



REPUBLIC OF KENYA

IN THE HIGH COURT

AT EMBU

CIVIL CASE NO. 62 OF 2006

DAVID NJOMO NJAGI.....PLAINTIFF

VERSUS

ABSOLOM NJAGI RUNDIA.....1ST DEFENDANT

JOHN NJEGA NYAGA.....2ND DEFENDANT

ERASTUS NYAGA ABSOLOM.....3RD DEFENDANT

AND

JANE CATHERINE THIRIKWA (as administrator of the estate of

EAUSTUS NJERU THIRIKWA – DCSD).....OBJECTOR

RULING

A. Introduction

1. This ruling is for the application by the objector herein as to who should be liable to pay costs of the objection proceedings filed in court on 25th November 2015.
2. The gist of this matter is that the plaintiff instructed Quickline Auctioneers to recover the decretal amount herein from the defendants. The Auctioneers proceeded to identify land parcel no. 3 Mufu Market – Kyeni North as being available for attachment.
3. The objector herein successfully filed an application claiming joint ownership over the suit land herein and is entitled to costs. A dispute has since arisen as to who should pay the costs of the objection proceedings.
4. The parties filed submissions in disposal of the matter herein.

B. Applicant's Submissions

5. It is submitted that the plaintiff provided the auctioneers with information concerning the property of the judgement debtors after which the auctioneers carried out due diligence and established that the suit land belonged to the judgement debtor.
6. The plaintiff submit that they had nothing to do with the information available to the auctioneers and as such they cannot be held liable for the costs of the objection.

C. Objector's Submissions

7. It is submitted that the plaintiff and his agent, quickline auctioneers are liable to pay costs of the objection as it was not the objector's fault that the auctioneer advertised the suit land for sale without making any due diligence as to the ownership.

D. Analysis & Determination

8. Section 27 of the Civil Procedure Act, states as follows;

“subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court of judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers; Provided that, the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”(emphasis mine).

9. In the instant case, I note that, the plaintiff instructed Quickline Auctioneers to recover the decretal amount herein from the defendants. The Auctioneers proceeded to identify land parcel no. 3 Mufu Market – Kyeni North as being available for attachment. The objector herein successfully filed an application claiming joint ownership over the suit land herein and was awarded costs.

10. The costs in issue herein relate to proclamation for attachment by the auctioneer in regard to LR. Kyeni/Mufu/2997. The property was advertised for sale in regard to the decretal of over Kshs. 700,000/= in HCCC No. 62 of 2006 between the plaintiff and the defendant herein.

11. An objection was filed by one Catherine Thirikwa in her capacity as one of the administrators in the estate of Eustace Daudi Njeru who was one of the proprietors of Plot No. 3 Mufu Market the plot alongside Njega Gakoromori, Eustace Njeru Thirikwa, Emilio Njeru the 1st and 3rd defendant. The objector claimed legal and equitable interest as an administrator of the estate.

12. The plaintiff did not proceed with the sale of the property after the objection was filed having recognised the interest of the objector. The only issue that arose was that of who was to pay for the costs of the objection.

13. From the submissions of the plaintiff, it is argued that the plaintiff identified two properties LR. Kyeni/Mufu/612 and 775 for attachment. However, the auctioneers proceeded to proclaim Plot No. 3 Mufu Market as opposed to the instructions of the plaintiff without informing the objector. It is argued that the plaintiff should not be held liable for the costs of the objection.

14. The objector on the other hand argued that the auctioneer was an agent of the plaintiff and that the plaintiff and the auctioneer ought to pay the costs of the objector.

15. I am in agreement with the objector that the plaintiff was the principal in the attachment of the property to realise the decretal amount against the defendants he appointed Quickline auctioneers to the Deputy Registrar High Court of Kenya Embu and copied to the plaintiff stating in part: -

“Take notice that while in the process of execution, we noted that the only property belonging to the judgment debtor jointly is Plot No.3 Mufu Market which was also the subject matter thereof.”

16. The auctioneers in their letter said they were replying on a transfer form already endorsed by the town clerk Runyenjes Municipal Council and further stated he had confirmed from the parties that the plot was right for sale. It later turned out that the plot was jointly owned by the 1st and 3rd defendant and three other people who are not parties in this case, one of them deceased.

17. The issue here is to blame for the said wrongful proclamation and advertisement that gave rise to the objection proceedings. The plaintiff’s advocate upon receiving the auctioneers letter did not move to conduct due diligence as required being the principal in the attachment process. It is the duty of the instructing client, in this case to conduct due diligence and the plaintiff was bound to do so in regard to the newly discovered property. He failed to do so.

18. The auctioneer after being instructed by the plaintiff must do his part of conducting due diligence to ensure he is advertising for sale the right property as regards ownership. In this case Quickline Auctioneers relied on a transfer form which is not proof of proprietorship. The auctioneer also failed to fulfil his obligation.

19. However, this court will not involve itself in the matters of the plaintiff and the auctioneer. The main concern herein is who should pay the costs of the objector.

20. I am of the considered opinion that the costs of the objector should be paid by the plaintiff for reasons given in this ruling and I hereby so order.

21. The plaintiff and the auctioneer will meet their own costs in this objection.

22. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 21ST DAY OF JANUARY, 2020.

F. MUCHEMI

JUDGE

In the presence of: -

Mr. Kassim for Momanyi for Plaintiff

Ms. Wangari for Ms. Muthoni for Defendant