



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NAKURU

CIVIL SUIT 35 OF 2000

NICONA CONSTRUCTION CO. LTD. PLAINTIFF

VERSUS

KEN SOUTH PLASTIC CO. LTD. 1ST DEFENDANT

ANNE KILELE 2ND DEFENDANT

THE ESTATE OF THE LATE WALTER KILELE...2RD DEFENDANT

RULING

The Notice of Motion **dated 27th July 2012** is made under provisions of **Order 45 Rule 1** and **Section 1A** and **1B** of the **Civil Procedure Act**. It seeks that:

- (1) This court reviews and/or varies the order given on 20th July 2012 to the extent that the 2nd Defendant/Applicant to deposit in court such sums as the court may direct as auctioneers costs pending taxation of their Bill of Costs.
- (2) Upon the grant of these orders, then M/s ELAN AUCTIONEERS do release the 2nd defendant's motor vehicle registration No.KBJ 303E upon payment of storage charges.

It is premises on grounds that:

- (1) The charges demanded by the Auctioneer are exorbitant.
- (2) The motor vehicle which is held by the Auctioneer continues to attract storage charges.
- (3) The 2nd defendant is willing to deposit such sum as the court may determine.

The background to this matter is that on 20th July 2012, the High Court granted applicant orders staying execution and for release of the motor vehicle on condition that the auctioneer's charges were paid. Negotiations were commenced with the auctioneer regarding the fee charged but no agreement could be reached. This is because whereas the auctioneer demanded over 2 million shillings. The applicant contends that the sum she offers to deposit being Kshs.143,520/= is strictly within the provisions of the Auctioneers Act as fees payable.

The application is opposed, and in a replying affidavit sworn by Stanley Ngata, a director of the respondent, he deposes that the applicant has refused to settle his fees which are not exorbitant and in fact what applicant is offering is described as being below the scale. Further the applicant has no known assets

and it took a considerable amount of time and money to trace the said motor vehicle so if it is released and his costs are taxed over the kshs.143,520/= offered, then there may be difficulty in recovering his fees.

At the hearing of the application it was submitted on behalf of the applicant that the Auctioneer has on different occasions given three varying figures (all in their millions) as his fees. Counsel also made a professional undertaking to pay whatever amounts the Taxing Officer will tax as costs, over what is proposed she also urges this court to be guided by the provisions of section 1A and 1B of the Civil Procedure Act so as to achieve the overly objectives of the Act – reference is made to the case of **DEPAK KIMANI V KENYA ANTI-CORRUPTION COMMISSION & OTHERS** Civil Appeal No.152 of 2009.

The application is opposed as having no merit and is described as only intended to frustrate the proceedings. It is pointed out that the auctioneers costs are yet to be determined – because having failed to agree, a bill of costs for taxation has been filed and is scheduled for hearing on 13th July 2012. The offer made is rejected as being too low and cannot even offset the disbursements incurred in executing the warrants and there is no justification as to how they arrived at the proposed figure.

Counsel argues that what the applicant is doing is tantamount to asking the court to tax the Bill, and thus pre-empt the taxation set for hearing.

The reason why the issue of depositing fees arises is that for as long as the motor vehicle is held, it attracts daily storage charges and it is argued that its continued detention does not benefit either party.

I think the only reference I can make to the Auctioneer's Act is with a view to considering whether the offer made is reasonable, and of course consider the sum claimed in light of the value of the subject property drawing daily charges. This would explain why at each new breath, a different figure pops up.

The Auctioneer has a very elaborate and detailed bill of costs, while the one proposed by the Applicant's counsel compresses all the units into 3 – the difference in the figures is so wide that the only way to resolve it is by way of taxation. I would be totally out of place to begin faulting the proposed Bill of Costs, as I would be encroaching on the Taxing Officer's territory prematurely.

The applicants concerns are not unreasonable. In my view if the applicant really wishes to secure the release of her motor vehicle then as a sign of good faith, she ought to deposit in court at least half the sum given in the Bill of Costs, then the professional undertaking being made would find good footage.

For the applicant to insist that the figure offered is the only just and equitable manner of addressing the issue is with the greatest respect, unfair and selfish. Where there are competing interest a middle ground must be found, and in my view the middle ground would have been what I have stated with regard to depositing half the amount claimed in the Bill of Costs and this sum must be deposited within 3 days from today. It is only to this extent that I would vary the earlier order.

In the event that such deposit is not made, and since the applicant does not deny that the motor vehicle is her only known asset, then she must abide the Taxation which is only 3 days away and the further storage charges will not astronomically alter the sums already incurred.

The overriding objective as envisaged by **Section 1A and B** of the **Civil Procedure Act**, and expounded in the **Deepak Kimani case** is intended to have a just, expeditious and proportionate administration of justice. It cuts both ways and not just in favour of one party. In my view, a 3 day wait to have the matter taxed does not in any manner compromise justice, so should the applicant fail to deposit half the sum of what is contained in the Bill of Costs, then the earlier order remains.

Delivered and dated this 9th day of August, 2012 at Nakuru.

H.A. OMONDI

JUDGE

Mr. Kariuki holding brief Mr. Mwangi for Respondent

Mr. Kimathi holding brief Mrs. Wambugu for Applicant