REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 102 OF 2015

CAMILUS OKWIRI (suing as administrator of the estate of

TABITHA GLADYS MAKOKHA.....APPELLANT

VERSUS

MATUNDA BUS SERVICES LIMITED.....RESPONDENT

RULING

[1] This ruling is in respect of two applications. The 1st application is dated **11 November 2020**. It was filed by **M/s Kimondo Gachoka & Company Advocates** on behalf of the respondent/applicant, **Matunda Bus Services Limited**, for stay of execution and setting aside of Warrants of Attachment issued herein. The 2nd application is dated **1 March 2021**. It was filed by **M/s Mbugua Korir & Company Advocates** on behalf of the Interested Party, **Kennedy Shikuku T/A Eshikoni Auctioneers**. It basically seeks orders that the Court do stay the release of the attached motor vehicles pending the hearing and determination of the application; and that the Court do issue an order for payment of the applicant's charges. The two applications were canvassed by way of written submissions and I now proceed to consider them in turn.

[2] The 1st application was filed pursuant to **Article 159 (2) (a) & (d)** of the **Constitution of Kenya**; **Sections 1A, 1B and 3A** of **the Civil Procedure Act, Chapter 21** of the **Laws of Kenya**; **Order 10 Rule 11, Order 22 Rule 22, Order 42 Rules 20 and 21**, and **Order 50 Rule 1** of the **Civil Procedure Rules, 2010.** The applicant seeks orders that:

[a] Spent

[b] Spent

[c] Spent

[d] That the Court be pleased to set aside the Warrants of Attachment issued on 2 June 2020 and the Proclamation Notice dated 3 June 2020 as the same are irregular;

[e] That the Court be pleased to order the unconditional release of Motor Vehicles Registration No. KCJ 816X and KCJ 814S, Toyota Hiace pending the hearing and determination of the instant application;

[f] That the Court be pleased to order stay of the Notice of Advertisement and/or subsequent intended sale of Motor Vehicles Registration No. KCJ 816X and KCJ 814X, Toyota Hiace;

[g] That the Court be pleased to stay any form of advertisement of the applicant's proclaimed properties pending the hearing and determination of the application *inter partes*;

[h] That the *ex parte* judgment entered herein on 4 December 2019 for Kshs. 1,804,070/= and subsequent orders granted against the applicant be reviewed, set aside, discharged and/or varied and the applicant be granted leave to file their statements of response and cross appeal out of time;

[i] That upon granting prayer (d) above, the Court be pleased to issue an order for retrial of this appeal;

[j] That the Warrants of Attachment issued on 2 June 2020 and Proclamation Notice dated 3 June 2020 or any form of advertisement or sale of the applicant's proclaimed properties be set aside and or lifted unconditionally;

[k] That the Court be pleased to issue any other order and/or direction it deems fit to grant in the circumstances;

[l] That the costs of the application be provided for and that the same be borne by the respondent.

[3] The application was premised on the grounds that the appeal was heard and Judgment in default delivered in the respondent's favour on **4 December 2019** for **Kshs. 1,804,070.70** plus costs and interest; and that the respondent thereafter embarked on the process of execution and has threatened to auction the applicant's motor vehicles **Registration Numbers KCJ 816X** and **KCJ 814X Toyota Hiace** on the basis of warrants which have since expired. The applicant further averred that it was not involved in the appeal process because no Memorandum of Appeal, Record of Appeal nor any other form of notice in connection with the appeal was ever served on it. Hence, it was the posturing of the applicant that what is on record is a default judgment which ought to be set aside, and the applicant granted leave to file a statement of response and a cross appeal out of time.

[4] The application was resisted by the appellant/respondent, **Camilus Okwiri**, vide his Replying Affidavit sworn on **20 November 2020,** contending that the firm of **M/s Kimondo Gachoka & Company Advocates** had no *locus standi* to act for the applicant in this matter as they were not properly on record. The respondent refuted the applicant's allegation that service of the appeal was not effected. He averred that the applicant was all the while aware of the appeal and fully participated therein. He annexed various documents to his affidavit to buttress this assertion and they are marked **Annexures CO 1-11.**

[5] The respondent further pointed out, at paragraph 12 of his Replying Affidavit, that the application is an afterthought, having been filed after the parties had recorded a consent on the costs for the appeal. He urged the Court to note that the said consent, dated **17 February 2020**, was prepared by counsel for the applicant as per the document marked **Annexure CO 12** to the Replying Affidavit. Accordingly, the respondent prayed for the dismissal of the application.

[6] The applicant thereafter filed what he referred to as an Amended Notice of Motion, whose object, as is discernible from paragraphs 2-4 of the Supporting Affidavit, was to incorporate the fact that, following the Court's ruling on the respondent's preliminary objection, a consent dated **2 November 2020** was filed between the firm of **Kimondo Gachoka & Company Advocates** and **Kairu & McCourt Advocates**. Subsequently, on **10 December 2020**, another Notice of Motion, seeking more or less similar orders as the 1st application, was filed by **M/s Nyairo & Company Advocates** on behalf of the applicant, seeking orders, *inter alia*, that:

[a] Leave be granted to M/s Nyairo & Company Advocates to come on record for and on behalf of the applicant;

[b] Motor Vehicles Registration No. KCJ 806X and KCJ 814X attached by Eshikoni Auctioneers be immediately and unconditionally released to the applicant on running attachment pending the hearing and determination of the application *inter partes;*

[c] There be an order for stay of execution and/or further execution and or attachment or carting away of the applicant's properties pending the hearing and determination of the application;

[d] Attachment and physical seizure of the applicant's Motor Vehicle Registration Numbers KCJ 806X and KCJ 814X by M/s Eshikoni Auctioneers be lifted and be declared illegal, null and void;

[e] That the costs of the application be borne by the respondent.

[7] The application dated **10 December 2020,** which was supported by the affidavit of the applicant's manager, **Robert Maina,** was predicated on the grounds that, as at the time of delivery of the Judgment dated **4 December 2019**, the respondent had received **Kshs. 472,071/=** in satisfaction of the lower court's Judgment in **Eldoret CMCC No. 263 of 2014**; and therefore that the amount due after **4 January 2020** was **Kshs. 1,331,999.70** only, plus costs and interest; and not the judgment sum of **Kshs. 1,804,070.70** decreed by this Court. The applicant further complained that no draft decree was served on it for approval as required by **Order 21 Rule 8(2)** of the **Civil Procedure Rules**. Hence, it took the view that the attachment of the subject motor vehicles on **7 November 2020** by **M/s Eshikoni Auctioneers** was not only illegal and unprocedural, but was also unwarranted.

[8] The applicant further averred that it is a public transport service provider and that the attached motor vehicles, **Registration Numbers KCJ 806X** and **KCJ 814X** are its tools of trade used for its daily business; and that, as a result of the respondent's illegal action, its business has suffered huge financial loss and continues to suffer unless the Court intervenes. It also averred that, unless the Court grants the reliefs sought the subject motor vehicles risk being wasted and/or vandalized to the applicant's detriment.

[9] In his written submissions filed herein on **22 February 2021** in respect of the 1st application, **Mr. Amihanda** furnished the background to this application and pointed out that, following the ruling of the Court dated **29 October 2020,** counsel for the applicant moved with haste and obtained the necessary consent to come on record and file the instant application. He proposed the following issues for determination:

[a] Whether the firm of **M/s Kimondo Gachoka & Company Advocates** is properly on record for the applicant;

[b] Whether the Warrants of Attachment issued on **2 June 2020** had expired when the respondent moved to attach the applicant's **Motor Vehicles Registration No. KCJ 806X** and **KCJ 814C;**

[c] Whether the respondent was issued with fresh warrants and/or extended warrants;

[d] Whether the Judgment entered herein against the applicant on **4 December 2019** should be set aside to enable the Court determine the appeal on merit;

[e] Whether substantial loss shall be visited upon the applicant if the orders sought are not granted;

[f] Whether the application was brought without undue delay.

[10] In respect of the issue of legal representation, counsel pointed out that, in compliance with the ruling of the Court dated **29 October 2020,** compliance was duly had with the requirements of **Order 5 Rule 9** of the **Civil Procedure Rules** in that a consent, duly signed between the outgoing and the incoming counsel, was filed herein on **11 November 2020**. He therefore submitted that the issue of representation was thereby settled and that the Court should find as much. On the validity of the Warrants of Attachment dated **2 June 2020**, counsel urged the Court to find that since the said warrants were returnable on **6 August 2020**, the execution levied on the basis thereof was illegal without extension. He relied on **Hatari Security Company Ltd vs. Hamisi Charo & Another** [2019] eKLR in support of his argument.

[11] On whether the Judgment dated **4 December 2019** ought to be set aside, counsel relied (wrongly in my view) on **Order 9 Rule 10** of the **Civil Procedure Rules** and argued that it empowers the Court to set aside an ***ex parte*** judgment. He urged that the impugned judgment be set aside pursuant to that provision. He further urged the Court to find that the applicant was neither served with the Memorandum of Appeal nor the Record of Appeal. He relied on **Pithon Waweru Maina vs. Thuku Mugiria** [1983] eKLR; K**imani vs. McConnel** [1966] E.A. 547; **Law Society of Kenya vs. Martin Day & 3 Others** and **Elizabeth Kavere & Another vs. Lilian Atho & Another** [2020] eKLR to underscore his submission that the discretion to set aside a default judgment is unfettered; and that it is intended to be exercised to avoid injustice or hardship especially where the omission is as a result of inadvertence or excusable mistake.

[12] Lastly, it was submitted on behalf of the applicant that it has been subjected to undue prejudice by reason of the wrongful attachment of its motor vehicles. The applicant further urged the Court to note that it promptly settled the decretal sum passed by the trial court; and that it was unaware of the appeal or the default judgment dated **4 December 2019**. Counsel accordingly urged the Court to exercise its discretion in the applicant's favour by allowing the application and granting the orders prayed for therein.

[13] In response to the applicant's written submissions, **Mr. Omusundi**, learned counsel for the respondent reiterated his posturing that the firm of **M/s Kimondo Gachoka & Company Advocates** is not properly on record and consequently the application dated **11 November 2020** is similarly incompetent, just as the applicant's earlier application dated **19 June 2020,** which was struck out for the same reason. He accordingly urged for the striking out of the instant application for having been filed in abuse of the process of the Court. He relied on **John Langat vs. Kipkemoi Terer & 2 Others** [2013] eKLR and **S.K. Tarwadi vs. Veronica Muehlemann** [2019] eKLR for the proposition that even where a consent is filed, an application would still have to be made and a court order obtained sanctioning the change; and that a consent between the outgoing and the incoming advocates is insufficient and cannot stand without a court order granting leave for the change pursuant to **Order 9 Rule 9** of the **Civil Procedure Rules.**

[14] On the merits of the application, **Mr. Omusundi** submitted that the appeal was lawfully instituted and prosecuted with the full knowledge of the applicant; and that the mere fact that the lower court's decree was satisfied is no bar to this appeal. Counsel further pointed out that, at no time did the applicant raise the issue of settlement in this appeal. He also urged the Court to note that no appeal has been filed against the Judgment of **4 December 2019**; and therefore that the Court is *functus officio* herein. He posited that, in the circumstances hereof, the only other option would have been an application for review under **Order 45 Rule 1(1)** of the **Civil Procedure Rules**; which the instant application is not. Accordingly, **Mr. Omusundi** urged the Court to find that the application dated **11 November 2020** is for dismissal with costs.

[15] I have carefully considered the application in the light of the grounds and averments raised in support thereof in the applicant's Supporting Affidavit. I have likewise considered the written submissions filed by learned counsel and the useful authorities relied on by them. The issues arising for determination, in broad strokes, are:

[a] Whether the firm of **M/s Kimondo Gachoka & Company Advocates** is properly on record for the applicant;

[b] Whether the attachment of the applicant's **Motor Vehicles Registration No. KCJ 806X** and **KCJ 814C** was lawful.

[d] Whether sufficient cause has been shown for the Judgment entered herein against the applicant on **4 December 2019** to be set aside to pave way for the hearing and determination of the appeal on merit.

[16] As has been pointed out herein above, the applicant's initial application for the setting aside of the Judgment dated **4 December 2019** was struck out on **29 October 2020** on the ground that it was filed by the firm of **Kimondo Gachoka & Company Advocates**; a firm that was not properly on record in this matter. This took into account that the applicant was represented before the lower court by the firm of **Kairu & McCourt Advocates.** By dint of **Order 9 Rule 5** of the **Civil Procedure Rules,** it is the latter firm that was deemed the lawfully appointed advocates to handle the appeal and any applications arising therein.

[17] It is common ground that the applicant's counsel filed a consent letter dated **2 November 2020** pursuant to **Order 9 Rule 9(b)** of the **Civil Procedure Rules** in the following terms:

"We the Advocates for the Parties herein should be most obliged if you would record the following Orders:

…

"BY CONSENT, the firm of Kimondo Gachoka & Company Advocates is hereby granted leave to come on record for the Defendant in place of Kairu & McCourt Advocates.

…"

[18] There is no indication on the record that this consent was ever adopted as an order of the Court before the subject application was filed. This is significant because **Order 9 Rule 9** of the **Civil Procedure Rules,** peremptorily states that:

"Where there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

a) Upon an application with notice to all the parties; or

b) **Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intended to act in person as the case may be."** (emphasis added)

[19] Thus, although the subject consent was filed along with the instant application dated **11 November 2020**, that, of itself, is insufficient for purposes of compliance with **Order 9 Rule 9** aforementioned, in so far as there is, thus far, no order of the Court approving the change. Hence, I would agree with the position taken by **Hon. Muchelule, J.** in **John Langat vs. Kipkemoi Terer & 2 Others** (supra) in which the learned judge held that:

"There was no application made to change advocates. In the replying affidavit, the appellant swore that there was a consent entered into between his previous advocates and his present advocate to effect change. This was done following the judgment. He annexed the said consent. There is no evidence that the respondents were put in the picture. But more important, the consent could not effect the change of advocates "without an order of the court." No such order was sought or obtained. It follows, and I agree with Mr. Theuri and Mr. Nyamweya, that Anyoka & Associates are not properly on record for the appellant, and therefore the appeal and the application are incompetent."

[20] Likewise, in **S.K. Tarwadi vs. Veronica Muehlemann** (supra), **Hon. Korir, J.** followed **John Langat vs. Kepkemoi Terer & 2 Others** and held that:

"Indeed Order 9 does not foresee how Rule 9 can be sidestepped hence the enactment of Rule 10 as follows:

> **"An application under rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first."**

The excuse by the applicant that his advocate was in a hurry to ask for extension of time in order to comply with the conditions in the ruling of 30th June, 2017 and could therefore not comply with the requirements of Order 9 Rule 9 CPR is therefore without merit. The Applicant's new advocate was allowed by Rule 10 to apply for extension of time to comply with the conditions of the trial court and at the same time comply with the requirements of Rule 9.

Even after the anomaly was drawn to the Applicant through the ruling of 13th February, 2018, he has neglected to make amends. He continues to act in total disregard of the rules and expect the court to act in support of such impunity. That will not happen. Had he moved to redress the failure to comply with Rule 9, I would have exercised discretion in is favour for it is the duty of the courts to dispense substantive justice. He has not taken any action. I will thus proceed to strike out the instant application for being incompetent…"

[21] It is therefore manifest that the firm of **Kimondo Gachoka & Company Advocates** continued to act presumptuously by filing the application dated **11 November 2020** before the proposed change was sanctioned by the Court. Counsel proceeded to prosecute the said application without seeing to it that the consent was adopted as an order of the Court and the change sanctioned upfront before the application could be disposed of. The result is inevitable; namely that the application dated **11 November 2020** is incompetent and, consequently, undeserving of a merit consideration. It is hereby struck out with an order that the costs thereof be costs in the cause.

[22] The 2nd application dated **1 March 2021**, is expressed to have been filed pursuant to **Sections 1A, 1B and 3A** of the **Civil Procedure Act** and **Orders 1 Rule 10(2), Order 51 Rule 1, Part III** of the **Auctioneers Rules** and **Rule 55 (1), (2) and (3)** of the **Auctioneers Rules**. It seeks orders that:

[a] Spent

[b] Leave be granted to **Kennedy Shikuku T/A Eshikoni Auctioneers** to be enjoined as an interested party in this suit;

[c] Leave be granted to **M/s Mbugua Korir and Company Advocates** to come on record for and on behalf of the applicant/proposed interested party;

[d] The Court do issue an order for payment of the applicant's costs arising out of the warrants of attachment issued herein which **have been duly executed by the applicant;**

[e] The Court do stay the release of the attached motor vehicles on running attachment pending the hearing and determination of the application;

[f] The costs of the application be provided for.

[23] The application was premised on the grounds that, in execution of the Warrants of Attachment and Sale issued herein, the applicant proceeded to attach two motor vehicles belonging to the Respondent in this appeal, namely, **Matunda Bus Services**; and that, since **17 November 2020** when the attachment was levied, the applicant has been incurring storage charges of **Kshs. 500/=** per day; such that, by **12 February 2021** when an order was made herein that the two motor vehicles be released on running attachment, an amount of **Kshs. 106,000/=** was due as storage charges to **Femfa Storage Yard** in Kitale.

[24] It was therefore the contention of the applicant that, since the issue of his charges was not addressed, he is entitled to joinder as an interested party to ventilate the said issue. He added that the respondent had not reached out to him on the issue of his charges or the storage fees which ought to be paid before the release of the two motor vehicles. Thus, the applicant prayed that orders be made in terms of his prayers as set out in his application dated **1 March 2021**. He annexed to the Supporting Affidavit copies of the Letters of Instruction, Warrant of Attachment, Proclamation dated **3 June 2020** as well as the Invoice from **Femfa Storage Yard** in support of his averments.

[25] The respondent opposed the application, to which end a Replying Affidavit sworn by **Daniel Ng'ang'a** was filed herein on **26 April 2021.** According to the respondent there are no issues between the applicant and the parties to the appeal that would warrant the joinder of the applicant as an interested party to this appeal. The respondent further averred that, since the applicant has already filed **Eldoret High Court Miscellaneous Application No. 21 of 2021** seeking orders for the payment of his charges, the application for joinder is totally unnecessary.

[26] At paragraphs 9 and 21 of the Replying Affidavit, the respondent pointed out that, on **2 March 2021** when the application came up for directions, counsel for the respondent confirmed to the Court that the respondent was willing to meet the storage charges and had already availed a Bank Guarantee for **Kshs. 2,000,000/=** dated **19 February 2021** as security. A copy thereof was annexed to the Replying Affidavit and marked **Annexure 'DN-2'** along with a copy of a letter dated **9 March 2021** to demonstrate the respondent's readiness to pay the storage charges. As for the applicant's charges, the respondent averred that it would be preemptive for a payment order to be made in that regard at this stage, granted that said costs are yet to be agreed on or assessed. It was thus the prayer of the respondent that the application dated **1 March 2021** be dismissed with costs as it was lodged for the ulterior motive of frustrating the it.

[27] On his part, the appellant relied on his Replying Affidavit filed on **16 April 2021**. He expressed support for the said application and averred that due procedure was followed in executing the Warrants of Attachment issued herein. He added that he was aware that no orders of stay were in force as at the time of execution; and therefore that the applicant is entitled to his charges as well as storage charges so far accrued. He accordingly prayed that the application be allowed.

[28] Pursuant to the directions given herein on **14 April 2021**, the 2nd application was, likewise, urged by way of written submissions. **Ms. Mbugua** for the applicant filed her written submissions on **10 May 2021**. She urged the Court to adopt the definition of "interested party" as provided for in the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** and find that the applicant has an identifiable stake in this appeal; and that his joinder will enable the Court to effectually and completely adjudicate upon and settle all questions and issues raised herein. Counsel also relied on **Kenya Medical Laboratory Technicians Board & 6 Others vs. Attorney General & 4 Others** [2017] eKLR to buttress his arguments for joinder.

[29] **Ms. Mbugua** then addressed the Court on why the applicant is entitled to costs and storage charges. She cited **Order 22 Rule 37** of the **Civil Procedure Rules, Rules 7 and 12** of the **Auctioneers Rules, 1997** and the case of **National Industrial Credit Bank Limited vs. S.K. Ndegwa Auctioneer** [2005] eKLR to underscore her submission that the applicant followed the due process as set down by the law; and therefore is entitled to the payment of his charges before release of the attached motor vehicles.

[30] On behalf of the appellant, **Mr. Omusundi** supported **Ms. Mbugua's** argument that the applicant has an identifiable stake herein and that his costs need to be paid before the release of the attached motor vehicles. He urged the Court to adopt a liberal approach in determining the question of joinder of the applicant as an interested party. He relied on **Kisumu HCCC No. 834 of 2005: Omondi Kokore vs. The Town Clerk & Others** in urging the Court to allow the application dated **1 March 2021.**

[31] The respondent's submissions were filed on **10 May 2021** by **Mr. Amihanda**. He proposed the following issues for determination:

[a] Whether there exists any issue for determination by the Court between **Eshikoni Auctioneers** and either the appellant or the respondent to warrant joinder of the applicant;

[b] Whether the firm of **M/s Mbugua Korir & Company Advocates** should be granted leave to come on record for the applicant;

[c] Whether the Court should stay the release of the attached motor vehicles pending the hearing and determination of the application;

[d] Whether the Auctioneer's charges should be provided for before the determination of the matter;

[e] Whether there is a parallel application seeking similar orders and whether the instant application is otherwise an abuse of the court process.

[32] **Mr. Amihanda** submitted that the application for joinder is premised on the sole ground the storage charges need to be paid before the

attached motor vehicles can be released. He pointed out that since the storage charges are due to a third party, namely, **Femfa Storage Yard,** there is no justification for joinder of the applicant to this appeal. He further submitted that since the auctioneer's charges will only be due at the conclusion of the appeal, it is equally pointless having the applicant enjoined to ventilate an issue that is yet to ripen for consideration. He urged the view that, in the circumstances, the Court would be acting in vain by permitting the joinder of the applicant as an interested party.

[33] In the alternative, the respondent was of the view that, since the applicant has already filed **Eldoret High Court Miscellaneous Civil Application No. 21 of 2021** involving the same parties, any issues of concern as to the payment of the Auctioneer's charges ought to be easily agitated therein. Counsel added that an auctioneer's responsibility is simply to execute a court order; and therefore has no interest in the dispute between the parties. He was also of the view that the prayer for leave for the firm of **M/s Mbugua Korir & Company Advocates** to come on record for the applicant is likewise unwarranted. He relied on **A M M vs. J M N** [2019] eKLR; **Party of Independent Candidates of Kenya & Another vs. Mutula Kilonzo & 2 Others** [2013] eKLR and **David Kiptum Korir vs. Kenya Commercial Bank & Another** [2021] eKLR among other authorities to bolster his submissions.

[34] I have given careful thought to the application, the averments in the affidavits filed herein in respect thereof as well as the written submission relied on by counsel, including the useful authorities brought to the Court's attention thereby. I entirely agree with the viewpoint taken by **Muriithi, J** in the case of **Brek Sulum Hemed vs. Constituency Development Fund Board & Another [2014] eKLR**, when he observed that:

> **"To be sure there is no procedure under the Civil Procedure Act and Rules for the joinder of interested parties and the practice of application for [by] interested parties must have been developed by necessary implication..."**

[35] Hence, whereas the application is expressed to have been brought pursuant to **Order 1 Rule 10(2)** of the **Civil Procedure Rules**, that provision is explicit that:

> **"The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant or whose presence before the court may be necessary in order to enable the court effectually and completely adjudicate upon and settle all questions** involved in the suit, be added."

[36] The applicant has not sought that he be joined either as an appellant or respondent; or that the name of any of the parties be struck out or any person be joined to the appeal. He consequently urged the Court to find that he has an identifiable stake for purposes of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules,** simply because an order has been made herein for the release of the attached goods. Needless to say that this is an appeal that has been heard to conclusion and a determination made in favour of the appellant on **4 December 2019**. It is at the execution stage; and the applicant is not seeking to have that Judgment re-opened. Whereas the respondent has sought to have the Judgment set aside, it is not the contention of the applicant that he is interested in participating in the proposed re-hearing of the appeal. It is clear to me then that sufficient basis for joinder has not been shown.

[37] Secondly, **Rule 55(2)** of the **Auctioneers Rules** recognizes that:

> **"Where a dispute arises as to the amount of fees payable to an auctioneer—**
>
> **(a) In proceedings before the High Court or**
>
> **(b) Where the value of the property attached or repossessed would bring any proceedings in connection with it within the monetary jurisdiction of the High Court, a registrar, as defined in the Civil Procedure Rules (Cap. 21, Sub. Leg.), may on the application of any party to the dispute assess the fees payable."**

[38] Pursuant to the above provision, the applicant filed **Eldoret High Court Miscellaneous Application No. 21 of 2021**, seeking orders, *inter alia*, that:

> [a] Leave be granted to the applicant/auctioneer to tax the auctioneers bill of costs arising out of the execution carried out against the 2nd respondent/defendant **(Matunda Bus Services)** having been instructed by the decree holder.
>
> [b] This Court do give directions on whom, between the 1st respondent and the 2nd respondent, is to pay the auctioneers fees upon taxation.

[39] It is manifest therefore that the applicant has already invoked the proper procedure for agitating the payment of his charges herein; and therefore that it would be superfluous for it to be enjoined to this appeal for that very purpose. Moreover, since the Auctioneer's costs are yet to be ascertained, it is premature for the applicant to seek joinder in this matter simply for the purpose of insisting that its fees, as an auctioneer, be paid before the release of the attached motor vehicles. That kind of approach smacks of abuse of the process of the Court and ought not to be countenanced.

[40] Lastly, and more importantly, the respondent has made manifest its readiness to pay the storage charges owing to **Femfa Storage Yard**. In spite of that, counsel have obstinately insisted on proceeding with the instant application. I can do no better that reiterate the position taken by the Supreme Court in **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others** [2014] eKLR that:

> **"a suit in court is a solemn process, owned solely by the parties. This is why there are laws and Rules, under the Civil**

Procedure Code, regarding Parties to suits, and who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it."

[41] For the foregoing reasons, it is my finding that the 2nd application dated **1 March 2021** is devoid of merit. The same is hereby dismissed with costs.

It is so ordered.

DATED, DELIVERED AND SIGNED AT ELDORET THIS 13TH DAY OF JULY 2021

OLGA SEWE

JUDGE