

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

Civil Appeal 971 of 2005

CHARLES NGARE KARAYA APPELLANT

VERSUS

FLORENCE MUTHONI 1ST RESPONDENT

BARCLAYS BANK OF KENYA LIMITED 2ND RESPONDENT

RULING

This has become an unduly long and protracted litigation, with the main Appeal still pending. There were originally three applications pending in Court; one dated 30th March, 2006 for stay of execution of the Lower Court's Orders; second dated 25th April, 2006 for extension of time to deposit funds in Court; and the third for the release of the attached tractor and motor vehicle. All these were resolved, or overtaken by events: funds were eventually deposited in Court as per the Orders of the Court, and stay of execution was granted. The only remaining issue, which arose from events that happened in between various Court Orders, relates to the payment of Auctioneers fees, arising from the attachment of goods (tractor and motor vehicle) carried out by the Auctioneer, at the instance of the First Respondent.

Who pays the Auctioneer? The Appellant or the First Respondent? That is the only issue for determination by me, and that, of course, depends on whether the attachment was proper and lawful.

I asked the parties to file written submissions on that one simple issue. Instead, they gave me needlessly long and irrelevant material, setting out the history and chronology of events leading to the attachment. Unfortunately, I have had to read these unduly long submissions, and I have no intention of commenting on any of the history narrated to me.

The only issue is: was the Auctioneer right in attaching the property? Did she have notice of the Court Order granting stay of execution?

The attachment took place in the early afternoon of 28th April, 2006. Because of the distance involved in serving the Auctioneer in Narok the Appellant took the most appropriate step of faxing the Court Order staying execution at 9.56 am on 28th April, 2006 and later served the formal Order, by way of personal service, at 1.23 pm on the same day. The attachment took place sometime in between. These facts are not controverted in the Respondent's Replying Affidavit. The First Respondent simply says that the formal Order was served at 1.23 pm, **after** the attachment had taken place. But, surely, the Auctioneer had notice of the Court Order by 9.56 am when the faxed copy was served. What difference does it make that it was not the "original". She knew, whether by fax, or through service of original copy, that there was a stay Order, so what was the big hurry in executing the same? If the Auctioneer was not satisfied about the authenticity of the faxed copy, all she had to do was make phone inquiries, or at worst, wait for one more day to determine the truth. But, the Auctioneer was far too much in a hurry to execute.

I am satisfied, from the material presented to me, that the Auctioneer was completely wrong in proceeding with the execution, and is to fully blame for the ensuing costs. This was a case of an overzealous and greedy Auctioneer, who simply went too far. It is instructive to note that even after the facts were known to her, the Auctioneer took no steps to mitigate the loss, in the hope that she would collect the huge storage charges she is demanding.

I, therefore, find that the attachment was unlawful, and Order the immediate release of the Appellant's property at no extra costs to the Appellant. The costs of this application are awarded to the Appellant.

Dated and delivered at Nairobi this 14th day of February, 2007.

ALNASHIR VISRAM

JUDGE