



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**MISC. APPL.270 OF 2004**

**REPUBLIC .....APPLICANT**

**VERSUS**

**MINISTRY OF LANDS AND SETTLEMENT.....1ST RESPONDENT**

**DISTRICT COMMISSIONER BONDO.....2ND RESPONDENT**

**R U L I N G**

- 1, The application by the interested party dated 19.10.2012 prays for the following orders:
  - a. **That this court be pleased to set aside the purported to set aside the purported execution process presently undertaken by M/s Kironje Auctioneers;**
  - b. **In the alternative if at all, it can be interpreted that there was such an order for costs. This Honourable court be pleased to review and or vary its order relating to the award of costs to the applicant LAWRENCE ATINGA OYUGI or otherwise clarify whether it was the respondents condemned to pay costs of the suit or the interested party.**
2. The supporting affidavit of JUDE RAGOT sworn on 19.10.2012 states that this court allowed the application dated 22.9.2004. The said application had granted him orders of certiorari and prohibition and or the last paragraph the honourable judge stated as follows:

**“In the circumstances therefore I grant orders sought in the notice of motion dated 22.9.2004.”**
3. Apparently part of the prayers sought in the said notice was provision of costs. The learned judge did not in her judgment specify who was to bear the responsibility for the costs.
4. Subsequently the applicant proceeded to tax his costs which was awarded at Kshs.79,733 by the deputy registrar. Again the deputy registrar did not specify who was to pay the same among the two losing parties. He then proceed to draw a decree and through it the auctioneers proceeded to proclaim the interested parties goods. This prompted the application herein
5. The interested party on his part argues that although the court did not specify who among the respondents or the interested party was to pay his costs, the same was nonetheless payable and that they cannot run against its responsibility as ordered by the court.
6. I have perused the lengthy submissions by the parties herein. There are two issues which ought to be tackled namely:

- a. **Whether this court could review the trial court's judgment and determine who was to pay the costs.**
- b. **Whether the execution process was lawfully undertaken.**

7. The court's ability to review the court's judgment can only be acted upon pursuant to Order 45 Rule 2(2) which states **“If the judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other judge who is attached to that court at the time the application comes for hearing”**

8. My sister judge **Abida Aroni** left the station some times back and thus its appropriate that this court does the said review.

9. There is no doubt that the learned judge awarded costs to the applicant. The only argument herein in my opinion is who should meet the said costs. It is not for me as suggested by the applicant to find that costs ought to have been awarded to the applicant and not be borne by the interested party because in the first place it was not a complainant against the applicants That argument ought to have been raised at the time of arguing the substantive application.

10. Section 27(C) of the Civil Procedure Act on the question of costs is explicit. The same states as follows:

**“(1) subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge and the court or judge shall have full powers to determine by whom and out of what property and to what extent such costs are to be paid and to give all necessary directions for the purposes aforesaid and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of that powers;**

**Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall have for good reasons or otherwise order.”**

11. In this case the learned judge used her discretion and awarded costs to the applicant. Although she never specified who was to pay the same between the respondent and the interested party both lost the application.

12. In light of the above observation I am persuaded that both ought to pay the costs. They both lost the cause. None of them appealed against that decision. Mere notice of appeal do not necessarily constitute an appeal. If the learned judge did not want to award costs then she would have clearly not allowed the motion wholly as she did.

13. The other issue raised by Mr. Ragot is the process of execution. He argued that the decree was not sent to him for his approval by the applicant's counsel as required by order 21 rules 7 and 8 of the Civil Procedure Rules. On his part the applicant argued in his application that though it is true that the same was not approved by his counterpart, there was nothing fatal as it never deviated from the court's judgment.

14. Rule 8 afore stated is clear. Although not worded in mandatory terms it is expected that no party should steal a match against another.

15. From the proceedings it appears that the applicant obtained a decree and went ahead to proclaim the interested parties goods and specifically tools of trade. Had the interested party been sent to approve the decree and perhaps refuses then this court would have considered otherwise. The proclamation was therefore faulty. Proper process was not followed.

16. In light of the above observations I shall allow the appeal as follows:

1. The applicant's costs of Kshs.79,723 as awarded by the deputy Registrar shall be paid equally (50:50) by both the respondents and the interested party.
2. The execution proceedings as commenced by the ex-parte applicant is hereby set aside together with all consequential orders
3. Costs of this application shall be in the cause.

Dated, signed and delivered this 16th day of December, 2015

H. K. CHEMITEI

J U D G E