



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 53 OF 2010

SALIM SHEIKHAN SALIM PLAINTIFF

VERSUS

SUPERSTAR PARCEL SERVICES LIMITED DEFENDANT

AND

SUPERSTAR PARCEL LIMITED OBJECTOR

BETWEEN

JOHN M. MBIJIWE T/A BEALINE KENYA APPLICANT

AND

OKONG'O WANDAGO & COMPANY ADVOCATES ... ADVOCATES

RULING

1. The dispute before this Court is as regards the Applicant auctioneer, **John M. Mbijwe** trading as **Bealine Kenya** and the advocates **Okong'o Wandago & Company**. The Applicant has filed a Chamber Summons dated 10th December 2012 in which it seeks orders that the advocates do honour the undertaking given to the applicant to pay the applicant's part-auctioneer's fees in the amount of Shs. 200,000/-. The Application is brought under the provisions of **Order 52 rule 7 (1) (a) and (2)** of the *Civil Procedure Rules*. The auctioneer has detailed that the grounds in support of his application were that he had duly discharged the instructions of the advocates and executed warrants of attachment and sale in connection with this suit. He maintains that the advocates undertook in writing to pay his part-auctioneer's fees in the amount of Shs. 200,000/- and that the advocates have failed to honour their undertaking.
2. The auctioneer's Application is supported by his Affidavit also sworn on 10th December 2012. The auctioneer, in the said Affidavit, related the history of this suit as far as the execution process was concerned. He detailed that his firm had been instructed by the previous advocates for the Decree Holder herein being Messrs. Eboso & Wandago to execute the warrants of attachment as against the Judgement Debtor for a sum of Shs. 12,691,810/-. He had proceeded to execute but was served with a stay of execution by the Objector herein on 18th June 2010. The auctioneer had attached a number of vehicles and on 29th June 2010, he advised the advocates for the Decree Holder, that the Judgement Debtor was the owner of such motor vehicles. On 17th August 2010, the auctioneer requested a motor vehicle assessor and a valuer to undertake a valuation of one of

- the attached motor vehicles. A valuation report was duly obtained.
3. The auctioneer then recited that on 21st September 2010, what it described as “a curious consent order” was filed herein by the advocates for the Decree Holder and Messrs. Onyango Oloo & Co, advocates who were not on record as representing any of the parties in the suit. The auctioneer attached a copy of that Consent Order which detailed that the interlocutory judgement entered on 18th March 2010 against the Defendant would be set aside and that the attached motor vehicles would be released to the Defendant for safe custody upon payment of storage charges and auctioneer’s fees. The auctioneer then stated that he had been advised to release the attached motor vehicles through a hand written note dated 23rd September 2007 from the advocates for the Decree Holder. On the same day, the auctioneer had informed the advocates for the Decree Holder that his charges would amount to Shs. 800,381.80 which he required to be settled before the release of the said motor vehicles. The auctioneer stated that immediately thereafter, the advocates herein Messrs. Okong’o Wandago & Company wrote to him an undertaking to pay part of the auctioneer’s fees in the amount of Shs. 200,000/- which would leave a balance of Shs. 600,381.80. He attached to his Supporting Affidavit a copy of the said advocates’ letter of undertaking in that connection. The auctioneer maintained that his fees with regard to the attachment remained unpaid to date.
 4. One of the partners in the law firm of Okong’o Wandago & Company, advocates **Amos Ogutu Wandago** swore a Replying Affidavit dated 19th December 2012 to the auctioneer’s Application. In paragraph 3 of that Affidavit the deponent stated that it was true that he had issued his professional undertaking to pay the auctioneer’s costs of Shs. 200,000/-. However he detailed that what the auctioneer had failed to disclose was that firstly the amount of Shs. 200,000/- had been negotiated and agreed down from his initial demand of Shs. 800,381.80. Secondly, the auctioneer had refused to release the said attached motor vehicles and so he was paid Shs. 117,000/-. The deponent went on to say that the amount of Shs. 200,000/- had been negotiated and agreed between the auctioneer, himself and the Judgement Debtor. The auctioneer had issued a receipt for Shs. 117,000/- but had written on the same “storage” instead of his fees whereas in his fee note No. 138 dated 23rd September 2010, there was no claim to storage charges. As a result, Mr. Wandago detailed that the auctioneer could only maintain a claim for Shs. 83,000/- which would be the balance due after deducting the Shs. 117,000/- already paid. He went on to say that he had deliberately withheld releasing the amount of Shs. 83,000/- because he had a right of lien over the funds. He justified this by stating that there were two matters in which he had acted for the auctioneer in which his fees to use his words: “are in the region of Kshs 700,000/= which he has refused or failed to pay”. He attached copies of the bills of costs in this connection. He then prayed that the current application before Court should be stayed pending the taxation of the said two bills of costs.
 5. By a Further Affidavit sworn on 29th January 2013, the auctioneer responded to the advocate’s Replying Affidavit. He deponed to the fact that he had attached two motor vehicles on 14th June 2010. He had stored the said motor vehicles in a commercial yard until he had been instructed to release the same. Upon receipt of those instructions, the auctioneer had computed storage charges amounting to Shs. 117,000/-. The Judgement Debtor herein had paid that amount on 23rd September 2010 and the auctioneer issued a receipt to him which had been exhibited to the advocates’ Replying Affidavit as “AW0 1”. On the same day, the auctioneer had raised his fee note which he annexed to his said Further Affidavit as “JMM 15”. He had forwarded the fee note under cover of his letter to the advocates, again dated the same day, the last paragraph of which read:

“We have given you the amount of money payable as storage charges and a tabulated fee note No. 133 regarding our fees is enclosed for Kshs 800,381.80 for your client’s settlement.”

As a result, the auctioneer closed his further Affidavit by stating that the advocates’ allegation that they had paid Shs. 117,000/- as against his undertaking was false and geared at deceiving the Court.

6. The Applicant auctioneer filed his submissions herein on 24th April 2013. He again recounted the history of the matter but pointed the Court towards the undated letter of the advocates exhibited as “JMM 13” to the Affidavit in support of the Application. He also reiterated his position as regards

payment of storage charges in the amount of Shs. 117,000/- by the Judgement Debtor on 23rd September 2010. He submitted that the issue of the storage charges having been settled, he had sent his fee note under cover of his letter dated 23rd September 2010. There was no claim to storage charges on the fee note. He maintained that the advocates' reply (as above undated) to his letter quite clearly detailed that the only matter being negotiated was the question of the auctioneer's fees and not storage charges. He maintained that the Consent Order dated 21st September 2010 was also clear that the motor vehicles would be released to the Defendant for safe custody upon the payment of storage charges and auctioneers fees. He concluded his submissions by saying that, in his opinion, the advocates herein did not want to pay the fees that were due. He attached for the interest of the Court one of the Court's own Rulings being **HCCC No. 274 of 2009 Labh Singh Harman Singh Ltd v Ahmed Salim Ahmed Jeizan.**

7. The Respondent advocates' written submissions were filed in Court on 8th May 2013. Referring to Mr. Wandago's Replying Affidavit, the Respondent submitted that in as much as a professional undertaking was issued by his firm, the Applicant auctioneer had deliberately failed to disclose the payment of Shs. 117,000/- to him either in the body of the Application or in the Supporting Affidavit. He also noted that the amount claimed by the Applicant auctioneer was negotiated downwards to which the Applicant agreed. In his view, the Applicant auctioneer was entitled to an amount of Shs. 83,000/- out of the agreed fees of Shs. 200,000/- less the Shs. 117,000/- which had already been paid to the auctioneer. The advocates referred this Court to its own decision in **HCCC No. 490 of 2011 Ayub Suleiman Omar v Salim Sheikhan Salim.** In that suit which was associated with this one before Court, I had referred the matter to arbitration. The matters in issue as between the two suits were substantially the same. The advocates maintained that the Ruling in *HCCC No 490 of 2011* correctly invoked the provisions of **Order 46 rule 20** of the *Civil Procedure Rules, 2010* by referring both suits to arbitration pursuant to the Articles of Association of the two companies concerned. The advocates submitted that the Order staying proceedings before this Court pending arbitration would essentially mean that any consequential orders as prayed for by the Applicant would have to be stayed as well or, in the alternative, disallowed pending the outcome of the Arbitral Award.
8. With due respect to the advocates, neither they nor the Applicant auctioneer are in fact parties to this suit. As a result, I do not consider that they are affected by the Order for the stay of proceedings pending arbitration both in this suit and in *HCCC No. 490 of 2011*. As a result, I do not consider that the Court is prevented in any way from making Orders in relation to the Applicant auctioneer and the said Advocates. I have perused Exhibit "JMM 13" attached to the Supporting Affidavit as regards the auctioneer's Application. As I read that undated letter, it is a clear undertaking by the advocates to pay the auctioneer's scale fees in the amount of Shs. 200,000/-. In my opinion, it makes no difference whatsoever that the auctioneer's fees were negotiated downwards from the figure of Shs. 800,381.80 contained in the Fee Note dated 23rd September 2010. An undertaking is an undertaking and where an advocate is giving an undertaking, it is even more so. Advocates are officers of this Court and when giving undertakings they must be expected to honour the same. In my view, it makes no difference either that the advocates are claiming a lien in relation to fees that they say they are owed by the auctioneer as regards other matters in which they claim that they have represented the auctioneer. The untaxed Advocate/Client Bills of Costs annexed as Exhibit "AOW 2" are dated the 4th and 19th September 2012. The advocates are guilty of inordinate delay in having those Bills of Costs taxed as against the auctioneer and until such are so taxed, the applicants have no lien as against monies that they owe to the auctioneer. Further, I have closely examined the receipt No. 155 dated 23rd September 2010 attached to the Replying Affidavit of Mr. Wandago dated 19th December 2012. It quite clearly says that monies received amounting to Shs. 117,000/- were paid by Superstar Parcel Services Ltd the Defendant in the above suit. They also quite clearly state that they were charges for storage for (vehicles) KBB 617M and KBB 618M. As a result, there is no merit in the advocates' proposition that the amount of Shs. 117,000/- should be deducted from the undertaking amount of Shs. 200,000/-.
9. In conclusion therefore, I allow the auctioneer's Chamber Summons dated 10th December 2012 as regards all three prayers thereof including the payment of costs of the Application. I direct that the Advocates will honour their undertaking and pay the sum of Shs. 200,000/- to the auctioneer as his duly earned fees within 7 days of the date hereof. Order accordingly.

DATED and delivered at Nairobi this 11th day of December, 2013.

J. B. HAVELOCK

JUDGE