



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITUI**

**MISC. APPLICATION NO.29 OF 2016**

**REPUBLIC.....APPLICANT**

**VERSUS**

**COUNTY GOVERNMENT OF KITUI.....RESPONDENT**

**R U L I N G**

1. **Mwalewa Stores**, the **Ex-parte Applicants** herein has brought this application dated 12<sup>th</sup> August, 2020 by way of Notice of Motion seeking the following prayers namely:

*(i) Spent*

*(ii) Spent*

*(iii) That a stay of execution arising from the Respondents taxed costs pending the hearing and determination of this application.*

*(iv) That the dismissal orders issued and all consequential orders be set aside the suit /application be reinstated*

*(v) Costs*

*(vi) That in the alternative that party and party costs taxed be set aside and taxation be done afresh.*

2. The Applicant has listed the following ground being the basis of its application namely:

*a. That the suit was dismissed without notice*

*b. That the Respondent's agents Milestone Auctioneers have proclaimed/attached the personal property of the directors contrary to the law.*

*c. That in any event the amount is excessive, exaggerated and contravenes the Advocates Act.*

*d. That the Applicant stands to suffer irreparable loss.*

3. The **Applicant** through **Japhet Mwinyi Mwakavi**, one of the co-directors of the applicant, has sworn an affidavit sworn on 12<sup>th</sup> August, 2020 alleging that the applicant has been engaged in negotiations with the Respondent through their advocate on the question of costs.

4. The deponent also avers that the auctioneers went to his home and proclaimed against him as a person instead of the company whose offices are situate elsewhere and not his home.

5. The deponent further alleges that the properties attached are his personal property and that the bill of costs is highly exaggerated adding that the auctioneers fees are equally exaggerated.

6. In its written submission through its advocates **M/s.Munyalo Muli and Co. Advocate**, the **Applicant** has reiterated the above grounds adding that the application that was dismissed was the application for leave to apply for Judicial Review Remedies under **Order 53**. It contends that the said application ought to have been heard ex parte as per the **Provisions of Order 53**.

7. The **Applicant** further submits there is no evidence on record that shows that it's advocate was served with Notice to Show Cause. In its view, the dismissal of its application was irregular and the dismissal should not have included cost element.
8. It further contends that the taxed costs were excessive and illegal because in its view there were no proceedings to be defended and that the Respondent should have waited until leave is granted and substantive application filed. The **Applicant** argues that costs were not payable despite dismissal of the application. It submits that the order for costs be varied and the same be re-submitted for fresh taxation.
9. The **Applicant** has further faulted the auctioneers for charging this **Kshs.51,493/=** for just delivering a notice of attachment and contends that the auctioneer is out to enrich himself through an illegality. It asks this court to be driven by substantive justice rather than be dogged by technicalities.
10. The **Respondent** has opposed this application through a Replying Affidavit of **J.K. Mwalimu** sworn on 19<sup>th</sup> August, 2020 and the written submissions through the same firm of advocates. The Respondent avers that the plaintiff's suit was properly dismissed on 3<sup>rd</sup> October, 2019 for want of prosecution after it failed to respond to notice to show cause.
11. The **Respondent** contends that the matter in court had been left lying idle for 3 years prior to its dismissal.
12. It further submits that taxation of the bill of costs was done procedurally and that the Applicant herein was duly served but offered no challenge to the bill of cost. He has exhibited an Affidavit of Service to buttress that point.
13. The **Respondent** further faults the **Applicant** for the seeking the alternative relief unprocedurally arguing that the procedure to challenge taxed costs has not been followed.
14. It also contends that the attachment cannot be challenged in the manner it has been made because no one has filed objection to the attachment.
15. The court has considered this application and the response made. The **Applicant** has invoked the **Provisions of Order 12 Rule 7 of the Civil Procedure Rule and Article 159 of the Constitution of Kenya**. It has further invoked the **Provisions of Section 1A, 1B & 3A of the Civil Procedure Act** in seeking the reliefs I have highlighted above.
16. The **Provisions of Order 12** of the **Civil Procedure Rule** relates to the hearing of matters when they are scheduled for hearing in court and consequences of non-attendance. When a matter has been scheduled for hearing and only the defendant attends, a suit maybe dismissed by the court where the matter is listed. The Provisions of **Rule 7 of Order 12** relates to a relief available to a party where his suit has been dismissed for non attendance.
17. The grounds cited in this application do not relate to reliefs provided under **Order 12**. The Applicant claims that the suit was dismissed without notice and that the cost taxed were excessive in its view. In my considered view the provisions of **Order 12 Rule 7** cannot aid the **Applicant** because they are not applicable.
18. Furthermore, the **Provisions of Sections 1A & 1B of the Civil Procedure Act** invoked by the Applicant relates to the overriding objectives of the **Civil Procedures Act** and the duty of courts in attaining those objectives. The bottomline of those objectives is to facilitate expeditions, just and proportionate disposal of matters in court and to comply with the processes and orders of court to avoid unnecessary delays attendant obstructions or delay of justice.
19. This court has perused through this matter and noted that the **Applicant** moved this Court for leave to challenge an administrative decisions made by the **Respondent** on 12<sup>th</sup> August, 2016. The application for leave is dated 24<sup>th</sup> November, 2016 and was filed on the same day under certificate of urgency. The record shows that this matter was placed before the judge on 29<sup>th</sup> November 2016 who pursuant to the Provisions of **Order 53 Rule 1(4)** directed the **Applicant** to serve the **Respondent**. The application was served and apparently the **Ex parte Applicant** grew cold feet after the court pointed out some defects in the said application. From 15<sup>th</sup> December, 2016 when the court noted the defect to 3<sup>rd</sup> October, 2019 the **Applicant** went to sleep and appeared to have lost interest in pursuing the matter, it never bothered to attend court on 3<sup>rd</sup> October, 2019 despite being served with Notice to Show Cause why the application dated 24<sup>th</sup> October, 2016 could not be dismissed for want of prosecution. The Notice to Show Cause was dated 23<sup>rd</sup> September, 2019 and the same was served on both counsels on record. When the matter came up 3<sup>rd</sup> October, 2019, only the **Respondent** attended and the application for leave was dismissed for want of prosecution with costs to the **Respondent**.
20. The **Applicant** has now come to this court to have the dismissal order set aside on the ground that the dismissal was done without due notice. I am however not persuaded for 3 reasons:-
  - (i) In his Supporting Affidavit the Applicant has not stated that it is or its counsel was not served with the Notice to Show Cause.
  - (ii) The Respondent through Counsel has sworn an Affidavit in response stating due notice was issued to both Counsels. The Applicant has not contested that fact made on Oath. That means that the Applicant is not contesting the fact that it was aware about the Notice to Show Cause.
  - (iii) The Applicant has not advanced reasons to explain its inaction for a period of 3 years yet it had stated that the application was urgent. The question posed is what happened that dissipated the urgency.
21. This court finds that the Applicant has failed to give sufficient reasons to set aside the dismissal order. It has not shown that it has a good

*prima facie* cause to pursue to be allowed back to court. Besides this, the **cited Provisions of Section 1A & 1B** run afoal the Applicant's conduct of indolence.

22. I have considered the Applicant's other prayer to refer the matter for fresh taxation on account that the taxed costs are excessive. This court finds that the prayer for referral again runs against the letter and spirit of **Section 1A & 1B of Civil Procedure Act**. This is because as correctly pointed out by the Respondent, where a party is aggrieved by a decision of the taxing matter, the Advocates Act provides that objection should first be lodged with the taxing officer and if dissatisfied, a reference is made to this court. The **Applicant** has not challenged the certificate of costs issued on any ground and it is improper for him to ask this court to set it aside and resubmit it for fresh taxation, without first pointing out to the taxing officer as to which item(s) it is challenging.

23. The **Applicant** has asked this court to overlook any procedural defects in its application but I am not persuaded that I should invoke the provisions of **Article 159** of the Constitution of Kenya or the inherent power of this court under **Section 3A Civil Procedure Act** because the **Applicant** is clearly abusing the court processes aimed at facilitating expeditious and just disposal of matters.

24. I am equally not convinced that the Applicant's grievance regarding auctioneers fees or its attachment can be challenged in the matter the Applicant has done in this application. The Provisions of **Order 22 Rule 51** of the **Civil Procedure Rules** provide adequate measures to be taken by anyone opposed to execution process particularly a party claiming that attachment has wrongly been levied on his/her goods. The Applicant herein was required to file an objection to kickstart objection proceedings as provided under the cited rules.

In the end this court for the above reasons finds no merit in this application dated 12<sup>th</sup> August, 2020. The same is dismissed in its entirety with costs to the respondent.

**Dated, Signed and Delivered at Kitui this 30<sup>th</sup> day of September, 2020.**

**R. K. LIMO**

**JUDGE**