



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL DIVISION**  
**MISC APPLICATION NO. 227 OF 2010**  
**IN THE MATTER OF THE ARBITRATIONS ACT 1995**

1. VIOLET MERAB SONG
2. EUGENE HARRY SONGA
3. EUNICE JEANETTE SONGA

**(claiming as administrators of the Estate of**

**DAN OYALO SONGA, Deceased).....APPLICANTS**

**VERSUS**

1. JAMES MUGA OGODA
2. EMMANUEL OCHOLA ODHIAMBO
3. CELESTINE LUSWETI WOSE

**(trading in the name and style of**

**SONGA OGODA & ASSOCIATES).....RESPONDENTS**

**R U L I N G**

**1. The notice of motion dated 29<sup>th</sup> March 2012** filed by the Auctioneer raises the issue who, as between the Applicants/Decree-Holders and the Respondents/Judgment-Debtors, should pay the Auctioneer's costs. Those costs arose out of warrants of attachment in execution of decree. The Auctioneer proclaimed the Respondents' goods; subsequently the Court stayed the execution upon application by the Respondents.

**2. It is common ground that the Auctioneer's charges ought to be paid. The Applicants argue that the Respondents should pay. On the other hand the Respondents argue that the Applicants should pay.**

**3. In their replying affidavit filed on 11<sup>th</sup> May 2012** (sworn by the 3<sup>rd</sup> Respondent) the Respondents present the following case –

- (i) An arbitrator gave the Applicants a huge monetary award against the Respondents.
- (ii) The Respondents applied to set aside the award vide **Nairobi HC Misc.**

**Cause No. 195 of 2010** and served the Applicants

(iii) While HC Misc. Cause No. 195 of 2010 was pending the Applicants applied vide the present proceedings for the award to be adopted as a judgment of the court. They obtained the order *ex parte*.

(iv) The Respondents plead that the Applicants obtained the said judgment without disclosing to court that the arbitral award had already been challenged.

(v) The Applicants then proceeded to execution, which the Respondents successfully resisted.

(vi) The Respondents subsequently and successfully prosecuted their application to set aside the arbitral award, thus rendering the proceedings herein “academic and of no consequence whatsoever”.

(vii) The proceedings herein by the Applicants were an endeavor at “sharp” practice which did not succeed, and which should never have been commenced at all.

4. The Applicants did not file any replying affidavit. They filed **grounds of opposition dated 26<sup>th</sup> April 2012**. Two grounds are raised thus -

(i) That the Auctioneers application is *res judicata*.

(ii) That the application as against the Applicants is misconceived “since costs of the attachment (should be realized from the Judgment-Debtors”.

5. In their submissions the learned counsels merely relied upon their respective papers.

6. I am satisfied from the material now before the court that the proceedings instituted by the Applicants for adoption of the arbitral award by the court, and the subsequent execution proceedings, were premature because the Respondents had already challenged the award, a fact that the Applicants were aware of. The Applicants should have waited the conclusion of that challenge which was vide **Nairobi HC Misc. Cause No. 195 of 2010**. As it happened, upon prosecution of HC Misc. Cause No. 195 of 2010 the proceedings herein, were rendered academic and of no consequence.

7. That being the case, it is only just that the Applicants do bear the costs of execution that should never have been instituted in the first place. It would be patently unjust for the Respondents to be condemned to pay those costs.

8. I therefore find the Auctioneers costs herein should be paid by the Applicants/Decree-Holders. It is so ordered.

9. The costs of the present application are awarded to the Auctioneer and the Respondents/Judgment-Debtors against the Applicants/Decree-Holders.

**DATED AND SIGNED AT NAIROBI THIS 17<sup>TH</sup> DAY OF JULY 2013**

**H. P. G. WAWERU**

**JUDGE**

**DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF JULY 2013**