



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS**

Civil Case 125 of 1990

ANNA NGENEKE KILONZO 1ST PLAINTIFF

JOSEPH MULINGE KILONZO2ND PLAINTIFF

VERSUS

KITIKA NZOVE 1ST DEFENDANT

KITUA MUTINGI 2ND DEFENDANT

RULING

1. What I gather from a perusal of the Application dated 23/5/2007 and which is grounded on Section 3A of the Civil Procedure Act is that on 25/11/1994, Osiemo J. entered judgment in terms of an elders award in this suit. Apparently attempts at reviving the proceedings failed and the latest was after a Ruling delivered on 26/1/2005 by Wendoh J. wherein the learned judge struck out a certain application placed before her and stated that the present Applicant who was one of the Defendants in the suit was condemned to pay costs thereof. By that time, the advocate for the Respondent/Plaintiff had drawn and taxed his costs and was attempting execution.

2. Subsequently, in any event, execution was levied and it is said by the Applicant, that on 5/9/2005, Kshs.66,493/= was recovered by M/S Eastern Kenya Auctioneers and thereafter his household goods were released back to him. That the auctioneers at an unclear time, sold two heads of cattle belonging to the Applicant but gave no account of the sale price. That prior to the filing of the present Application, another attempt at execution was made and the Applicant takes the view that the Respondent is now enriching himself at the expense of the Applicant and that this court should exercise its inherent jurisdiction and lift the execution of the decree as against him and the warrants of arrest issued be recalled and cancelled.

3. The 2nd Plaintiff/Respondent in a Replying Affidavit sworn on 11/6/2007, depones that the order for costs was made against the Applicants jointly and severally and that since only Kshs.37,000/= had been recovered, the Respondent was entitled to pursue the Applicant for the balance.

4. Mrs Nzei for the Applicant has added the point that the Applicant should not be vexed more than once as a matter of natural justice. That the Kshs.93,737/= now sought is unclear as to its basis and should not be paid in any event.

5. Mr Wambua on the other hand argues that having taken into account Kshs.37,000/= received from the Applicant the figure of Kshs.92,737/= was the balance from the date of payment plus interest thereon.

6. My view of the matter is as follows:-

Costs of the suit were awarded to the Plaintiffs and in the Amended Plaintiff deemed filed on 18/7/1991 by order of Toghbour J., the Plaintiff sought judgment against the Defendants, including the Applicant, “jointly and severally” including on the subject of costs. Later the matter was referred by consent to arbitration by elders and in a decision dated 23/3/1993, the elders found in favour of the Plaintiffs, and Osiemo J adopted the award as a Judgment of this court and in effect granted the prayers in the Plaintiff including on the subject of costs. Execution for costs later commenced and I see that in a letter dated 5/9/2005, Eastern Kenya Auctioneers asked the Applicant to pay his pro rata share of costs being Kshs.56,493/= and I have seen receipts dated 5/9/2005, 15/9/2005, 4/10/2005 and 19/10/2005 showing that the Applicant paid that sum and more including Auctioneers charges of Kshs.9,500/=. However, in receipts issued by L.W. Wambua & Co. Advocates, the said auctioneers are shown to have remitted only Kshs.37,000/= in two instalments of Kshs.7,000/= and Kshs.30,000/=.

7. It is unclear to me what happened to the cows that were proclaimed and attached but it is clear that the Applicant is being harassed; I say so because the agent of the Respondent in the letter dated 5/9/2005 severed the decretal sum into two and asked the Applicant to pay Kshs.46,993/= plus Auctioneers fees of Kshs.9,500. He paid it all and was then released from his obligation. The auctioneers remitted kshs.37,000/= and kept two cows or may be they did not. Whatever the case, once they chose to sever the claim, the Applicant met his part of it. Natural justice, I agree holds it that no man should be led to believe that he is free only for him to be saddled with his past sins.

8. Where an injustice is committed, this court has inherent power to say, “stop what you are doing because it is causing injustice.” This is true in this case and I agree that Section 3A of the Civil Procedure Act is properly invoked.

9. In the event, the Application dated 23/5/2007 is merited and is allowed with no order as to costs. It is obvious why.

10. Orders accordingly.

Dated and delivered at Machakos this 17th day of September 2008.

ISAAC LENAOLA

JUDGE

In the Presence of: Miss Musila for 2nd Defendant/Applicant

N/A for Respondent

ISAAC LENAOLA

JUDGE