



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

MISC. CIVIL APPLICATION NO. 166B OF 2014

MORGAN OMUSUNDI P/A MORGAN OMUSUNDI LAW FIRM.....APPLICANT

-VERSUS-

LOISE KIBOR T/A LOYSONS INVESTMENT LIMITED.....RESPONDENT

RULING

[1] This matter was commenced on **8 April 2015** at the instance of **Morgan Omusundi Law Firm** (hereinafter, “the Applicant”) by way of the Notice of Motion dated **31 March 2015**. The application was filed under **Section 51(2)** of the **Advocates Act, Chapter 16** of the **Laws of Kenya**, and **Order 51 Rule 1** of the **Civil Procedure Rules, 2010**, for orders that the Certificate of Taxation of the Applicant’s costs in the sum of **Kshs. 394,115/=** be adopted as the Judgment and Decree of the Court, and that the costs of the application be provided for. That application was heard and allowed on **9 May 2017**.

[2] Thereafter, on **13 July 2017**, the Respondent, **Loise Kibor T/A Loysons Investment Limited**, filed an application herein dated **12 July 2017** against the Applicant under **Article 50** of the **Constitution of Kenya**, **Sections 3A and 63(e)** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya**; **Order 22 Rule 6 and 22**; **Order 50 Rule 6** and **Order 51 Rule 1** of the **Civil Procedure Rules**, as well as **Rule 11(1)** of the **Advocates (Remuneration) Order, 2014**, for orders that:

[a] Spent

[b] Spent

[c] The Warrants of Attachment and Sale issued herein to **Eshikoni Auctioneers** be set aside;

[d] **Eshikoni Auctioneers** be directed to forthwith release **Motor Vehicle Registration No. KBU 908A**, Ford Ranger to the Respondent/Applicant unconditionally;

[e] The Court be pleased to enlarge time within which to file an objection to the decision of the Taxing Officer herein by a period of 14 days from the date of the Order;

[f] The costs of the application be borne by the Applicant.

[3] In support of the application, it was averred that the Applicant and the Respondent were Advocate and Client in respect of **Eldoret CMCC No. 500 of 2014**, wherein the Respondent had instructed the Applicant to obtain injunctive orders to forestall the attachment of the Respondent’s motor vehicle over a debt of **Kshs. 3,000,000/=** owed by the Respondent to **Family Bank (the Bank)**. The Respondent further averred that the case was subsequently mutually compromised after the Bank obtained the funds from her account; and that it was only when **Eshikhoni Auctioneers** attached and took away her Motor Vehicle **Registration No. KBU 908A**, make Ford Ranger, that she got to know of the existence of these proceedings.

[4] The Respondent further asserted that, unknown to her, the Applicant had ceased acting for her in the lower court matter on **27 August 2015**; and that most of the notices filed herein were allegedly served by registered post through an address that was inactive from the year **2014 to 2017**; yet the Applicant was well aware of her physical address in Eldoret Town. She expressed her desire to challenge the *ex parte* taxation of costs, terming the amount of **Kshs. 394,115/=** as highly exorbitant for instructions to stop an intended sale of a lorry; particularly because the matter was resolved by consent within 3 weeks. It was therefore the Respondent’s contention that, unless the orders of stay of execution are granted, she risks suffering the loss of her motor vehicle by way of a public auction in the interim.

[5] In support of the application, the Respondent relied on her own affidavit, sworn on **12 July 2017**, wherein she reiterated her assertion that at no time did the Applicant notify her of his intention to cease acting for her. She particularly took issue with the fact that the Applicant purported to serve process on her by registered post, yet he knew her physical address as well as telephone contact. The Respondent further refuted the averments by **Robert Omenge**, a Process Server who is alleged to have served her with court documents on **19 April 2017**; contending that she was then busy campaigning for nomination as a candidate for the Women Representative position in the 2017 General Elections, which nomination was due on the **21 April 2017**; and that at no time did she step into **Sirikwa Hotel** as alleged.

[6] In response to the application, the Applicant relied on his Replying Affidavit sworn on **2 August 2017** and filed on **29 August 2017**. His basic contention was that the Respondent was duly served with the Notice of Taxation and his Bill of Costs; and therefore, that the taxation of his Bill of Costs and the ensuing Judgment were procedurally and properly done and entered. He added that it was upon failure by the Respondent to pay the taxed costs that **M/s Eshikhoni Auctioneers** were instructed to attach the Respondent's **Motor Vehicle Registration No. KBU 863N**; and that no useful purpose will be served by setting aside the attachment.

[7] The court record shows that, while the Respondent's application remained unprosecuted, **Kennedy Shikuku T/A Eshikhoni Auctioneers**, moved the Court vide his application dated **23 January 2019** (hereinafter, "**the second application**") for the following orders:

[a] That leave be granted to him to tax his Bill of Costs arising out of the execution carried out against the Respondent, who he cited as the 2nd Respondent in his application;

[b] That he be permitted by the Court to sell the **Motor Vehicle Registration No. KBU 908A**, Ford Ranger, to recover his fees plus storage charges;

[c] That the costs of the application be awarded to him.

[8] The second application was premised on the grounds that **Eshikhoni Auctioneers** (the Auctioneers), were instructed to recover taxed costs of **Kshs. 394,115/=** by **Mr. Morgan Omusundi T/A Morgan Omusundi Law Firm**, cited as the 1st Respondent in the second application; and that, as a matter of procedure, he proclaimed and attached the Respondent's **Motor Vehicle Registration No KBU 908A**, Ford Ranger pickup. He was thereafter served with an Order staying further execution dated **20 July 2017**; but that the Respondent has never bothered to prosecute the application to conclusion or settle the decretal sum or his costs.

[9] The Applicant opposed the 2nd application and, to that end, relied on his Replying Affidavit sworn on **16 April 2019**. He averred therein that the subject motor vehicle was attached by the Auctioneers for the sole purpose of recovering his costs; and that should they be allowed to sell the same to recover their costs, he will be left without any security for the due performance of his decree. He further averred that this is not the right forum for the Auctioneers to tax their costs; and that a separate cause ought to have been filed before the Deputy Registrar or the Magistrate's Court for that purpose.

[10] On the **25 June 2019**, directions were given herein that the two applications be disposed of simultaneously by way of written submissions. In respect of the 1st application dated **12 July 2019**, there appears to be no written submissions filed by the Respondent. The Applicant on his part took the position, vide the written submissions dated **4 July 2019**, that since there was no dispute as to the retainer, no useful purpose will be served in setting aside the taxation. Counsel further pointed out that the taxing officer was satisfied about service before proceeding with the taxation *ex parte*; and that in any event, the period for raising an objection to the taxation had lapsed by the time the 1st application was filed. It was therefore the submission of Counsel for the Applicant that the Court has no jurisdiction to grant the orders sought on account of effluxion of time.

[11] I have carefully considered the grounds upon which the 1st application was premised, as well as the averments set out in the Supporting Affidavit and the pertinent written submissions. It is manifest that prayers 1 and 2 thereof are already spent while prayer 3 has been overtaken by events, in that the attachment had already been levied on the strength of the warrants of attachment and sale by the time the application was filed. Hence, the only outstanding issue is the question whether a case has been made for enlargement of time to file a reference, in terms of prayer 5 of the Notice of Motion dated **12 July 2017**.

[12] Paragraph 11 of the **Advocates (Remuneration) Order**, recognizes that:

"(1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

(2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.

(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.

(4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) of subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired."

[13] A perusal of the record shows that the application for taxation of the Advocate/Client Bill of Costs was filed herein on **24 November**

2014; and that the matter proceeded *ex parte* on **17 February 2015**, whereupon a Certificate of Taxation was issued on **31 March 2015**. The Applicant thereafter applied for Judgment on the strength of the Certificate of Taxation, which application was, likewise, granted *ex parte* on **9 May 2017** by **Hon. Githua, J.** upon being satisfied that the Respondent was duly served. There is, therefore no question that the instant application was filed way out of time, from the standpoint of **Paragraph 11(1)** of the **Advocates Remuneration Order**; and therefore the question to pose is whether a plausible explanation has been proffered for the delay between **17 February 2015**, when the ruling on taxation was made, and **12 July 2017** when the instant application was filed.

[14] At paragraphs 6-16 of the Respondent's Supporting Affidavit, she explained that she never received any notice of the taxation and that it was upon the attachment of her motor vehicle by **Eshikoni Auctioneers** on **5 June 2017** that she learnt of the existence of these proceedings. While conceding that the documents were served by way of registered post to her address, the Respondent took the position that the said address was inactive at the time and that the Applicant ought to have effected personal service on her instead. She further denied that she was served by **Robert Omenge** as averred in the Affidavit of Service sworn on **9 May 2017**.

[15] Having given careful consideration to the explanation offered by the Respondent for the delay, I am far from convinced that the explanation is tenable. This is because the record shows that in both instances when the proceedings herein were conducted *ex parte*, the Court was satisfied that the Respondent had been duly served; and there is no reason for me to come to a different conclusion. Indeed, the record shows that between **14 June 2015** and **14 March 2017**, the matter could not proceed basically because previous attempts to serve the Respondent had been futile. Thus, the Court only proceeded on **9 May 2017** upon being satisfied, vide the Affidavit of Service sworn by **Robert Omenge**, that the Respondent had been duly served. It is also noteworthy that the Respondent did acknowledge that most of the documents were served on her through her postal address; It is instructive that one of the reasons why the Applicant applied for leave to cease acting for the Respondent was that she had failed and or neglected to attend court whenever her attendance was required.

[16] In the premises, I am far from satisfied that a plausible explanation has been given by the Respondent to account for her failure to accord with the strictures of **Paragraph 11(1) and (2)** of the **Advocates Remuneration Order**. That being my view, the application dated **12 July 2017** fails and is hereby dismissed with costs.

[17] In respect of the 2nd application dated **23 January 2019**, by which the Auctioneers sought the leave of the Court to have their charges assessed and recovered by way of sale of the attached motor vehicle, reliance was placed on **Rule 7** of the **Auctioneers Rules, 1997**, which stipulates that the auctioneer's charges are to be paid by the judgment debtor. In support of his written submissions dated **17 September 2019**, Counsel for the Auctioneers relied on **Rule 55(1)** of the **Auctioneers Rules** and **Joseph Gikonyo T/A Garam Investment vs. National Social Security Fund** [2016] eKLR, in urging the Court to allow the 2nd application and in response to the objection raised by the Applicant (cited in the 2nd application as the 1st Respondent).

[18] In response to the submissions by Counsel for the Auctioneers, **Mr. Mwinamo** for the Applicant relied on the Replying Affidavit sworn by the Applicant on **16 April 2019** as well as his written submissions dated **4 July 2019**, contending that the Auctioneers were acting as the agents of the Applicant; and that, since the subject motor vehicle was attached pursuant to the execution of the Judgment on costs entered herein, the Applicant would be left without any security for his judgment. It was further submitted that the Court has no jurisdiction to deliberate on the 2nd application as the proper forum for taxation of the Auctioneers Bill of Costs is at the subordinate court and not at the High Court. Thus, according to Counsel for the Applicant, the Auctioneers' application is premature and ought to be dismissed. He added that the Auctioneers ought to have filed a separate cause of action to recover their costs.

[19] Granted the foregoing, the only issue for determination in the 2nd application is whether the same is competently before this Court. There is no dispute that the Auctioneers were instructed in this matter after Judgment was recorded in favour of the Applicant for his costs. The court record shows that an application for execution was made by the Applicant on **16 May 2017** upon which warrants of attachment and sale were issued on **26 June 2017** in favour of the Auctioneers. In the premises, the Auctioneers are in order in seeking that their charges be ascertained in this cause. This, in my view, is in accord with **Rule 55(2)** of the **Auctioneers Rules**, which states 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 ... may on the application of any party to the dispute assess the fee payable.”

[20] Clearly therefore, the 2nd application is competently before this court. The Auctioneers have expressed valid concerns that the storage charges for the attached motor vehicle may eventually outstrip its value, granted that the attachment was levied way back in **2017**. I am therefore convinced that the 2nd application, dated **23 January 2019**, is meritorious. The same is hereby allowed.

[21] In the result, the orders that commend themselves to this Court, in respect of the two applications, and which I hereby grant are as hereunder:

[a] That leave be and is hereby granted to the Auctioneers to file their charges arising out of the execution carried out against the Respondent, before the Deputy Registrar for assessment;

[b] That the 1st application having been dismissed as aforesaid, the Auctioneers are at liberty to sell the attached **Motor Vehicle Registration No. KBU 908A**, Ford Ranger, not only for the purpose of recovering their charges, but primarily to satisfy the Judgment entered herein in favour of the Applicant;

[c] That the costs of the application to be borne by the Respondent, Judgment Debtor.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 6TH DAY OF FEBRUARY 2020

OLGA SEWE

JUDGE