



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL DIVISION – MILIMANI
CIVIL CASE NO.1094 OF 2002**

TULAGA CO-OPERATIVE SOCIETY LTD.....1st PLAINTIFF

ABERDARE MULTI-PURPOSE

CO-OPERATIVE SOCIETY LTD2ND PLAINTIFF

VERSUS

ABERDARE CREAMERIES LTD1st DEFENDANT

JAMES KIARIE KAIRU.....2nd DEFENDANT

RULING

The Defendant has brought this application for the following main orders:-

(a) That W.M. Kariuki t/a Wiskam Agencies (Auctioneers) be restrained whether by himself, agents or whosoever from selling, disposing off, alienating or transferring ownership of the attached assets/goods pending the hearing and determination of this application.

(b) That the auctioneer herein be ordered to render his fee note for payment by the Defendant if agreed upon and/or tax his costs in Court within such time as the Court may order.

(c) That the Auctioneers be ordered to release the Defendant's attached assets/goods now in his custody forthwith and unconditionally.

The application is supported by an affidavit sworn on 5th November 2004 by one Njoroge Wa Kairo the Defendant's Managing Director and is based on the following grounds that:-

1. The parties herein recorded a consent order on payment of the decretal sum by monthly installments and payment of auctioneer's charges.

2. The Auctioneer has refused and or failed to render his fee note to the Defendant or tax his costs.

3. The Auctioneer has refused to release and continues to hold the Defendant's attached

assets/goods unlawfully.

The application was opposed by the auctioneer who filed a Replying Affidavit sworn on 11th November, 2004. He deponed that he was not aware of the compromise reached by the decree holder and the judgment debtors. He therefore proceeded to advertise the attached goods and sold them by public auction. He further deponed that the compromise was signed long after the auction had been held.

The Managing Director of the Judgment debtor responded to the said Replying Affidavit of the auctioneer to the effect that the consent order was in fact recorded on 30th August, 2004 before the purported auction and the auctioneer was aware of the same and in fact did not hold any auction at all and his allegations are after thoughts merely intended to mislead the Court. In the opinion of the Managing Director of the judgment debtor the actions of the auctioneer were illegal and void.

Counsel for the decree holder on his part contended in his affidavit sworn on 29th November, 2004 that he informed the auctioneer of the judgment debtor's application for stay of execution and the subsequent compromise and asked the auctioneer to defer the sale of the Judgment debtor's property. He further deponed that he did not instruct the auctioneer to proceed with the sale of the Judgment debtor's property as the Judgment debtor had not defaulted on the terms of the recorded compromise.

What emerges from the affidavit evidence is that, the Judgment debtor does not believe that any auction of the Judgment debtor's property ever took place and the auctioneer has committed a fraud on the Judgment debtor. That may very well be the case. Where does that leave the Judgment debtor's application? Courts do not act in vain. Prayers 2 and 4 of the application under consideration are therefore not available to the Applicant. The Judgment debtor would have been on firmer and productive ground if it made an application to set aside the alleged sale on the ground of material irregularity or fraud or made a claim for damages resulting from the irregularity or fraud allegedly committed by the auctioneer.

The Judgment debtor is therefore not remediless. As for the present application the order that commends itself to me is that the auctioneer should still file his bill of costs for taxation by the Deputy Registrar of this Court within fourteen (14) days from the date hereof failing which the said auctioneer should deposit the entire sum of Kshs 217,500/= retained by him as his charges. In default of deposit aforesaid the Judgment debtor be at liberty to execute for recovery of the same.

The judgment debtor will have the costs of this application to be borne by the auctioneer.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF MARCH 2005.

F. AZANGALALA

JUDGE

Read in the presence of: