



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

E.L.C NO. 24 OF 2017

RURAL ELECTRIFICATION AUTHORITY.....APPLICANT/DEFENDANT

VERSUS

JOHN KIRAGU KIMANI.....1ST RESPONDENT/PLAINTIFF

RUTH NDUNGU t/a

KINGPIN AUCTIONEERS.....2ND RESPONDENT

RULING

1. The Application dated the 8/8/2019 seeks the following orders;

a. Spent

b. That the attachment and sale of motor vehicle Reg No KCP 154K Pickup be stayed and the same be forthwith released to the Defendant.

c. Costs of the application.

2. The application is based on the grounds adduced thereto and the Supporting Affidavit of Ms Pauline Sewe, the Legal Officer of the Applicant where she deponed that; The entire decretal amount of Kshs 1,573,444/- as per the warrant of attachment was paid on the 26/7/19 leaving the auctioneers fees which was still subject of negotiations as it was noted to be exorbitant and contra the 4th schedule of the Auctioneers Rules; That the auctioneer was informed of this concern on the 31/7/19; That on the 2/8/19 the Auctioneer accosted the driver of the M/V KCP 154 K without leaving behind any attachment schedule. It termed the actions of the auctioneer illegal and unlawful as by then the decretal amount had been settled. That the Applicant then filed Misc cause No 44 of 2019 with the Auctioneers Licensing Board for taxation of the auctioneer's fees. That it later learnt through its Advocates on record that the said auctioneer had been paid all the auctioneers fees in full which it faults the auctioneer and the 1st respondent for collusion as the payment is not supported by the Auctioneers Act. That their actions are geared at defeating the taxation of the auctioneer's fees which is pending at the Auctioneers Licensing Board.

3. The application is opposed by the 1st Respondent through the Replying Affidavit sworn by Mwangi Chege on the 17/9/2019. He deponed that Judgment was delivered on the 15/11/18 and the bill of costs taxed on the 8/5/19 and the Applicant delayed in settling the decretal amount forcing the 1st Respondent to apply for execution of the decree which was issued on the 15/7/19 to Kingpin Auctioneers. By the power vested by the Court, the Auctioneer proceeded on the 18/7/19 to attach several assets of the Applicant in satisfaction of the decretal amount, which assets included M/V KCP 154K. On the 26/7/19 the Applicant settled the decretal amount less the auctioneer's fees and charges. On the request of the auctioneer the 1st Respondent paid to the auctioneers its fees in the sum of Kshs 147,056/- in cash pending reimbursement upon sale of the attached items. The 1st respondent averred that it was not party to the attachment of the motor vehicle and no relief has been sought from it in the Notice of Motion.

4. The 2nd Respondent opposed the application through the Replying Affidavit of Ruth Ndung'u, the auctioneer in this case. She deponed that she was issued with the warrants of attachment on the 15/7/19 and proceeded to proclaim the Applicant's goods on the 18/7/19 after which she pursued the legal officer of the judgement debtor for payment to no avail. The said Legal officer informed her that the decretal amount was paid on the 26/7/19 less her fees and costs, which fees was paid by the 1st Respondent on the 2/8/19 pending reimbursement after the sale of the attached goods, a fact that she disclosed to the Applicants Advocates on record. When no payment was forthcoming, she proceeded to advertise the M/V KCP 154 K for sale on the 10/8/19 which sale took place by public auction on the 16/8/19.

5. Further she contended that she is entitled to payment of the auctioneers fees in accordance with the auctioneers Act and acted in compliance with the Act in selling the attached M/V. She informed the Court that the stay orders issued on the 13/8/19 were served on her on

the 16/8/19 at 4.30 pm when the said M/V was sold at 10.30 am the same day.

6. Except for the Applicant the Respondents did not file any written submissions. The respondents made oral submissions before me in open Court in respect to the application.

7. The Applicant submitted that the goods which were proclaimed by the auctioneer were office goods which excluded the M/V. That if the auctioneer wanted to attach additional assets of the Applicant it was obligated to seek the leave of the Court for permission to attach such other additional property of the Applicant in accordance with Rule 12(2) of the Auctioneers Act. He contended that page 2 of the proclamation dated the 18/7/19 was a forgery as it contained serial No 344 similar to page one which contained the office goods and without the m/v. That page 2 of the proclamation falsely introduced the M/V which was not there in the first place.

8. Further the Applicant argued that in any event the decretal amount had been settled on the 26/7/19 and therefore the attachment of the M/V was illegal as the decretal amount had long been satisfied. That the auctioneer's fees were a subject of the Misc. Cause No 44 of 2019 filed on the 31/7/19 before the Auctioneers Licensing Board, which was in the knowledge of the auctioneer. That the auctioneer's fees were not contained in the warrant of attachment and therefore could not have been part of the decretal amount. It concluded that the no sale of the M/V could have lawfully taken place in the circumstances. It faulted that advertisement because no decretal amount was outstanding. The alleged sale on the 16/7/19 was illegal as it was not done within 7 days as mandated by Rule 12 (1) (f) of the Auctioneers Rules. That the proceeds of the sale of the M/V have not been remitted to the 1st respondent's counsel or the Court in compliance with Rule 18(4) of the Auctioneers Rules, 1997.

9. The Respondents relied and reiterated their Replying Affidavits on record and reiterated the same.

Analysis and determination

10. There are two issues for determination in my view. Firstly, whether this is the right forum for this application and secondly whether the orders can be granted by this Court.

11. The gist of the application is for orders of stay of the attachment of the M/V Reg No KCP 154K Pickup be stayed and the same be forthwith released to the Defendant.

12. The background leading to the filing of this application is that judgement was delivered in this case on the 15/11/18 in favour of the Plaintiff (judgment creditor). On the 13/6/19 a formal decree was issued by the Court. On the 12/7/19 an application for execution was filed before the Court against the judgement debtor. The mode of execution was disclosed to be by issue of warrants of attachment and sale of the Defendants movable assets to satisfy the decree to be executed by Kingpin Auctioneers. On the 15/7/2019 the Court issued a warrant of attachment of movable property in execution of decree for money in the sum of Kshs 1,573,444/-. On the 18/7/19 the auctioneer proclaimed office goods at the judgment debtors office at Kawi House as well as the 5 motor vehicles in satisfaction of the decretal amount. The said proclamation is endorsed by the legal officer of the Judgment debtor.

13. Simultaneously the auctioneer raised a fee note on the 18/7/19 in the sum of Kshs 184,780/- which was later amended to Kshs 147,056/- on the 2/8/19.

14. The undisputed evidence on record is that the decretal amount was paid on the 26/7/19. This has been commonly acknowledged by all the parties.

15. It is commonly agreed by the parties that the full decretal amount was paid to the judgement creditor through its Advocates on record. It would appear that the decretal amount was paid less the auctioneers fees.

16. On the 2/8/19 the judgement creditor paid the auctioneer the sum of Kshs 147,056/- being fees with instruction to recover the same from the decretal amount as per the warrants and reimburse it to them. This amount was duly acknowledged by the auctioneer.

17. Order 22 Rule 1 provides as follows;

“All money payable under a decree or order shall be paid as follows— (a) into the Court whose duty it is to execute the decree; (b) direct to the decree-holder; or (c) otherwise as the Court which made the decree directs”

18. To the extent that the decretal amount was paid directly to the judgement debtor in full the decree was fully satisfied and that signaled the conclusion of execution of the decree in this case. It is further opined that on matters regarding the judgments and process of execution, this suit having declared itself on the Plaintiff's and Defendants' rights over the suit properties lands and the parties having no issue on execution of the decree the Court is functus officio.

19. The bone of contention by the Applicant is that the attachment of the motor vehicle is illegal for the reason that there was no proclamation of the same, the decretal amount had been paid in full. That if it was in respect to the auctioneers fees the same had been found excessive and not drawn to scale in accordance with the 4th schedule of the Auctioneers Act and a Misc cause No 44 of 2019 was pending for determination at the Auctioneers Licensing Board for taxation of the fees.

20. Further that there could be no sale on 16/8/19 since the first day is not to be counted and the date of advertisement is to be excluded as well. That the auctioneer has not remitted the proceeds of sale to the Court. That the motor vehicle was also attached after the decretal sum was paid, the Plaintiff's Advocate's earlier instructions to attach were illegal, there were also letters to the auctioneers over intention to file complaints at the Auctioneers licensing board in respect to the fees and therefore attachment and sale could/should not be done.

21. In answer to the issue whether or not a proclamation was made the record speaks for itself as alluded to earlier that the auctioneer did indeed proclaim on 5 vehicles one of which is M/V Reg No KCP 154K.
22. It is not in dispute that the auctioneer's fee was not paid. The Auctioneers rules provides that ;
- “Except as may be provided by any other written law or by contract, the fees set out in the Fourth Schedule payable to the auctioneer for the attachment, repossession and sale of moveable and immovable property under Court warrants or letters of instructions shall be charged in accordance with these rules.”
23. Rule 7 of the Auctioneers rules provide that a debtor shall pay the charges of the auctioneer unless a. the debtor cannot be found, b. it has no goods upon which execution can be levied or c. the sale proceeds are insufficient to cover the charges in which the creditor shall pay the charges or deficiency thereof.
24. In the case of **Joseph Nganga & 2 others Vs Lawrence Muriungi Gichunge & Anor Misc Application No 45 of 2012**, the Court held that the judgement is legally bound to settle the decretal sum and the consequent execution costs which include the auctioneer's fees.
25. The 2nd Respondent has led uncontroverted evidence that following the failure by the judgement debtor to pay its auctioneers fees, it proceeded to advertise the motor vehicle. The advertisement was carried on the 10/8/19 on the Star Newspapers showing that the M/V was to be sold by public auction on the 16/8/19. The auctioneer in support of the sale has annexed the said advertisement and the receipt of purchase price dated the 16/8/19 in the sum of Kshs 800,000/- received in cash from one Dominic Ndabuai Ndungu, who is said to be the successful bidder in the auction.
26. I have seen the Court orders issued on the 13/8/19 staying the sale of the M/V which orders were admitted to have been served on the Auctioneer on the 16/8/19 at 4.30 pm when the M/V was sold the same day at 10.30 am. The process server vide Affidavit of service dated the 4/9/19 deponed that he served the said Court order on the auctioneer on the 19/8/19, 3 days after the m/v had been sold.
27. As at the time of writing this ruling the said M/V has been sold by public auction contrary to the submissions of the Applicant that the said M/V has not been sold. No evidence was adduced by the Applicant to support a contrary position.
28. It follows that the Auctioneer was legally right in pursuing her fees and charges. The matters raised by the application are issues relating to a dispute in respect to payment of the auctioneer's fees which are dealt with in accordance to the rules and procedure provided in the Auctioneers Act.
29. To the extent that the Applicants claim is for recovery of its motor vehicle, this is a new cause of action which should be brought in the right forum .The rights and liabilities of the Defendant against the auctioneer will be determined in that forum too .That forum will also resolve whether property in the motor vehicle passed to the 3rd party as per receipts attached in the auctioneers responses.
30. These are matters that are outside the jurisdiction of this Court and indeed form an independent cause of action which has no nexus to the suit herein. The Court finds that the application to the extent that it is filed in this Court is incompetent and must fail.
31. Further the application in my view is overtaken by events in view of the fact that what is sought to be stayed has been sold in a public auction. The vehicle is now in the hands of a 3rd party who is not a party to this application.

32. The application fails and is dismissed with costs to the respondents.

33. **It is so ordered.**

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 16TH DAY OF JANUARY 2020

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of;

Plaintiff/Respondent: Absent

Wahome Gikonyo for the Defendant/Applicant

2nd Respondent: Absent

Irene and Kuyiyaki, Court Assistants