



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
H.C. MISC. APPL.NO. 177OF 2001

GALAXY AUCTIONEERS.....APPLICANT

VERSUS

E.N. NGANGA & CO. ADVOCATES.....1ST DEFENDANT

NATIONAL IRRIGATION BOARD.....2ND DEFENDANT

RULING

1. The Application dated 12.7.2004 seeks an interpretation of the Consent Order dated 21.7.2003 by the parties as regards costs payable to M/s E.N. Ng'ang'a & Co. Advocates and Auctioneers fees. The same is said to be brought under Section 3A and Section 34 of the Civil Procedure Act.
2. What happened is that on 18th May 2001, M/s E.N. Ng'ang'a & Co. Advocates taxed their bill of costs and a Certificate of Taxation dated 24th May 2001 was issued indicating that the costs payable to the said Advocates is Kshs.15,125,000.00. There being no payment, a Notice to Show Cause why attachment should not issue against the Defendant was heard on 25th June 2001 and 5th July 2001 and there being no cause shown, attachment of the Defendant's moveable goods was ordered. On 4th October 2001, a warrant of attachment was issued to M/s Rosam Enterprises who proclaimed the Applicant's goods. After a number of Applications, part- payment of the costs and negotiations between the parties, a consent order was recorded on 21st July 2003.
3. The consent order is in the following terms; - "By consent:
 - i) There be a stay of execution of the orders made on 18 th May 2001.
 - ii) The warrants of attachment of the defendant's immovable property issued on 7 th July 2003 be waived, cancelled and declared null and void.
 - iii) The defendant to pay Kshs.500,000.00 forthwith and thereafter Kshs.300,000.00 per month with effect from 20 th August 2003 and a similar amount on the 20 th of each succeeding month until payment in full.
 - iv) In default of any installment, the Plaintiff/Respondent be at liberty to file suit for any sum due."
4. Galaxy Auctioneers had attempted to execute warrants of attachment sometime in December 2002, which attachment was blocked by order of court, which order subsequently lapsed upon the substantive Application being struck out on 3rd July 2003. On 7th July 2004, the said Galaxy Auctioneers attempted to attach for their fees as against the Defendant which led to the instant Application being filed.

5. Counsel for the Defendant argues that since the fees arise from warrants that had been declared null and void, no fees can possibly - be payable. That pursuant to consent order (iv) between the parties, the only way to recover costs would be by way of filing a fresh suit in that regard.

6. Further, that the mere existence of a certificate of Taxation or certificate of costs does not operate to entitle a party to execute as if the same was a decree. This was the holding in Blue Shield Insurance Co. Ltd. vs. G.N. Kagia t/a G.N. Kagia & Co. Advocates, HCCC 27/2001 (unreported).

7. Counsel for the Auctioneers argues that the certificate of costs as drawn shows that the costs are properly payable to the Auctioneer. Further, that the instant Application is an Appeal to a court of equal jurisdiction as Ochieng, Ag. J. had dealt with the matters being raised and yet no appeal has been filed against that Ruling. Counsel then delved into the provisions under which the Application was brought and stated that; -

i) Section 34 of the Civil Procedure Act is inapplicable as the Auctioneer is not executing a decree as defined in the Act.

ii) Section 28 of the Act cannot also be applied as it is itself directly in conflict with Section 34 aforesaid. Two conflicting provisions cannot be invoked at the same time.

iii) Order 21 Rule 22 of the Civil Procedure Rules refers to decrees that are being executed and the objection is therefore similar to (i) above.

8. Counsel then made two other pertinent points; firstly, that the Auctioneer was not party to the consent order of 21st July 2003 and is not bound by its contents and secondly, that the Blue Shield Insurance Co. Ltd. case (above) is distinguishable as the same applies to an Advocateclient bill of costs as opposed to Auctioneer's fees.

9. Mr. E.N. Ng'ang'a appeared for his firm associated himself with submissions by Mr. King'ara for the Auctioneer. He added one more thing; that the consent was deliberately worded as it was to allow the Defendant an opportunity to liquidate the costs in installments and that the choice of method of recovery in case of default was upon the firm of advocates and it was in no way a mandatory order that the should only file suit.

10. I have perused the Ruling of my brother, Ochieng, Ag. J. delivered on 1st April 2004. What was before him was an Application by the Defendant/Applicant herein for orders that the taxation of the Auctioneers Bill of Costs be stayed and that time be enlarged to allow an appeal to be filed against a certain Ruling of the Deputy Registrar on a Preliminary Objection taken to the taxation. That objection is pertinent because from the record, it relates to the very same consent order of 21st July 2003. The Defendant had objected to the taxation being done on the very same basis that it was against the terms of the consent order. Muya Esq. Senior Principal Deputy Registrar overruled the objection and stated thus;

“A perusal of the consent order shows that it was between the 1st and 2 nd Respondents. The Applicant was not a party to it. The consent order cannot be held to be binding by proxy. I find the Preliminary Objection has no merit and it is dismissed with costs.”

Ochieng, Ag. J. stated this on the same point; -

“As far as I can see, the Ruling by the Senior Deputy Registrar did not conclusively determine the rights of the parties on the issue of taxation .”

11. He also refused to grant the order for stay of taxation with the consequence that the taxation proceeded and the Auctioneers costs were on 14th June 2004 taxed at Kshs.225,569.15.

12. I agree with counsel for the Auctioneer that the consent order is not binding on the Auctioneer as he was not a party to it. However, a more pertinent issue arises; the Auctioneer is executing for costs based

on a warrant of attachment which the substantive parties to the suit have declared, by consent, to be in their own words, “waived, cancelled and declared null and void.” These words are clear, unequivocal and cannot attract an ambiguous interpretation. They mean precisely one thing; the warrants have no legal validity or basis and no act founded on those warrants can be sustained. One such act is any costs attendant upon execution thereof. Ochieng, Ag. J. did not rule on the matter and the same cannot now be said to have been dealt with by the Senior Principal Deputy Registrar as I agree with Ochieng, Ag. J. that he did not. This court is therefore properly seized of the matter.

14. Without even going to the Consent Order which I have held to be inapplicable to the Auctioneers, the only way the Auctioneer can recover his costs is by addressing his claim against the instructing party, M/s E.N. Ng’ang’a & Co. Advocates who I note are also liable under the Certificate of Taxation to pay those costs. It was the same party that consented to the waiver of the warrants well knowing that the Auctioneers may well raise their fee note. The alternative is to sue for the same.

15. In the circumstances then, and notwithstanding the Certificate of Taxation of Auctioneers costs, and for reasons that I have stated above, I should allow the Application dated 12th July 2004, in terms of prayers 4 and 5 thereof.

16. Costs thereof shall be paid to the 2nd Defendant by both the 1st Defendant and the Plaintiff.

Orders accordingly.

Dated and delivered at Nairobi this 24th day of September 2004.

I. LENAOLA

Ag. JUDGE

24/9/2004

Coram: Makhandia, Ag. J.

CC: Ndung’u

Mrs. Mungai for Kimani for Applicant

Ngoi for King’ara for 1st Respondent

Ng’ang’a for 2nd Respondent

Ruling delivered in court by Justice Makhandia on behalf of Justice Lenaola who is away at Embu High Court on duty.

MAKHANDIA

Ag. JUDGE