



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
PAUL K. OLE YIAILE T/A MASIOKI
AUCTIONEERS.....PLAINTIFF

VERSUS
EQUITY BANK (K)
LTD.....DEFENDANT

RULING

The application dated 15/3/2012 is brought pursuant to **Order 51 Rule 1** of the **Civil Procedure Rules** and **Sections 1A(3)** and **3A** of the **Civil Procedure Act** in which Equity Bank, the defendant/applicant seeks an order of stay of all the proceedings arising from the assessment and ruling of Hon. J. Njoroge, Senior Principal Magistrate delivered on 27/3/2012, pending the hearing and determination of the appeal. The application is based on grounds found on the face of the application, the affidavit sworn by Daniel Muiruri, the Credit Legal Services Manager of the applicant and a further affidavit sworn by Tim Agufana Liko, dated 26/3/2012 and submissions of counsel.

The grounds upon which the application is predicated are that the Deputy registrar erred in assessing the respondent's/applicant's Bill of Costs summarily and in lump sum manner yet it comprised of 400 different and specific instructions that are in excess of 3,000 pages; that the Deputy Registrar exercised his discretion incorrectly by failing to comply with the **Auctioneers Act** in that he failed to give reasons and justification for the assessment; the assessment is manifestly high; that the Deputy Registrar acted in excess of jurisdiction by converting the assessed fees into a decree contrary to **Rule 55** of the **Auctioneers Rules**.

It was deposed that the respondent is likely to commence execution proceedings against the applicant; that the applicant had filed a Judicial Review application 14/2012 seeking an order of certiorari to quash the proceedings and orders of the Deputy Registrar issued on 27/2/2012 because the applicant was blocked from participating in the proceedings that led to the assessment. It was also submitted that the auctioneer does not have a licence to operate in some of the areas he purported to operate as indicated in the Bill of Costs. A letter from the **Auctioneers Licensing Board** dated 28/7/2011, annexed, shows the areas of jurisdiction of the said auctioneer (EQ3).

The application was opposed and a replying affidavit was sworn by the Auctioneer, Paul Ole Yiale. It was the respondent's contention that the Judicial Review Application 14/2012 is of no relevance to this application and only relates to the orders issued on 27/2/2012; that the appeal cannot be rendered nugatory because the services that were rendered are not denied; that the Auctioneer is a man of means having practiced as an auctioneer for over 18 years, has invested heavily in the pastoral industry and has over 500 cattle, 1,500 sheep and is engaged in barley farming; that his jurisdiction is spread throughout the Republic of Kenya where he was instructed to repossess and realize securities and sale of moveable and immovable properties; that Musembi Ndolo was duly licensed as an advocate having paid for the practicing certificate for the year 2012 and lastly that the Deputy Registrar had jurisdiction to convert the assessed costs into a decree.

Before considering whether or not an order of stay can issue:

I think it proper to consider the some of the issues raised by the applicants, on whether the Auctioneer's counsel had a Practicing Certificate when he took part in the assessment proceedings, whether the Auctioneer had the jurisdiction to carry out repossession or attach the properties all over the country and whether the Deputy Registrar had jurisdiction to convert the assessed costs into a decree.

As respects the Auctioneer's jurisdiction, the applicant annexed a copy of a licence purportedly issued by the Auctioneers Licensing Board for the period 2009 upto 2011. The certificate was issued to the Auctioneer trading as Nasioki Auctioneers. The jurisdiction of the Auctioneer as reflected in the certificate is:-

“1. Repossession, realisation of securities, sale of moveable and immovable property by auction or any other mode of sale by compulsion, throughout the Republic of Kenya;

(2) Execution of court orders and distress for rent in the Districts of Nakuru, Narok, Uasin Gishu, Bomet and Kericho only.”

Sichangi Advocate made an inquiry with Auctioneers Licencing Board and the Board Secretary Mr. K. Kandet wrote back that in the period 2009 and 2010, Nasioki Auctioneers was only licenced to carry out auctioneers business in the Districts of Nakuru, Narok, Uasin Gishu, Bomet and Kericho (EQ3). The Board is the body charged with licencing auctioneers in the country and it seems that records do not show that Nasioki Aucitoneers had jurisdiction all over the country as alleged. The respondent did not challenge the letter from the Secretary to the Board. The Auctioneers exercise of jurisdiction in the matter from which the Bill was taxed is questioned.

As to whether the counsel had no practicing certificate issued by the Law Society of Kenya between 6/2/2012 and 27/3/2012 when the Bills were filed, proceedings taken, and orders issued, Mr. Musembi Ndolo has contended that he had a Practicing Certificate. The applicants received a letter from the Law Society dated 14/3/2012, authored by Appollo Ochieng, CEO/Secretary of the Society, which indicates that as of the time the assessment of the Bills was done, Musembi Ndolo had not paid for his 2012 Practicing Certificate. In the letter issued by the Law Society of Kenya, their website is www.lsk.or.ke (EQ4). The respondent purported to attach a list of lawyers who were licensed and his name appears at No.1833. That list gives the Website of the Board as “lawyers.co.ke” which differs from the website given by the applicants. The applicants attached to the further affidavit, the receipt issued to Musembi Ndolo by the Law Society upon payment of the 2012 fees, dated 20/3/2012 (TAL1). That receipt is not denied. That being the case, it seems that until 20/3/2012 when Mr. Ndolo paid for the certificate, he had been practicing without a Practicing Certificate and the proceedings that resulted in the order of 27/2/2012, were taken when he had no Practicing Certificate. In **CA 119/02, National Bank of Kenya Ltd v Wilson Ndolo Ayah**, the Court of Appeal observed that **Section 34** which bars advocates from practicing without a Practising Certificate is meant to ensure proper conduct on the part of practicing advocates and protect the public from unqualified people. The court said:-

“It is public policy that courts should not aid in the perpetuation of illegalities, invalidating documents drawn by such advocates we come to the conclusion that will discourage excuses being given for justifying the illegality. A failure to invalidate the act by an unqualified advocate is likely to provide an incentive to repeat the illegal act. For that reason alone the charge and instrument of guarantee in this matter are invalid, and so we hold.”

In the instant case, it seems the proceedings leading to assessment of the bills, the subject of challenge herein, were taken when counsel had no Practicing Certificate and it would follow that the proceedings conducted by him were invalid.

Rule 55 of the Auctioneers Rules allows the Deputy Registrar to assess the fees payable to an Auctioneer. It is alleged that the Deputy Registrar went ahead to convert the said assessment into a decree. When the costs are assessed, if not paid the applicant is supposed to file suit. The conversion of the assessed costs into a decree raises an issue of the Deputy Registrar's jurisdiction. I appreciate that at this stage, this court is not supposed to consider whether or not the applicant has an arguable case but

these issues that go to jurisdiction and capacity of the counsel cannot be ignored.

Order 42 of the **Civil Procedure Rules** which governs applications for stay to the High Court. Before a court can exercise its discretion to issue an order of stay, the threshold that the applicant has to meet is as follows:-

- 1. He has to demonstrate that the application is brought without unreasonable delay;**
- 2. that he will suffer substantial loss if the order is not granted;**
- 3. That the applicant has provided security for due performance of the decree as may be ultimately binding on the applicant.**

The impugned order was made on 27/2/2012 and this application was filed on 15/3/2012. I am satisfied that the application was brought timeously.

The other hurdle that the applicant must jump is as to whether substantial loss will result if an order of stay is not granted. The court in **Machira t/a Machira & Co. Advocate v E.A. Standard (No.2) [2002]KLR 63, at page 66** stated that:-

“In this regard, this process means that in order for an unsuccessful party to obtain a suspension of further proceedings or execution, he must satisfy the court on affidavit or on some other proper evidential material, that substantial loss may result to him out of all proportions in relation to the interests of justice and fairness, unless suspension or stay is ordered and the parties’ positions so regulated and ordered that injustice is averted.”

The judge further stated at page 67 that it is not enough merely to state that substantial loss will result or that the appeal will be rendered nugatory. In this regard, the decretal sum stands at over 11 million. The sums are colossal but the respondent claims to be a man of means also has invested in cattle, sheep and farming in barley. I do appreciate that the respondent may not be a man of straw but what the Auctioneers claim to own measured against the decretal sum is not as valuable as the costs is not even estimated. It is my view that substantial loss may result if the 11 million were paid to him. I have seen the bill that is under challenge.

I also take into account the question of jurisdiction raised in this matter and whether the proceedings before the Deputy Registrar were a nullity. On that basis, I do not find it necessary to order that security be provided by the applicant. In the end, I find that the application for stay is merited. I grant stay of execution pending the hearing of the appeal. Costs will abide the appeal.

DATED and DELIVERED this 13th day of July, 2012.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Otieno for the plaintiff

Mr. Ndolo for the defendant

Kennedy – Court Clerk