



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Suit 689 of 2001**

**SPEEDMAN COMMERCIAL AGENCIES LTD.....1<sup>ST</sup> PLAINTIFF**

**PHILIP J.WISHAMINYA .....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**NATIONAL BANK OF KENYA LTD.....DEFENDANT**

**R U L I N G**

The plaintiffs filed a Notice of motion pursuant to the provisions of Order **XLVII** Rule 3 of the Civil Procedure Rules seeking order of this court for the warrants of attachment and sale issued on 3<sup>rd</sup> September, 2009 to be set aside. The plaintiffs contend that the order for costs for which the warrants were issued was made on 19<sup>th</sup> May, 2006. Since then more than a year had passed and therefore the warrants of attachments were issued contravention of the provisions of Order **XXI** Rule **18 (1)** of the **Civil Procedure Rules**. They further contend that the warrants of attachment that were issued were for an exorbitant and exaggerated amount of Ksh.67,450/- when the costs were for Ksh.35,000/- without interest. The plaintiffs' were of the view that the warrants of attachment issued were unlawful and made without jurisdiction. The application is supported by the annexed affidavit Simeo Mugalavai Keyonzo, the advocate for the plaintiffs. The application is opposed. Clifford Okello Rachuonyo, the advocate of the defendant swore a replying affidavit in opposition to the application.

At the hearing of the application, I heard submissions made by Mr. Keyonzo for the plaintiffs and by Miss Munyasa for the defendants. I have carefully considered the said submissions. I have also read the pleadings filed by the parties in support of their respective opposing positions. The plaintiffs and the defendants have a long standing dispute in regard to costs. According to the plaintiffs, the issue of costs between the plaintiff and the defendant was compromised on 21<sup>st</sup> May, 2001 when the parties entered into a consent. The plaintiffs argued that they had agreed to pay the auctioneers costs which had been assessed as Ksh.30,000/- and the defendant's costs of the suit. The plaintiffs contend that on 19<sup>th</sup> May, 2006 the defendant's cost was agreed at Ksh.35,000/-. It was the plaintiffs' contention that the said advocates' cost were to be paid without any interest. The plaintiffs were thus aggrieved that the defendant had purported to execute for the costs for an exaggerated sum of Ksh.67,450/- which included interest. The plaintiffs were of the view that the procedure that the defendant had adopted in executing for costs was illegal since the defendant was required to first issue notice to show cause before purporting to execute against the plaintiff. On its part, It was the defendant's case that indeed the parties had agreed by consent that the defendant's costs would be Ksh.35,000/-. However, at the time the defendant applied for warrant of attachment, the Deputy Registrar of the court included further costs of Ksh.32,450/-. The sum that the defendant therefore claimed from the plaintiff was Ksh.67,450/-.

I have perused the record of the court. It is evident that the plaintiffs have a case when they allege that the defendant had inflated its costs by a sum of Ksh.32,450/-. The court record reflects the fact that the parties had agreed that the defendant's costs would be Ksh.35,000/-. To date the plaintiffs have not paid this cost. If the defendant was minded to execute against the plaintiffs, it could only execute for the sum of Ksh.35,000/- together with any interest which may have accrued. There was no basis upon which the Deputy Registrar granted further costs to the defendant of Ksh.32,450/-. The defendant is entitled to be paid the agreed costs of Ksh.35,000/- plus interest, and further court fees that it may have paid in applying for execution of the costs awarded to it. I therefore hold that the plaintiffs' application has merit. The warrants of attachment issued by this court to Messrs Bealine Kenya Auctioneers Ltd on 3<sup>rd</sup> September, 2009 were issued in error. The amount stated in the warrants of attachment was incorrect.

The plaintiffs' application is therefore allowed. The warrants of attachment and sale issued by this court on 3<sup>rd</sup> September, 2009 are hereby set aside. The defendant shall be at liberty to apply for other warrants of attachment after excluding the illegal costs that were lumped on the agreed costs. The defendant shall however be entitled to be paid interests on the taxed costs and any other further costs that are due and

payable, including further court fees. The plaintiffs shall have costs of this application.

DATED AT NAIROBI THIS 28TH DAY OF MAY, 2010

**L. KIMARU**

**JUDGE**