



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI
MISC.APPL. NO.282 OF 2016
CHAMBER UNITY SAVINGS &
CREDIT CO-OPERATIVE SOCIETY LIMITED.....PLAINTIFF
VERSUS
JOSEPH KAHORO MUNDIA
T/A UPSTATE KENYA AUCTIONEERS.....DEFENDANT

R U L I N G

This is a ruling on application dated 31st May 2017 filed by the Defendant herein seeking the following prayers;

1. Spent.
2. That this Honorable Court be pleased to declare the warrant of attachment of movable property in execution of Decree for money and warrant of sale of property in execution of Decree for money dated 14th March 2017 proclamation dated 21st March 2017 was illegal, null and void and incapable of being executed.
3. That costs of the application be provided.

Grounds on the face of the application are that on 6th June 2016 the Respondent filed a bill of costs dated 3rd June 2016 in Miscellaneous Application No.282 of 2016 at the High Court in Nairobi which was taxed on 7th December 2016 at Kshs 178,955. That the Respondent instructed auctioneer on the basis of Certificate of Costs dated 30th January 2017 on the same date the Certificate of Taxation was issued. That there was no Decree upon which the warrant of attachment; thus the Respondents actions are illegal and unlawful.

The application is supported by affidavit sworn Dr. Samuel Thinguri Warwathe who restated the grounds. He averred that the Applicant wrote to the Respondent to furnish them with Decree upon which they were executing but failed to avail. He attached the letter to the Affidavit.

In response the Respondent filed Replying Affidavit dated 17th July 2017. He averred that the application is an abuse of the Court process as the Applicant has filed another case at Kiambu Court. He submitted that the Applicant has not challenge the certificate of Courts issued and therefore the bill remains

outstanding. He added that upon issuance of the warrants the Applicant issued a cheque for Kshs 199,975; and having admitted the debt he cannot approbate and reprobate. He stated that the Applicant should not rely on technicality and that justice should be administered. He averred that the amount is not disputed and that the Applicant is the verge of closing business. He sought that the Applicant be ordered to pay Kshs 199,975.

I have perused and considered submissions by both parties herein. I have also perused the Court record and confirm that there is a Certificate of Taxation was issued by the Deputy Registrar. It relate to Bill of Costs dated 3rd June 2016. Costs of Kshs 178,955/= were allowed on 7th December 2016. Both parties have not disputed that the bill of costs was taxed and certificate of costs issued by the Deputy Registrar. I have seen application for Decree filed on 14th March 2016. I have not seen Decree in the file but there is warrant of sale in the file dated 14th March 2016 the same day the Respondent applied for Decree. What should have followed Certificate of Costs was application to adopt it as judgment of the Court before Decree was issued. Respondent has not said anything about adoption of the certificate of costs by Court as judgment of the Court. Adoption of Certificate of Costs as judgment of the Court would have been followed by execution proceedings. There is no judgment upon which Decree would have been issued. That may explain why there is no Decree in the file. Execution process cannot commence without a Decree. It appears that the Respondent herein jumped the gun. The Respondent rushed for attachment of the Applicant's property before judgment was entered and followed by issuance of Decree. It follows therefore that the issuance of warrants of attachment was improper. Even if there is money owing from the Applicant to the Respondent, the right procedure should have been followed. In the absence of a Decree I find the warrants issued irregular. I do set aside the warrants of attachment and proclamation. Respondent is restrained from carting away the Applicant's goods. The 1st Defendant to follow the right procedure in recovering the certified costs

Costs of the application to the Applicant.

Dated and Delivered this 24TH day of October, 2017

.....

RACHEL NGETICH

JUDGE

IN THE PRESENCE OF

.....COURT ASSISTANT

.....COUNSEL FOR APPLICANT

.....COUNSEL FOR 1ST RESPONDENT

.....COUNSEL FOR 2ND RESPONDENT