decree-holder; or

(c) otherwise as the court which made the decree directs.

(2) Where any payment is made under subrule (1) (a), notice of such payment shall be sent by the court to the decree-holder and his advocate, if any.”

16. In this case the applicant did not comply with the foregoing provision if at all it made any payment to the trade union on behalf of the claimants as alleged.

17. The foregoing notwithstanding, I am of the opinion that the applicant did not pay any money to the said trade union as alleged because it has not proved that the alleged cheques were delivered to the union and banked. The applicant has not produced any copy of demand for the decretal sum from the trade union and the letter by which it forwarded the cheques to the union. It only produced a letter from the union dated 22.8.2018 which purported to confirm payment of the decretal sum in respect of this suit but without indicating whether the payment was by cheques, and if so the cheque numbers.

18. In view of the above observations and findings, I decline to withdraw and or lift the proclamation of attachment dated 20.8.2018 and warrants dated 17.8.2018 as prayed. I also decline to make declaration that the decree herein including costs has been fully settled since there is no evidence to prove that the applicant has done so in accordance with Order 22 Rule 1 of the Civil Procedure Rules provides. In the end, the application must be dismissed, which I now do, with costs to the claimants.

Dated, Signed and Delivered at Nairobi this 5th day of February 2021

ONESMUS N. MAKAU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE



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