



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
MISCELLANEOUS APPLICATION NO. 372 OF 2013
MARGARET AMIMBO t/a IGARE AUCTIONEERS.....PLAINTIFF
-VERSUS-
LASIT LIMITED..... DEFENDANT
RUIRU AND REBANIA LIMITED.....OBJECTOR

RULING

1. This application is brought by way of Notice of Motion dated the 28th April, 2014 under the provisions of **Order 12(7)** of the **Civil Procedure Rules** and **Sections 1B** and **3A** of the **Civil Procedure Act**.
2. The Applicant seeks the following orders:
 - i) That this application be certified as urgent and be heard on a propriety basis and service of the same be dispensed with in the first instance.
 - ii) That the honourable court be pleased to stay the orders granted on 31/3/2014 pending hearing and determination of this application *inter-partes*.
 - iii) That the Honourable Court be pleased to set aside the orders granted on 31.3.2014.
 - iv) That cost of this application be borne by the Respondent.
3. Reliance is placed on grounds on the face of the application and on the supporting affidavit of Margaret Amimbo made on the 28th April, 2014.
4. The Applicant sees mischief in that the Objector's application proceeded *ex parte*, whereas no service of the Notice of Motion had been effected upon the Auctioneer nor upon the advocate on record, acting on the Auctioneer's behalf
5. Further, the Objector failed to inform the court that when it sought the stay of execution orders and also at the time of hearing of the Notice of Motion, that the subject matter, tractor had already been released.
6. Counsel submitted that the Ruling delivered on the 31st day of March, 2014 was irregular for want of service and prayed that the orders granted be set aside.
7. Upon hearing Counsel for the Applicant, this court finds that the only issue for determination relates to

setting aside the orders made in favour of the Objector.

8. This matter proceeded for hearing. Counsel for the Respondent though duly served was not in attendance.

9. Upon perusal of the annexures marked "MA3", this court notes that the tractor, the subject matter of the Objection had already been released to the duly authorised agent of the Objector.

10. It was therefore incumbent upon Counsel, to inform the court of the new developments.

11. This was not done and the court proceeded to grant orders for the release of the subject matter and costs.

ISSUES FOR DETERMINATION:

12. After considering the submissions made by counsel for the Applicant, this court finds the following issues for determination:

- i) irregular service
- ii) whether the objector was entitled to the orders sought, after the release of the subject matter
- iii) setting aside of the orders granted

ANALYSIS:

13. This court will not belabour itself on the issue of irregular service and the competence of the process server.

14. The annexures marked as "MA3" clearly shows that the subject matter, tractor, had already been released to the Objector, prior to the hearing of the Notice of Motion dated 10th March, 2014 and therefore the orders granted were in vain.

DETERMINATION:

15. For the reasons stated above, the application is found to have merit

16. The order condemning the Decree Holder to pay costs is hereby set aside.

17. The Respondent shall pay the costs of the objection proceedings.

It is so ordered.

Dated, Signed and Delivered at Nakuru this 31st day of July, 2014.

A. MSHILA

JUDGE