



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CIVIL APPEAL 76 OF 2002

DEBLA KHASOHA MMAITSI APPELLANT

V E R S U S

JAMES KEGODE (for Mbaya Primary School).....RESPONDENT

R U L I N G

The applicant filed the application dated 2nd July, 2008 seeking several orders namely that:-

- 1. *Manuel Otiangala T/A KURONYA AUCTIONEERS be made a party to these proceedings as an Interested Party.***
- 2. *The execution process by KURONYA AUCTIONEERS above as against the Applicant in his capacity be declared unlawful and or wrongful.***
- 3. *The respondent and KURONYA AUCTIONEERS do jointly and severally return the value of the applicant attached and sold goods in execution thereof at the current market price.***
- 4. *The costs of this application be borne by the respondent jointly with KURONYA AUCTIONEERS.***

The application is supported by the affidavit of the applicant sworn on 2nd July, 2008. Mrs. Muleshe, counsel for the applicant submitted that execution for costs of KShs.61,800/= awarded to the respondent was levied upon the applicant in his personal capacity. The applicant was only a Chairman and not the owner of Mbaya Primary School.

Mrs. Muleshe further submitted that at the time of execution the applicant had already retired as the chairman of the school. The applicant's five cows and a calf were sold for KShs.32,300/= and would like the court to declare the attachment as unlawful as it was made upon the applicant instead of the school.

Mr. Nandi, counsel for the respondent opposed the application. Counsel submitted that the application is an afterthought and is made in bad faith. The applicant ought to have raised objection proceedings before the proceeds from the auction were paid. The applicant was cited in the proceedings as a party.

In the first prayer, the applicant would like to have one Manuel Otiangala Trading as Kuronya

Auctioneers to be made a party to these proceedings as an interested party. The reason for joining this party is that he is the auctioneer who executed the warrants.

The record shows that this court issued warrants of execution on 17th April, 2007. The warrants were to be executed by Kuronya Auctioneers. The warrants indicate that they were to be executed against James Kegode for Mbaya Primary School. The main issue is whether the said Kuronya auctioneer executed the warrants against the wrong party so as to have him enjoined in this matter.

It should be noted that Auctioneers are appointed by the courts as agents to assist the courts in executing decrees. If the auctioneer executes the warrants and files his returns in court, then the auctioneer should not later on be open to litigation unless it can be shown that his action was contrary to the direction of the court.

I have read the ruling of my brother, Justice Fred Ochieng delivered on 12th May 2008. The background of this matter has been clearly elaborated in the said ruling. The auctioneer sold the attached goods for KShs.32,500/=, took his costs of KShs.21,821 and sent a balance of KShs.14,000/= to the decree holder's Advocate. On 6th June, 2007, the auctioneer wrote to the court returning the warrants. The applicant was cited in the warrants and the words "for Mbaya Primary School" are included. I do not find that the auctioneer executed the warrants on the wrong party to the suit. This is an appeal and the applicant's name has been appearing since 2002 when the appeal was filed. It is true that the applicant may not be the owner of Mbaya Primary School. However, all along he had the opportunity to have his name struck out from the proceedings before the matter was concluded. The words "for Mbaya Primary School do not show that the execution was to be made against the school. I do find that there is no reason to enjoin Kuronya Auctioneers as an interested party to this suit.

Having found that the warrants were properly executed, the applicant's prayers 2, 3 and 4 should also fail. I do note that from the proceedings before the Lugari Land Disputes Tribunal and the Appeals Committee the applicant appeared in both cases. He had his other members of the Board before the Lugari Land Disputes Tribunal but was alone before the Provincial Appeals Tribunal.

Order XXI rule 53 (1) provides as follows:-

"Any person claiming to be entitled to or to have legal or equitable interest in the whole of or part of any property attached in execution of a decree may at any time prior to payment out of the proceeds of sale of such property give notice in writing to the court and to the decree-holder of his objection to the attachment of such property."

The applicant had the opportunity to object to the attachment of his property when the execution was levied. He did not utilize that process. He also exposed himself as the proper party to the suit and execution was levied against him. It is now too late by the day to ask the court to declare the execution as unlawful and/or wrongful. The warrants issued by the court did not specifically indicate that execution was to be made against the school and not the applicant. It is the applicant and his Board of Mbaya Primary School who decided to use the wrong procedure in claiming the land they bought from the respondent. The process was nullified by the court. The applicant has the avenue of asking the school to refund him the loss he incurred as the dispute was not personal.

In the end, I do not find any merit in this application and the same is dismissed. There shall be no order as to costs.

Delivered, Dated and Signed at Kakamega this 15th day of October, 2009

SAID J. CHITEMBWE

J U D G E