



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NO. 65 OF 2006

SIMON P. KAMAU & 19 OTHERS.....PLAINTIFF/ 1ST RESPONDENTS

VERSUS

TEACHERS SERVICE COMMISSION.....DEFENDANT/2ND RESPONDENT

JOSHUA OHUYA OMUGANDA

T/A ESHIKONI AGENCY.....AUCTIONEERS/APPLICANT

RULING

1. The Notice of Motion dated the 26th February 2016 and filed by the Auctioneers under the **Autioneers 1997 Rules 7 and 55 (2)** is between the said Auctioner Joshua Ohuya Omunganda t/a Eshikoni Agency and the 1st Respondent, defendant in this case. Simon P. Kamau and 19 others who are plaintiffs in the case. the application is directed for hereby before the Deputy Registrar as the taxing officer of the court.
2. The applicant seeks taxation of the Applicants Bill of costs dated 26th February 2016 against the 1st Respondent. When parties appeared before the Deputy Registrar on the 11th May 2016 for taxation of the Bill of Costs, parties sought that the application be placed before a judge to give directions.
3. On the 23rd May 2016, the court by consent of the parties Advocates informed the court that by the courts Ruling dated 18th November 2011 J.Emukule nullified the attachment of the Teachers Service Commission assest by the Auctioneers but did not direct which party would pay the autioneers fees. The parties told the court that **HCC No. 300 of 2009** is similar and that the ruling on the Notice of Motion would apply to the said **HCC No. 300 of 2009**.
4. Parties then proceeded to file written submissions upon which I am to determine the application before me.
5. I have read Honourable Emukule Judge Ruling dated the 18th November 2011, upon a Notice of Motion dated 19th September 2011. The Honourable Judge allowed the Defendants Teachers Service Commission (TSC) application and made a further order that costs be in the cause.
6. My understanding of the ruling is that TSC, being a Government Agency whose funds are derived from the Annual Budgetary allocations cannot be attached to enforce a judgment and decree in terms of **Section 21 of the Government Proceedings Act**. As a result, the attachment of TSC assests was lifted. The autioneers were instructed to excute the decree by way of attachment by the plaintiffs in this case who were the decree holders.

7. The controversy between the parties is therefore which party ought to pay the Auctioneers attachment fees. I have stated that the Auctioneers are agents of the court but were instructed by the plaintiffs. The court by its ruling found the attachment unprocedural.

The 2nd Respondents (TSC) submissions were filed on the 25th July 2016 and are dated 1st July 2016. On the issue as to who ought to pay the Auctioneers charges, its argument is that it did not instruct the Auctioneers, nor were they its agents for purposes of execution and therefore being not parties to the contract between the Auctioneers and the plaintiffs as decree holders, it cannot be held liable for the annulled attachment.

8. It is submitted that under **Section 21 (4) of the Government Proceedings Act, Cap 40 the Civil Procedure Rules**, issuance of any orders for attachment against the government or state agency as the TSC is, is contrary to the law as the government is immune from attachment of its assets in execution of a decree. It is therefore submitted that the 1st Respondent (plaintiffs) ought to pay the Auctioneers charges.

9. I have considered the submissions by the both parties. It is trite that no order of attachment in execution of a decree can issue against the Government or a Government Agency like the 2nd Defendant Respondent (TSC).

Section 21 (4) Government Proceedings Act provides:

“save as aforesaid, no execution or attachment or process in the nature thereof shall be issued out of any such court for enforcing payment by the Government of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Government, or any Government department, or any officer of the Government as such of any money or costs.”

Rule 7 of the Auctioneers Rules 1997 provides

“.....that a debtor shall pay the charges of the auctioneer unless

a. That debtor cannot be found, or

b. He has no goods upon which execution can be levied or

c. -----”

10. The provisions of law quoted above are clear that warrants of attachment ought not have been issued by the court for execution against a Government Agency in this case the TSC, 2nd Respondent. It is my finding that the issuing officers of the court that issued the warrants of attachment acted without any legal basis, or was it out of ignorance of that fact? I do not agree. The said court officers were acting upon application for issuance of such warrants by the plaintiffs through their advocates who ought to have known that no orders of attachment against TSC ought to have been issued or enforced unless the procedure provided under **Section 21 Cap 40** are followed, and in any event, even after exhausting the said procedure, it is only the chief officer of the stated agency or department who, in his official capacity as such would be compelled to pay the decretal sum by a writ of *mandamus* upon an application (See **Order 53 Civil Procedure Rules**) under a certificate of order for such payment.

11. The matter of why orders of attachment against of the Government Agency are not available were discussed in length in **Petition No. 309 of 2014 – Pravin Bowry -vs- Ethics and Anti-corruption Commission (2015) e KLR** where J.Lenaola (as he then was) dissected and dymistified the purport and meaning of **Sections 29 and 21 of the Government Proceedings Act**.

When Emukule, J in his ruling dated 18th November 2011 made an order that costs of the application be in the cause, in my opinion, he meant that the costs of the application would be borne by

the unsuccessful party in the main cause (suit) not by the respondents in the application.

12. In the present case, the successful party was the plaintiffs whereas the unsuccessful parties were the Defendant (TSC). To that end, it is the TSC – 2nd Defendant who ought to pay the costs of the application, but upon due regard and proper procedure being followed.

Section 27 of the Civil Procedure Act gives directions to a judge to order which party ought to pay costs in a suit or application in his discretion. That discretion cannot be questioned unless under a review application which is not the case here.

13. For the foregoing, and after extensive interrogation on the issue, I come to the findings and conclusion that the Auctioneers costs of the annulled attachment by way of proclamation ought to be paid by the unsuccessful party the defendant (TSC). I further find that such payment should only follow after the process and procedure as provided under the **Government Proceedings Act Cap 40 Laws of Kenya and upon provisions of Order 53 of the Civil Procedure Rules, 2010.**

14. Consequently, the Auctioneers Bill of Costs dated 26th February 2016 is properly and procedurally filed. It ought to proceed for taxation. However, the Auctioneers cannot proceed to execute for the costs by attachment of Teachers Service Commission assets. Provisions under the Government Proceedings Act must be followed in terms of **Order 53 of Civil Procedure Rules 2010** as aforesaid.

15. Each party shall bear own costs for the application.

Dated, Signed and Delivered this 27th Day of April 2017.

J.N. MULWA

JUDGE