



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELCC NO. 72 OF 2014**

**YUSUF O. CHITUYL.....PLAINTIFF**

**VERSUS**

**SILVANUS LUKOKO WERE.....DEFENDANT**

**RULING**

1. This is a concluded matter; judgment having been delivered in favour of the plaintiff on 28<sup>th</sup> November 2019 wherein the plaintiff was awarded costs of the suit. The costs were taxed at KShs 133,190 through a ruling delivered by the Deputy Registrar on 25<sup>th</sup> February 2021. The plaintiff then embarked on the process of recovering the costs.

2. The defendant filed Notice of Motion dated 14<sup>th</sup> April 2021, seeking the following orders:

1. [Spent]

2. [Spent]

3. THAT there be a stay of execution against all the goods and equipment proclaimed on 16<sup>th</sup> March 2020 by Dimonde Agencies Auctioneers at the Defendants' premises situated in Shibiriti area, Kakamega County within the Republic of Kenya pending the hearing and determination of this application and/or further orders of the Court.

4. The execution for costs herein and the issuance of the warrants of attachment and sale be declared irregular, null and void.

5. That the undated proclamation issued on 16<sup>th</sup> March 2021 be declared unlawful.

6. [Spent]

7. The costs of this Application be provided for.

3. The application is supported by an affidavit sworn by the defendant. He deposed that on 16<sup>th</sup> March 2021 he was served with a proclamation of attachment by Dimonde Agencies Auctioneers in respect of the taxed costs. That he had by then not been served with a certificate of costs and decree. That his advocates then wrote to the plaintiff's advocates seeking the certificate of costs and also making proposals on payment of the costs by instalment. He added that the plaintiff's advocates accepted the proposals. That no decree has ever been drawn or signed in the matter by the Deputy Registrar and that the proclamation was thus premature.

4. No replying affidavit was filed in respect of the application. The application was canvassed through written submissions. Both the plaintiff and the defendant filed submissions.

5. Relying on **Order 21 Rule 7 (1)** of the **Civil Procedure Rules** as well as the case of **Rubo Kimnetich Arap Cheruiyot v Peter Kiprof Rotich [2006] eKLR**, the applicant argued that in the absence of a decree the proclamation was premature and that the application ought to be allowed.

6. On his part, the plaintiff argued that there is an agreement on how the costs should be settled, that the applicant was aware of the quantum of awarded costs and that despite not seeking to stop payment of costs to the plaintiff, the applicant has sought to stop payment of the auctioneer's charges without serving the auctioneer with the application or making him a party to it. Citing **Article 159 (2) (d)** of the **Constitution of Kenya** as well as **Sections 1A and 1B** of the **Civil Procedure Act**, he argued that justice should be administered without

undue regard to procedural technicalities.

7. I have considered the application and the submissions. The record herein shows that the date of ruling in respect of the plaintiff's bill of costs was scheduled in the presence of counsels for both parties on 4<sup>th</sup> February 2021. Come the date of delivery of the ruling on 25<sup>th</sup> February 2021, there was no appearance either by the parties or their advocates. The applicant cannot therefore complain about the question of certificate of costs. In any case, as is manifest from the application, the applicant has absolutely no problem with the costs awarded to the plaintiff and has in fact agreed with the plaintiff on how to settle the costs. I note however that the applicant was only jolted into action upon being served with the proclamation of attachment. In other words, the costs had remained unpaid as at 16<sup>th</sup> March 2021 when the auctioneers acted.

8. The plaintiff also raised an important matter; that the applicant did not involve the auctioneer in the present application. The record indeed confirms that the auctioneer was not served with the application. The right to a hearing is an important aspect of the justice process. The court cannot make orders affecting the auctioneer without giving him a chance to be heard. It was incumbent upon the applicant who moved the court to ensure that all such persons against whom he sought orders were served.

9. In view of the foregoing, I do not find merit in Notice of Motion dated 14<sup>th</sup> April 2021 and I therefore dismiss it. Since party and party costs have already been taxed, I make no order as to costs.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 25<sup>TH</sup> DAY OF JANUARY, 2022**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

Mr Akwala holding brief for Mr Were for the defendant/applicant

No Appearance for the plaintiff/respondent

Court Assistant: E. Juma