



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

MISC. APPLICATION NO.39 OF 2017

FRANCIS NGARAMA KIRATU.....PLAINTIFF/APPLICANT

~VERSUS~

EQUITY BANK (K) LIMITED.....DEFENDANT/RESPONDENT

~AND~

NGANGA MUNENE & CO. ADVOCATES.....APPLICANT/RESPONDENT

RULING

The application before me is dated 29th January 2018 by the Plaintiff/Applicant brought under Sections 1, 1A, 3 and 3A of the Civil Procedure Act and Order 40 and 51 Rule 1 of the Civil Procedure Rules, 2010 seeking for: -

- a) Spent
- b) Spent
- c) A mandatory injunction be issued to the Applicant/Respondent, Ng'ang'a Munene & Company Advocates compelling them to demand the correct amount as ordered by this Court vide certificates of costs dated 30th August 2017 from the Plaintiff/Applicant.
- d) Costs of the application be provided for.

The application is supported by the Plaintiff's/Applicant's affidavit sworn on even date and the grounds on the face of the application viz:

1. The Applicant/Respondent has through Providence Auctioneers proclaimed against the Plaintiff/Applicant in the sum of Kshs. 521,159.35.
2. The said proclamation is against the Court's decree that indicates Kshs. 439,423.00.
3. The amount in the certificate of costs issued on 30th August 2017 is Kshs.420,262.00 which is at a great variance with both the proclaimed amount and the amount in the decree.
4. The Plaintiff/Respondent cannot understand how the amount rose from Kshs. 420,262.00 in the certificate of costs to Kshs. 439,423.00 in the decree and then to Kshs. 521,159 in the proclamation notice.
5. The amount has been inflated.
6. The Applicant/Respondent did not give the Plaintiff/Applicant a formal demand before proceeding to auctioneers.
7. The amount due and owing to the Applicant/Respondent should have be ascertained before instructing the auctioneers.

The application is opposed on the grounds that it is frivolous, bad-law and an abuse of the Court process, that the figures complained of are clearly self-explanatory on the body of the court warrant and the proclamation notice, that no attempt has been made to pay the amount on the decree which has not been challenged.

The application was canvassed via written submissions.

In the plaintiff applicant's submissions dated 11th June 2018, he reiterated the averments in his affidavit in support of the application. He contested the sum of Kshs.16,811/= indicated as interest in the warrants of attachments as it was not indicated in the certificate of costs. He questioned the rise of interest to the amount from 30th August 2017 when the certificate of costs was issued to 30th November 2017 when the warrants were issued. The certificate of costs was clear that only Kshs.420,262/= was to be paid arguing that collection fees did not apply where it was the auctioneer proclaiming. He urged this court to ascertain the amount payable to the Applicant/Respondent.

In the Respondent's submissions dated 18th June, 2018, it was argued that the additional sums followed the event of the judgment entered pursuant to an application dated on the 8th November 2017 which was allowed together with costs and interest on 14th November 2017. Warrants of attachment were issued as per the orders of 14th and the decree of 30th Nov 2017 all of which are part of this record. That auctioneer fees became payable upon instructions to pursue attachment.

It was also argued that counsel for applicant was wrongfully on record, and the application ought to have been brought under Order 22 of the CPR.

application for execution contained interest of Kshs. 16,811, subsequently incurred costs of Kshs.950 and Court Collection fee of Kshs. 1,500/- which amounted to a total of Kshs. 439,523.00 when added to the decretal sum of Kshs.420,262.00/-. The Respondent argued that other amounts come from auctioneers charges. Under Rule 7 of the auctioneers Rules once an auctioneer receives instructions to pursue attachment, fees are payable. It was further argued that the applicant has not attempted even to pay the decretal sum making the application an abuse of Court process. The application offends the provisions of Order 9 Rule 9 of the Civil Procedure Rules 2010 in that no leave was sought before the notice of appointment of advocates dated 7th February 2018 was filed as judgment had already been entered. The application dated 29th January 2018 was filed by the same advocate without appropriate instructions and therefore bad in law and should be struck out. Order 40 of the Civil Procedure Rules does not apply in any manner or at all and the application should clearly have been brought under the provision of Order 22.

The issues for determination are;-

- a) Whether the figures as claimed are disputable and is what is due to the respondent?
- b) Whether the application is an abuse of the due process of law.

On the 1st issue a certificate of costs was issued on 30th August 2017 for Ksh. 420, 262.00/=.

By an application dated 8th September 2017 the Respondent sought judgment against the applicant for the sum of ksh. 420,262.00 with interest at court rates 'as per the certificate of costs and decree to issue'.

Orders were issued accordingly on 14th November 2017.

In the application for execution dated 20th December 2017, an additional Ksh.16,811/= was claimed as interest, ksh.950/= as 'subsequently incurred', ksh.1500 as court collection fees totaling to ksh.439, 523.00/-.

A warrant for the same amount was issued on the 22nd December 2017, and issued to Providence Auctioneers on 16th Jan 2018, who proceeded to issue a proclamation for the sum of ksh.521, 159.35

Obviously the figures on the proclamation are not 'self-explanatory' as contended in the grounds of opposition. Even if auctioneer's fees were to be accounted for, there is no explanation on the face of the proclamation why the amount is not what was in the warrant.

Secondly, it is correct that the Certificate of Costs as issued did not award the respondent any interest and despite the orders of 14th November 2017 being in force, that issue may be contested in the appropriate forum.

What is clear is that the proclamation is seeking almost Ksh.100,000/= more than what was in the warrant without any explanation.

However, that is no reason for the applicant not to pay what is on the certificate of costs which is not contested. The respondent did not file any affidavit in response to the application to explain how the interest was arrived at, what the 'subsequently incurred' was all about and how the sum shot from about Ksh.439,000/= to over Ksh. 500,000/=.

Clearly there must have been post certificate of costs expenses, etc. There would be auctioneers fees which the applicant would be bound to pay but the proclamation clearly states they are to be stated on its body as '*costs of the attachment/ repossession/distrain as specified overleaf...*'. No such figures are stated. Even the court does not know what those are. Without those explanations it is difficult not to be persuaded by the applicant.

Having dealt with the substantive issue, question is, is this application bad in law and an abuse of the Court process deserving be struck out?

Three grounds are set out to persuade the court to do so.

1. The applicant has not attempted even to pay the decretal sum.

I have pointed out that indeed there are unexplained amounts in the proclamation. However, that is not a reason not to pay the uncontested amount. This application could also be here to simply buy time.

2. The application offends the provisions of Order 9 Rule 9 of the Civil Procedure Rules 2010 in that no leave was sought before the notice of appointment of advocates dated 7th February 2018 was filed as judgment had already been entered. The application dated 29th January 2018 was filed by the same advocate without appropriate instructions and therefore bad in law and should be struck out.

3. Order 40 of the Civil Procedure Rules does not apply in any manner or at all and the application should clearly have been brought under the provision of Order 22.

2 and 3 are not reasons sufficient to hold the instant application as an abuse of the process being procedural issues.

Hence, the orders that will issue are as follows:

1. The sum of Ksh.420, 262/= is not contested and the ought to be settled without much ado.
2. The other figures on top of the certificate of costs be properly clarified to the applicant to enable him settle the same.
3. Any dispute arising out of the calculations be mentioned before the Deputy Registrar for settlement.
4. Each party to bear its own costs.

Dated, delivered and signed at Nyeri this 25th day of January 2019.

Mumbua T Matheka

Judge

In the presence of:

Court Assistant-Jerusha

Kinuthia holding brief for Ng'ang'a for respondent

Omino on record for applicant.

Mumbua T Matheka

Judge

25/1/19