REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO. 388 OF 2013

HANNAH NJOKI

T/A ROSE WOOD HARDWARE……APPELLANT/APPLICANT

VERSUS

DENNIS NGAII NDUA ……RESPONDENT

RULING

This ruling follows an application by way of Notice of Motion dated 12th August 2013 by the objector/applicant/appellant. The same is brought under the provisions of Order 43 Rules 2 and 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.

The applicant seeks for order that:-

a. The amount of Kshs 214,583 paid vide cheque No. 0003 together with Kshs 49,200/- paid to the plaintiff/respondent through Fantasy Auctioneers be deposited in court pending the hearing and determination of this appeal.
b. That Fantasy Auctioneers who are the plaintiff's agents be ordered to deposit in court a sum of Kshs 8,000/- being the ten jerricans of Apex paints which were confiscated on 17th June 2013 while purporting to execute the lower court decree.
c. A declaration that the amounts paid to Fantasy Auctioneers Kshs 363,783 is over and above what was sought in the decree.
d. That upon grant of prayer No. 3 above and upon determination of the appeal the monies be refunded to the objector/appellant.
e. The respondent/plaintiff be ordered to pay damages to the objector /applicant for breaking and causing malicious damages to the door grills unnecessarily.
f. Any other relief that this court may deem fit to grant.

The application is predicated on the grounds that:

a. The objector/appellant is aggrieved with the ruling of the trial magistrate in a CM CC 2317/2012 and has filed an appeal.
b. The amounts paid to the respondent through their agents /servants Fantasy Auctioneers was over and above what they sought in the decree.
c. The respondents/agents, servants confiscated ten jerricans of worth 8,000/- when executing the decree.

d. The respondent/plaintiff agents applied unnecessary force and caused extensive damages to the door grills and that the respondent should meet the damage.
e. The lower court orders of 31st May 2013 have caused crystallized damage to the objector/applicant.

In the affidavit of Hannah Njoki sworn on 12th August 2013, it is deposed that the Auctioneers – Fantasy Auctioneers did break into the appellant's premises and they took away goods. That they were in the company of police escort and used unnecessary force and intimidation thereby coercing her husband to issue them a cheque and Kshs 49,200 as police costs. It is further deposed that the cheque was for Kshs 214,583 No. 00003 which was paid to the respondent herein was in excess of decretal sum. That the auctioneers further took with them her 10 jerricans of her Apex paint worth Kshs 8,000.

She therefore prayed that all the money paid to the respondent through the auctioneers be deposited in court pending hearing and determination of this appeal. It is in excess of what the decree demanded and that they be further ordered to pay Kshs 8000/-, the value of 10 jerricans of Apex paint since she had also suffered damage following the break into her business premises , using unnecessary force.

The respondent Dennis Ngaii Ndua, who was the plaintiff in the subordinate court did not file any replying affidavit to the applicant's application dated 12th August 2013, despite being given an opportunity to do so on 25th September 2014, 9th October 2014 and 10th November 2014. When the application came up for mention on 25th November 2014, the respondent's counsel did not attend court and neither had they filed any replying affidavit.

The respondent's counsel nevertheless did , on 5th December 2014 file their written submissions in which they deny the allegations by the applicant and pray for dismissal of the applicant's application with costs. With utmost respect to the respondent's counsel, they cannot be permitted to ambush the applicant with written submissions based on no affidavit responding to issues of fact pleaded and deposed by the applicant. I have examined the said respondent's submissions and they purely respond to matters of fact alluded to in the affidavit by the appellant. No single point of law is raised. Consequently, I strike out the respondent's submissions from the record as being an abuse of the court process, as counsel cannot purport to adduce evidence on behalf of his client from the bar,denying matters of fact leveled against their client. The respondent had ample time to file a replying affidavit or grounds of opposition to the application but they squandered that opportunity and cannot by any stretch of imagination be allowed to emerge through written submissions that raise no single point of law.

It would in my view, be prejudicial to the applicant to allow the respondent's counsel to adduce evidence in defence of his client from the bar, when they had an opportunity to challenge all the allegations leveled against him.

The applicant on the other hand filed her written submissions on 7th November 2014 expounding on the grounds and supporting affidavit and reiterating her contention against the respondent.

I have carefully examined and considered the applicant's application , her supporting affidavit and the written submissions by her counsel and the law upon which the application is premised.

The applicant relies on order 43 Rules 2 and 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. From the onset, the provisions of Order 43 of the Civil Procedure Act as cited have no relevance to these proceedings. The said provisions relate to Appeals from orders. Under Order 43 (2), *the Rules of Order 42 which relate to appeals, shall apply, so far as may be, to appeals from orders. 3. Nothing in this order shall apply to any adjudication which, as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit.*

In her submissions, the applicant's counsel never alluded to the relevance of the provisions of the law under which the application was brought. Instead, she complained that the court did stay execution

pursuant to Order 22 Rules 51,52,53 of the Civil Procedure Rules and on 31st May 2013 "she made ambiguous orders which saw Fantasy Auctioneers break into the objector's business with the assistance of the police and carry the objectors goods."

Section 3A of the Civil Procedure Act empowers this court to invoke its inherent power to make such orders as may be necessary for the ends of justice, or to prevent abuse of the process of the court. I will therefore invoke the said provisions and proceed to determine this application on merits.

My examination of the lower court record, the ruling on objection proceedings made on 31st May 2013 by the trial magistrate reveal that upon the objection by the appellant herein being dismissed on 31st May 2015, the respondent proceeded with execution and an attachment was levied against those items that the trial magistrate had found in her ruling did not belong to the objector as had been claimed in the objector's application objecting to attachment. The trial magistrate further made it clear as to which of those items it had been proved belonged to the objector could not be attached to satisfy decree.

The appellant having been dissatisfied with the said ruling of 31st May 2013 and having obtained leave on 27th June 2013 to appeal against the said ruling, is now seeking in her application dated 12th August 2013 to have the amount paid to the auctioneers for onward transmission to the decree holder, which amount included the decretal sum, auctioneers changes and police assistance fees, to be deposited in court, or the excess thereof refunded to her. With utmost respect, the prayer sought as above cannot be issued by this court for reasons that the auctioneers were agents of the court and they were executing decree of this court. The court below having dismissed the applicant's objection proceedings, she can only seek relief from this court by way of an appeal being heard and determined on merit.

Furthermore, the objector does not disclose in her affidavit whether she is the one who paid the Kshs 214,583 via cheque No. 00003 together with Kshs 49,200/- which she claims was in excess of the decree. The question that begs answers is that the applicant/objector /appellant herein was not a party to the original proceedings in the lower court and there was no decree passed against her. She only came in as an objector and resisted any attempt to attach properties that she considered belonged to her and not the judgment debtor. How then did she end up paying the monies that she now seeks refund of excess or depositing into court of the whole amount paid out to the respondent decree holder through fantasy auctioneers?

In my view, as the appellant was not a party to the proceedings and she as she was under no duty to settle the decretal sum since there was not order made against her by the trial court, and if the amount paid by the judgment debtor who happens to be her spouse was in excess of the decretal sum, then only the judgment debtor can seek a reimbursement of excess money paid out, and not the objector/appellant.

On the other hand, if the applicant believes that her property was illegally attached and sold in execution of decree to which she was not a party, then she can ventilate that in this appeal and should the appeal be determined in her favour, she would be entitled to such reimbursement or compensation.

Curiously, the judgment debtor has not appealed and neither is he complaining that he paid out more than the decree demanded. Neither did he file any affidavit contending that the items attached and confirmed by the trial court as belonging to him were his.

The auctioneers , George Gitonga Muchiri T/A Fantasy Auctioneers did on 12th June 2013 obtain a court order for police assistance to enable them access the business premises to remove the proclaimed goods apart from iron sheets and cement as per the order of 31st May 2013.

My perusal of the record does not show that the said attached goods were ever removed or sold subsequent to the order of the trial magistrate as there is every evidence that the judgment debtor settled the claim in full on 17th June 2013 vide cheque No. 000003 dated 17th June 2013 for Kshs 214,583.

The said cheque which is on record and attached to the objector's own affidavit sworn 24th June 2013 is drawn on A/C No. 1074093001 with Chase Bank Ngara Branch, in the account name of Andrew Kamau Ngugi, who was/is the defendant/judgment debtor in CMCC 2317/2012.

For the above reasons, the application herein as filed seeking for depositing in court of Kshs 214,583 is devoid of merit and that prayer is dismissed.

On whether Kshs 49,200/- allegedly paid to the decree holder through fantasy auctioneers should also be deposited in court, the applicant in paragraph 33 of her affidavit in support of this application deposes that this amount was demanded as police costs and she avers that her husband the judgment debtor was coerced and intimidated into paying this money together with the cheque mentioned above, which exceeded the decretal sum.

My finding is that the decree in the lower court is clear. It was against one Andrew Kamau Ngugi, who was the defendant/judgment debtor and not Hannah Njoki T/A Rose Wood Hardware. The cheque was not in her name. It is therefore incomprehensible how the applicant herein, who did not pay out the monies complained of can urge this court to make orders for depositing of the said monies into court, when the judgment debtor who paid out the said money is well and alive and silent about it. The appellant/objector may be an overzealous wife who is ready to protect family property to the teeth but that protection is, regrettably, not available, in law and in the circumstances of this case. The applicant has not brought this appeal in a representative capacity. As a result, the prayers sought are incompetent and therefore not available to her.

The same fate befalls prayer No. C which seeks for a declaration that the amounts paid to Fantasy Auctioneers-Kshs 363,783 is over and above what was sought in the decree. It is clear that the appellant was not the judgment debtor and neither were her property, as an objector, sold to realize the decretal sum, since it is apparent that when the auctioneers went to break in to take possession of the proclaimed goods with the assistance of police on 17th June 2013, the judgment debtor did pay the auctioneers all the decretal sum of Kshs 176,983 together with auctioneers costs and costs incurred in hiring police assistance. Whether that amount was in excess of the decretal sum or not, only the judgment debtor who settled the sums can claim to have over paid , and not the objector/applicant herein as she is a stranger to the payments made and to the decree.

On what the prayer that should this court determine that the amount paid to the Fantasy Auctioneers were over and above the decretal sum, then upon determination of the appeal, the said monies be refunded to the objector/appellant herein, I find that having held that the appellant did not pay any monies to the auctioneers or the respondent, and as she has not claimed or proved that any of her personal property or assets were attached and sold in execution of decree to which she was not party, this court cannot make any order in her favour as it shall be in vain, and as such order can only be made in the appeal an not in an interlocutory application of this nature. I therefore decline to grant the prayer.

The applicant/appellant has also sought an order for damages to be paid to her for the breaking and causing malicious damages to the door grills of her business premises unnecessarily.

Regrettably, such a prayer is not available to her in these appeal proceedings, assuming her complaint is well founded. She can only lodge such a claim for damages against the auctioneer in separate proceedings and prove her claim, as those damages have to be quantified and assessed. This court cannot turn itself into a trial court at this stage and engage in the process of typing to determine damages occasioned as a result of unnecessary breaking of the applicant's premises, which damages are unknown. I therefore decline to grant that prayer and dismiss it.

The applicant/appellant also sought an order for compensation of Kshs 8,000/- being the value of ten jerricans of Apex paint confiscated by the auctioneers on 17th June 2013 while purporting to execute the decree. This is a matter, in my view, which is criminal in nature and the applicant's remedy lies on lodging a complaint with the police for investigation and possible prosecution of the culprits in the event that there is evidence of culpability. the appellant can also lodge a formal complaint with the

Auctioneers Licensing Board against the individual auctioneer if she believes that the action by the auctioneer amounted to an actionable misconduct, since the allegation of fact concerning the taking of the ten jerricans of Apex paint valued at Kshs 8,000/- has not been controverted or denied by the respondent or auctioneer.

Nonetheless, it has not been alleged that the respondent is the person who was paid the proceeds of sale of the ten jerricans as the record is clear that the money paid by the judgment debtor to the auctioneers was sufficient to cover the decretal sum and other expenses. There was therefore no reason for the auctioneer to take possession of any other property. Regrettably, the auctioneers are not parties to this appeal and even if they were, that money or those items can only be recoverable through an independent suit filed by the objector, as it is a special damage suffered by her.

The applicant also seeks that this court orders the auctioneers to deposit the Kshs 8,000/- in court. This court declines to grant that prayer for the reasons given above.

The upshot of all the above expositions is that the applicant/appellant has not demonstrated to this court that she is entitled to any of the prayers sought. Consequently, the application dated 12th August 2013 by way of Notice of Motion is declined and dismissed. As the respondent did not respond or oppose the said application, I make no orders as to costs.

I direct that as the lower court record is now available, the appeal be placed before a judge of the High Court civil Division for perusal and consideration under Section 79B of the Civil Procedure Act, as to the admission or otherwise forthwith.

Dated, signed and delivered at Nairobi this 14th day of May 2015

R.E. BURILI

JUDGE

14.5.2015

Coram Aburili J

C.C. Kavata

Mr Githinji holding brief for Wandago for the respondent

No appearance for A.N Oeri for appellant

(Pupil Mr Ndungu from Oeri's office present)

COURT- Ruling was to be delivered on 26th February 2015 but was inadvertently omitted from the cause list and parties did not attend court then.

Ruling now read and pronounced in open court as scheduled and parties notified in advance.

R.E. ABURILI

JUDGE

14/5/2015