



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

MISC. APP. NO.14 OF 2015

LAVIAN OKERE WATAKO.....APPLICANT

VERSUS

ASMAN MOMBO OKWAKO.....1ST RESPONDENT

ESHIKHONI AUCTIONEERS2ND RESPONDENT

R U L I N G

1. The application for determination is the Notice of Motion dated 20th day of February 2015 brought pursuant to Sections 3,3A 63 (e) of the Civil procedure Act Cap 21 Laws of Kenya Order 22 Rule 59, Order 40 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules.

2. The applicant seeks for orders:-

a. Spent

b. Spent

c. THAT this Honourable Court be pleased to issue a permanent order of injunction restraining the interested party and the 3rd Respondent by themselves, their servants, their agents and whosoever acting on their behalf from selling by public auction or in any other manner disposing of the attached livestock, one brown and white cow with its calf, one black and white female calf and one brown cow and its calf all of them in good health pending the hearing and determination of this application inter parties.

d. THAT this Honourable Court be pleased to issue an order that the attached five heads of cattle be kept in safe custody by the 3rd Respondent pending the hearing and determination of this application inter parties.

e. THAT the costs of this application be provided for:

3. The application is based on the grounds set out on the face of the application and the supporting affidavit of FLAVIAN OKWERE WATAKO sworn on the 20/02/2015.

4. The applicant claims that he has no case with the 1st and 2nd Respondents herein nor is he a party to the proceedings in Kakamega H.C. Misc. Application No.29 of 2010. He explains that it is his father

CLAUSE WATAKO LUTTA who is a respondent in the said suit having been sued by his neighbour ASMAN MOMBO OKWARO. He claims to have set up his home 500metres away from his father's home. He explains that on 14/2/2015 at 6.00am the interested party trespassed into his home in the company of the 2nd Respondent who went ahead and carried away his five heads of cattle including the brown and white cow and its calf, one black and white female calf and one brown cow and its calf as shown in the copy of proclamation and Notification marked "FOW 1 A – B". He claims that the proclamation and Notifications of sale above were backdated. He has quantified the value of his cattle as follows:

		Kshs.
One brown cow	-	30,000/=
One calf	-	5,000/=
One black & white female calf	-	25,000/=
One brown cow	-	30,000/=
One calf	-	<u>8,000/=</u>
		98,000/=
		=====

5. The application was certified urgent and the applicant ordered to serve the same upon the respondents for interparties hearing. The application is opposed. The 1st respondent filed his replying affidavit on 2nd March 2015. He states therein that the application is fundamentally defective unprocedural and offends the provisions of Section 34 of the Civil Procedure Act. He claims that the orders sought cannot be sustained vide a miscellaneous application without being hinged on the parent suit. He also claims that the objector has not demonstrated the prejudice he has suffered and how he came up with the quantification of kshs.98,000/= for the attached cows.

6. Further that the order and decree that gave rise to the attachment has not been discharged, reviewed or varied. He claims that he is aware that the animals attached belonged to the judgment Debtor/Applicant in Kakamega H.C. Misc. Application No.29/2010 in which the debtor therein was ordered to pay costs as shown in the annexure marked "AMO (a) – (b)". He claims that the objector herein has filed the objection to save the fathers skin and that he does not live 500m away from his father. He maintains that the auctioneers went to the objector's father's house and that the current application is an afterthought as it was filed on 23/2/2015 when the attachment was done on 14/2/2015. He maintains that the attachment, proclamation and Notification was legal he denies any trespass into the objectors home by the 2nd respondent.

7. Lastly the 1st Respondent avers that the application has been overtaken by events because the attached livestock had already been sold by the 2nd Respondent, Kennedy Shikuku a licenced auctioneer of class "B" practicing as such in the name and style of ESHIKHONI AUCTIONEERS. The 2nd Respondent also filed a replying affidavit dated 03/03/2015. The deponent states that he was assigned relevant warrants of attachment and sale "KS1" by the honourable Court on 30/01/2015 in Kakamega H.C. Misc. 29 of 2010; on the 02/02/2015 he proceeded to the homestead of CLAUSE WATAKO LUTTA and proclaimed the judgment debtor's property by giving seven (7) days notice to the judgment debtor to pay the decretal sum of kshs.70,050/= together with the auctioneers charges (see "KS3") which is a copy of the proclamation. On the 13/02/2015 he seized all the proclaimed livestock and issued a 72 hours notice to the judgment debtor to redeem his property but there was no compliance.

8. That on the 16/02/2015 at 10.00am he presented the attached property at a public auction and sold them

and used the proceeds as shown by copies of the letters marked KS5 and KS6. He denied entering the objector/applicant homestead on the 14/02/2015 but maintains that he went to Clause Watako Lutta's home on 13/02/2015. He states that the applicant is guilty of inordinate delay and is being used by CLAUSE WATAKO LUTTA to derail the due process of the law. He denies backdating any documents as alleged by the objector but states that both the proclamation and notification of sale were issued to Clause Watako Lutta who went to his office after proclamation and requested for one (1) week to pay but failed to do so, hence the subsequent attachment and sale.

9. The 2nd Respondent also states that the applicant's right and equity of redemption was extinguished at the fall of the hammer on 16/02/2015. He states that the instant application offends the mandatory requirements of Section 34 of Civil Procedure Act Order 22 rules 51 and 52 of the Civil Procedure Rules making the application defective and unacceptable in Law. He maintains that the valuation by the applicant has nothing to support it and that in the absence of ownership being proven there is no point or need to delve into the issue of valuation. He adds that the 3rd Respondent and interested party referred to by the applicant in his pleadings do not exist and that the applicant does not know whom he is seeking orders against. He also faults the applicant's case on grounds that no substantive orders have been sought. He asks this court to dismiss the application.

10. When this matter came up for hearing parties agreed to canvass the same by filing and exchanging written submissions. In his submissions the objector applicant has stated that he made the application timeously with the aim of stopping execution against him. He claims that he has suffered loss since the 2nd Respondent took away his cattle which were valued at kshs.98,000/=.

11. The 1st Respondent submits that the objector has not proved ownership of the attached animals and has also not explained how he came up with the valuation without any independent valuation report from a Veterinary officer. He also submits that the application contravenes the provisions of Section 34 of the Civil Procedure Act which provides that any objection proceedings must be filed in the main suit of the cause of action but not in a different suit.

12. The 2nd Respondent also submits that the objector has not proved ownership of the livestock attached. He also submits that if the applicant had any claim he ought to have objected to the attachment and sale of the attached property before the sale and that such claim ought to have been filed in the same proceedings which gave rise to the execution not a separate suit/file.. The 2nd respondent further submits that this application is barred by the express provisions of Section 34 of the Civil Procedure Act and is improper because it is being litigated separately from the suit which gave rise to the execution proceedings, the subject of this application.

13. This Court has carefully considered the application filed together with the supporting affidavit and the replying affidavit. I have also considered the submissions by all the parties and the authorities relied upon. From all the above, two issues arise for determination:-

(a) Whether the application contravenes the provisions of Section 34 of the Civil Procedure Act.

(b) Whether the orders sought by the applicant can be granted.

14. This Court notes that though the application is expressed to be brought under the provisions of Order 22 Rule 59 of the Civil Procedure Rules, there is no prayer to stop or adjourn any sale. It is also noted that the application does not anchor in a plaint and in this regard, I concur with the position taken by the respondents that this application ought to have been filed in the same cause being Kakamega H.C.Misc. Application No.29 of 2010. It is that suit which gave rise to the execution complained of in the instant application. The provisions of Section 34(1) of the Civil Procedure Act, Cap 21 of the Laws of Kenya are clear on this issue. The Section provides as follows:-

“34 (1) All questions arising between the parties to a suit in which the decree was passed or their representatives and relating to the execution, discharge or satisfaction of the decree

shall be determined by the Court executing the decree and not by a separate suit.”

15. Bearing the above provisions in mind, I find that the applicant was procedurally wrong in filing the instant application as a separate and distinct suit from Kakamega HC Misc. application No.29 of 2010; and accordingly the applicant has flouted the provisions of Section 34 of the Civil Procedure Act (supra).

16. With regard to the second issue, the applicant is required to satisfy the conditions for the granting of injunctions as spelt out in the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] EA 358.** The Applicant must first prove that he has a prima facie case with probability of success. Secondly, he must prove that he is bound to suffer substantial loss unless the order of injunction is granted. When the Court is in doubt, the case will be decided on a balance of convenience.

17. In the instant case, it is clear that the applicant does not have a prima facie case with probability of success. First of all, he has filed the application in the wrong Court and secondly the application for injunction is not supported by a substantive prayer in a plaint. This being the case, the applicant has not demonstrated that he will suffer substantial loss of the order sought is not granted. In any event, the mischief intended to be cured by the applicant’s application had already taken place by the time the application was drawn and filed, so that if the order sought by the applicant were to be granted, such an order would be made in vain.

18. It may be argued that the failings of the applicant in this case are issues of technicality which can be cured by Article 159(2)(d) of the Constitution to the effect that “justice shall be administered without undue regard to procedural technicalities.” However, as stated in the case of **Abdul Aziz Juma –vs- Nikisuhi Investment & 2 others [2013] e KLR,** Article 159 of the Constitution was never intended to override the clear provisions of any Statute unless such provisions are found and held to be unconstitutional. I do not think that the provisions of Section 34(1) of the Civil Procedure Act can be said to be unconstitutional. The said provisions are, in my view, intended to bring order in the manner the Courts do their business. I am also of the considered view that each case must be considered on its own merits when it comes to applying the provisions of Article 159 (2) (d) of the Constitution.

19. In light of what I have stated in paragraph 18 above, I take the same view as the one taken by the Court in the Abdul Aziz Juma case (above) that the applicant herein should either have filed a plaint herein to support his application or he should have made the application in Kakamega H.C.Misc application No.29 of 2010, as provided under Section 34 of the Civil Procedure Act.

20. Having said the above, it is clear that the orders sought by the applicant cannot be granted. In the circumstances, I find that the application dated 20/02/2015 lacks merit and the same be and is hereby dismissed with costs to the respondents. The interim order of injunction issued herein on 23/02/2015 is hereby vacated.

21. Orders accordingly.

Ruling, delivered, dated and signed in open Court at Kakamega this 21st day of October 2015.

RUTH N. SITATI

J U D G E

In the presence of:

Present in person for Objector/Applicant

Mr. Ongagi (absent) for 1st Respondent

Absent – appears in person for 2nd Respondent

Mr. Okoit - Court Assistant