



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

MISC. CIVIL APPLN. NO. 52 OF 2016

JONES N. MARWA t/a IKIMWANYA AUCTIONEERS.....APPLICANT

VERSUS

SOUTH NYANZA SUGAR CO. LTD.....RESPONDENT

(Being an appeal from the ruling and order of Hon. E. M. Nyagah, Senior Resident Magistrate

in Migori Chief Magistrate's Misc. Application No. 33 of 2016 delivered on 11/10/2016).

RULING

1. Before me is a Chamber Summons dated 14/10/2016 filed by the Applicant herein, **Jones N. Marwa**, on 24/10/2016 seeking the following orders: -

1. The Honourable Court be pleased to grant the Applicant leave to appeal against the Ruling/Order of Hon. Nyagah (S.R.M) in Migori Chief Magistrate's Miscellaneous Application No. 33 of 2016, duly delivered on 11th October 2016 out of time.

2. The Honourable Court be pleased to wholly set aside the Rulings / Order delivered on 11th October 2016, re-assess the Applicant's Bill of Costs dated 12th May, 2016./

Alternatively;

3. The Honourable Court be pleased to refer the Auctioneer's Bill of Costs dated 12th May 2016 for re-taxing before a different tax master particularly on the items No. 3, 4, 5, 6, 7, 8, 10 and 12 of Bill of Costs dated 12th May 2016 plus the Party to Party costs thereof.

4. Costs of this Application be provided.

2. The Applicant is an Auctioneer and carries business in the name of Ikimwanya Auctioneers. The application was anchored on some 20 grounds appearing on its face and supported by the Affidavit of the Applicant sworn on 24/10/2016. The Affidavit had several annexures thereto.

3. The application was opposed by the Respondent herein, **South Nyanza Sugar Co. Ltd**, through a Replying Affidavit sworn by one **Gabriel Ouma Otiende** on 14/11/2016 and a Further Replying Affidavit by the said person sworn on 31/03/2017.

4. On concurrence of Counsels and the Court, the application was disposed of by way of written submissions where both parties duly complied and filed their respective submissions. The parties also allowed prayer 1 of the application by consent which was endorsed by this Court.

5. The application traces its background from the execution of a decree in **Migori CMCC No. 32 of 2015 – Nsotho C. Masiaga vs. South Nyanza Sugar Co. Ltd** (hereinafter referred to as '**the suit**'). The execution was carried out by the Applicant herein by way of proclamation and attachment of the Respondent's motor vehicles. The Warrant of Attachment was dated 21/04/2016 and the proclamation of the Respondent's goods was done on 22/04/2016. The said proclamation and attachment was challenged by the Respondent herein by way of two applications. The first application was by way of a Notice of Motion dated 28/04/2016 wherein the Respondent sought for *inter alia* the recall and annulment of the Warrant of Attachment over its goods and that the costs of that attachment be borne by the then Plaintiff/Decree Holder one Nsotho C. Masiaga. The application was strenuously opposed and by a ruling rendered on 16/06/2016 the application was

allowed.

6. The other application challenged the attachment of one of the Respondent's motor vehicles which had not been named in the Warrant of Attachment. The application prayed for *inter alia* the annulment of the Warrant of Attachment and that the costs of that execution process be borne by Nsotho C. Masiaga. As expected, the application was opposed and by a ruling delivered on 31/03/2016 the court allowed the application and further directed that execution proceedings do commence afresh and be conducted procedurally.

7. With that, the Applicant herein applied for taxation of his fees due from and the costs incurred in the said impugned execution proceedings. That he did by filing his Bill of Costs in **Migori CMCC Miscellaneous Application No. 33 of 2016 – Jones Marwa t/a Ikimwanya Auctioneers vs. South Nyanza Sugar Company Ltd and Nsotho C. Masiaga**. The Bill of Costs was taxed and by a ruling rendered on 11/10/2016 the court awarded the Applicant herein Kshs. 5,500/= and partly stated that: -

‘In a ruling delivered on 31.3.2016 I allowed the application dated 17.2.2016 wherein the Auctioneer’s costs/charges were to be borne by the Plaintiff/Respondent...’

8. The Applicant being aggrieved by the ruling on the taxation of the Bill of Costs made on 11/10/2016 filed the current application seeking the orders reproduced hereinabove. This application was however brought against **South Nyanza Sugar Company Ltd** only.

9. In opposing the application, the Respondent herein was clear that the Applicant was entitled to the fees and costs that resulted from the execution proceedings which were eventually set aside, but that the said costs and fees were to be borne by one **Nsotho C. Masiaga** and not itself. The Respondent relied on a List of Authorities filed on 22/01/2018 wherein it referred to various laws and several persuasive High Court decisions.

10. I have keenly read and understood the substance of this matter. I have perused the application and the accompanying Supporting Affidavit, the Relying Affidavits, proceedings and rulings before the lower court and the parties' submissions before this Court.

11. It is a fact that the rulings of the lower court rendered on 16/06/2016 and 31/03/2016 were not in any way challenged whether by Nsotho C. Masiaga or any other person. The lower court was categorical that the costs of the impugned execution process were to be borne by the said Nsotho C. Masiaga. There was hence no justification in the Applicant herein joining the Respondent in the taxation of his Bill of Costs in the face of the express orders of the lower court. Likewise, I do not see any factual and/or legal basis upon which the Applicant even after wrongly enjoining the Respondent in the taxation of the Bill of Costs in **Migori CMCC Miscellaneous Application No. 33 of 2016 – Jones Marwa t/a Ikimwanya Auctioneers vs. South Nyanza Sugar Company Ltd and Nsotho C. Masiaga** went ahead to lodge this application, which is in the nature of an appeal, only against the Respondent.

12. I must therefore find, which I hereby do, that this application as well as any proceedings towards the recovery of the Auctioneer's fees and costs arising from the impugned execution against the Respondent herein, **South Nyanza Sugar Company Ltd**, without setting aside or varying the lower court orders that the costs of the impugned execution be borne by Nsotho C. Masiaga can only be misconceived, bad in law and utterly uncalled for.

13. It is on the foregone basis that I find the application unmerited and is hereby dismissed with costs.

14. Those are the orders of this Court.

DELIVERED, DATED and SIGNED at MIGORI this 24th day of May 2018.

A. C. MRIMA

JUDGE

Ruling delivered in open Court and in the presence of:

Mr. Odhiambo Kanyangi Counsel instructed by the firm of Messrs. Odhiambo Kanyangi & Company Advocates for the Applicant.

Mr. Marvin Odera Counsel instructed by the firm of Messrs. Okong'o Wandago & Company Advocates for the Respondent.

Evelyn Nyauke - Court Assistant