



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

HIGH COURT MISCELLANEOUS CIVIL APPLICATION NO. 8 OF 2016

SAVANNAH INTERNATIONAL LIMITED.....APPLICANT

VERSUS

ZIPPORAH KWAMBOKA ONCHARI.....RESPONDENT

RULING

1. Before me are two Notices of Motion filed on 9/2/16 and 15/2/16, respectively. The first is expressed to be brought under Order 50 rule 6 and Order 42 rule 6 (1) & (2) of the Civil Procedure Rules and Section 59 G of the Civil Procedure Act. The live prayers therein are numbers 3 & 4. The prayers are for the enlargement of time to allow the Appellant file appeal out of time, and stay of execution pending such appeal.
2. The second application invokes the provisions of Order 40 rule 1 (a), Order 42 rule 6 (1) and (2) and rule 7 (1) & (2) of the Civil Procedure Rules only live prayer in that chamber summons, in light of the consent order recorded on 23/2/16, is prayer 5 regarding the party responsible for payment of auctioneer's fees arising from alleged illegal attachment of the vehicle **KBF 614H** without due proclamation.
3. The Respondent swore an affidavit in opposition to the two applications, arguing that the applicant is guilty of laches. He defends the execution process as proper, given the obstruction placed on the auctioneer's way while attempting to access the applicant's premises.
4. The parties' advocates filed written arguments and highlighted them orally in court. I have considered all the material canvassed in relation to the two applications. There was no serious opposition to the first application as admittedly, the judgment of the lower court was postponed on the initial date set for the delivery.
5. There is no evidence that the court served a notice upon the Applicant on the next set date for the delivery of judgment and they were therefore absent on 24/11/15 when the Judgment was eventually delivered. It may or may not be that the Respondents notified the Applicant on 25/11/15 of the delivery of the Judgment. In my view the first duty lay with the court to communicate the change of Judgment dates to all parties.
6. Thirty days since the judgment of 25/11/15 lapsed on 17th January 2016 due to the *hiatus* in the period between 26th December to 13th January when time does not run, pursuant to Order 50 rule 4 of the Civil Procedure Rules. The delay between 17th January, 2016 and 9th February, 2016 is 23 days. The delay is not inordinate and has been explained sufficiently. The memorandum of appeal contains grounds which

the face of it, demonstrate that the appeal is not frivolous.

7. The Respondent will not be prejudiced unduly if stay is granted as the decretal sum has already been deposited into court. The foregoing is in accordance with the principles stated in **Mwangi -v-s Kenya Airways Ltd. (2003) KLR 486** as governing the granting of an application under section 79 G of the Civil Procedure Act. And in **Ivita -vs- Kyumbu (1984) KLR 441** the court stated that the court's main concern ought to be to see whether despite the delay, justice could still be done between the parties (See also **Bagajo -vs- Christian Children Fund in (2004) 2 KLR 73**

8. There is no room for the grant of stay pending appeal where no appeal has been filed hence the 4th prayer is rejected. See **Equity Bank -vs- Westlink Muzo Ltd (2013) eKLR** and **Balozi Housing Co-operative Society Ltd -vs- Captain Francis E.K. Hinga (2012)eKLR** and **Jihan Freighters Ltd -vs- Veronica Wanjiru Gikonyo & Another (2015)eKLR**.

I will therefore allow the applicant leave to file an appeal within 14 days of today's date but award the costs in respect of this first application to the Respondent in any event.

9. Regarding the 2nd application, the statements of **Geoffrey Kariuki**, the auctioneer in his affidavit filed on 15/2/16 and in answers during the oral hearing introduce doubt regarding his alleged visit to the applicant's premises on 4/2/16. It was not possible to state with certainty whether he went there at 9.30 a.m. or in the afternoon, whether he proclaimed a motor vehicle **KBF 164H** or **KBF 614H** at the said premises and who was served with the proclamation.

10. **Evelyn Chemjor** the Human Resource Manager of the applicant and the duty guard **Enock Mukwami Obunga** have sworn affidavits disputing his claims to have visited the applicant's premises and served the proclamation notice on 4/2/16.

11. If indeed the auctioneer met resistance or obstruction as he alleges he should have sought the court's intervention rather than purport to effect a proclamation while stationed outside the Applicant's compound, as he alleges. It is little wonder then that the registration number of the vehicle he eventually attached **KBF 614H** was not among those in his proclamation of the 4th February, 2016, or was possibly mistaken to be **KBF 164H**. It is telling that in court and through his affidavit the auctioneer sought to introduce a different proclamation notice bearing corrections on this aspect.

12. Rule 12 (1) (b) of the Auctioneers Rules requires that a proclamation be prepared by the auctioneer and to contain an inventory of goods proclaimed, the condition and value of such goods and that the same be signed by an adult residing or working at the premises where goods are found. A certificate is to be issued where such person refuses to sign such a notice. What the auctioneer purports to have done in this case was to record mere details of vehicles entering the applicant's premises before proceeding to deposit the said bare notice with a guard whose name he cannot state.

The proclamation unpugned refers to declined access but not to the alleged refusal by the guard to sign the proclamation.

13. In my considered view, the anomalies relating to this particular attachment arose from the casual approach taken by the auctioneer and his failure to seek the court's intervention to enable him conduct a proper proclamation as required by the Rules. The auctioneer and the Respondent are therefore jointly and severally liable for the charges arising from the defective attachment procedure and I so find. The costs of the second application are also awarded to the applicant.

As the decretal sum has been deposited into court, I will order in relation to the rejected prayer in the first application that the status quo be maintained pending the filing of the appeal by the applicants in the period allowed by this court.

Delivered and signed this **20th** day of **May**, 2016

C. MEOLI

JUDGE

In the presence of:

M/s Gitau holding brief for Mr Terer

For the Applicant

Non Appearance

For the Respondent

Court Clerk

Mr. Barasa