



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)

MISCELLANEOUS APPLICATION 1661 OF 2009

**MARGRET ANUNDO T/A IGARE AUCTIONEERS
APPLICANTS**

VERSUS

**HARAMBEE SACCO SOCIETY LTD 1ST
RESPONDENT**

**ELITE COMPUTERS
..... 2ND RESPONDENT**

RULING

The chamber summons application dated 7th April 2008 is before me for determination. The background of this matter can be stated briefly as follows. On 30th November 2008, the respondent (herein referred to as the auctioneer) filed an auctioneer's bill of costs against Harambee Sacco Society Ltd and the 1st respondent, and Ali Nashir Kurji and Riaz Kurji T/A Elite Computers, (hereinafter referred to as the applicants) The applicants filed this chamber summons seeking for orders that the Auctioneers bill of costs dated 20th November 2007 as against the applicants be dismissed/struck out with costs to the 2nd respondents.

It is contended by the applicants that the bill of costs is scandalous, vexatious and an abuse of court process. The application is also supported by the affidavit of **Alnashir Kurji** sworn on 7th April 2008. The reasons given in support of the application were also expounded during the hearing of this application. Principally, it was argued that the auctioneers can only pursue her costs from the 1st respondent who had issued the instructions to levy distress. More importantly, the instructions to levy distress were wrongly issued because there was a court order issued in High court civil case No.267 of 1998. An order of stay of distress dated 8th July 1999 was still in force, thus the instructions to levy distress were illegal.

Moreover there was a dispute between the 1st respondent and the applicants was over the increment of rent, which dispute had snowballed into several suits filed between the 1st respondent and the applicants, those suits are still pending. It was also submitted that there is pending before the Chief Magistrates Court at Milimani being CMCC No1540 of 2006, filed by the auctioneers against the applicants. In the face of all those suits, the bill of costs was filed in bad faith.

This application was not opposed by the 1st respondent but formidable opposition was put forth by the auctioneers. Counsel for the auctioneers relied on written submissions and further arguments. According to counsel, the auctioneers were properly instructed vide a letter written 3rd July 2003 by M/s V.A. Nyamondi Advocates acting on behalf of the 1st respondent to levy distress against the 2nd respondent and recover arrears of rent. After receiving instructions they proceeded to proclaim the 2nd respondents property and after the expiry of 14 days they attached the properties but the attachment was stopped by M/s Flavia Rodrigues who purported to issue a cheque of 5.84 million in order to stop the execution of distress. The cheque was refused by M/s V.A. Nyamondi Advocates. However, the following day when the auctioneers tried to continue with the execution they were served with a court order.

The auctioneers later received a letter dated 20th August 2003, by M/s V.A. Nyamondi advocate on behalf of the 1st respondent instructing them to proceed with the execution because the order of stay of execution of distress was dismissed. The auctioneers proceeded to the applicants premises but in the process of carrying away the distained goods, they were arrested by the police and charged in criminal case No.6645 of 2003 at Kibera law Courts.

According to counsel for the auctioneers, there was no suit between the applicant and the auctioneers. The suit referred to, and in particular **H. C. C. No.267 of 1998** and the order of 8th July 1999 involved different parties altogether. The dispute was in regard to eviction whereas the bill of costs is seeking payment of costs for carrying out instructions for distress for rent. The auctioneers put in the machinery to distress for rent but the 2nd respondent obtained a temporary stay order which was subsequently dismissed and frustrated the second attempt by reporting the matter to the police.

The applicants did not attach any valid order to show there was a court order in place. They merely made reference to a court order but did not attach a copy. Thus the applicants are selective on the materials disclosed to the court. There were lawful instructions to levy distress and if indeed there was an order in HCCC No.267 of 1998 the applicants should have filed an application in that suit for stay of taxation of this auctioneers bill of costs, that way the court could establish from the relevant court file as to whether there was an order of stay of execution. The suit before the Chief Magistrate's Court is for malicious prosecution and it is against many parties including the Attorney General.

The issues which fall for determination is whether the auctioneers bill of costs should be struck out under the provisions of order 6 r 13 (1)b and d of the Civil Procedure Rules. Secondly, whether the auctioneers can claim costs from the 2nd respondent for instructions issued by the 1st respondent. Finally, whether there was a court order stopping distress for rent against the applicants.

It is not in dispute that the auctioneers were given instructions by the 1st respondent to levy distress against the applicants. Going by the information before the court, it is also not in dispute that the auctioneers attempted to levy distress against the applicants. In the process of levying distress on 13th August 2003, they were served with a court order staying execution of distress. By a further letter dated 2003 by M/s V.A. Nyamondi & Co. Advocates instructed the auctioneers to proceed with the distress. However the auctioneers were arrested and charged with a criminal offence. The auctioneers were acquitted of the criminal charges and it appears they have filed a suit seeking damages for malicious prosecution against the individual tenants as well as the Attorney General.

I find the instructions given to the auctioneers were valid, for reasons that the applicants are not claiming that there were no arrears of rent owing at the time the distress instructions were issued. The applicants are claiming that there was a court order barring any execution of distress for rent. The order annexed to the affidavit by the applicant regarding this issue, relates to HCC No 267 of 1998 which is a suit by the 1st respondent against **John Kananda**. There is no order exhibited in the applicant's affidavit which is against the 1st respondent and the auctioneers.

The averments also by the auctioneer to the effect that, when they first attempted to levy distress on 13th August 2003, they were given a cheque by the applicants advocates and the following day they were

served with a court order which was subsequently dismissed and on 20th August 2003. They were subsequently instructed to continue with the execution of the distress instructions, those averments have not been controverted by the applicants.

The applicants other contention is that the bill of costs should have been filed against the 1st respondent only. It is correct the instructions were issued by the 1st respondent to levy distress against the 2nd respondent who was in rent arrears. Is the joinder of the 2nd respondent an abuse of the court process? If the bill of costs was only directed against the 1st respondent how would the taxing master even comprehend the matter? As stated earlier in this ruling, there is no dispute that rent was due and owing from the 2nd respondent to the 1st respondent. Further the applicant has not established that there was a court order stopping or staying execution of distress as at the time the auctioneers tried to levy distress. I also find the applicants have been less than candid by failing to make proper disclosure and by annexing irrelevant court orders to confuse the issues.

For those reasons I am not satisfied that the auctioneers bill of costs is scandalous and an abuse of the court process. The 1st respondent on whose behalf the instructions were issued, and the 2nd respondents who owed the rent in arrears, should settle the auctioneer's costs. The chamber summons dated 7th April 2008, is dismissed with costs. The Auctioneers Bill of Costs to proceed for taxation.

RULING READ AND SIGNED ON 5TH DAY OF JUNE 2009.

M.K. KOOME

JUDGE