



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei J

CIVIL APPEAL NO. 1 OF 2018

NICHOLAS MWAKA.....APPELLANT

VERSUS

CAROLINE NTHENYARESPONDENT

AND

JAMES KIMANI NDIRANGU T/A

CASH GATE AUCTIONEERS.....INTENDED INTERESTED PARTY

RULING

1. The ruling relates to the application dated 19.12.2019 and filed in court on 20.12.2019. The applicant approached the court vide certificate of urgency and notice of motion that was brought under Order 1 Rule 10(2), Order 45 Rule 1 and Order 40 Rule 6 of the Civil Procedure Rules, 2010, Section 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the law seeking the following orders;

a) *Spent.*

b) *THAT leave be granted to the applicant to be enjoined in this suit as an interested party*

c) *THAT the orders made on the 5th December, 2018 by this honorable court be reviewed and set aside as to where is (sic) prejudicial to the parties involved.*

d) *THAT the costs of this application be in the cause*

e) *Any other orders with leave of court.*

2. The grounds of the application were indicated in the face of the notice of motion as well the supporting affidavit sworn on 19.12.2019 by **James Kimani Ndirangu** who is stated to be an auctioneer executing Machakos Law court warrants of attachment and sale in PMCC 132 & 133 of 2010 that has now become HCCA 1 of 2018. It was averred that the deponent proclaimed the attachable goods of the appellant on 22.11.2018 for the recovery of Kshs 1,074,057.00. It was averred that he deponent on 6.12.2018 procured the services of security officers and hired labourers to seize the proclaimed goods whereupon Kshs 195,000/- was spent. The deponent averred that he carried out partial physical removal of the proclaimed goods and as he was about to load the same, he was served with stay orders dated 15.12.2019. It was pointed out that the storage of the goods had accumulated storage charges and the deponent sought directions on how to ventilate this issue. The deponent pointed out that he was guided by Rule 8(2) of the Auctioneers Rules for the court to allow the sale of the removed goods to mitigate loss through waste.

3. In reply to the application was an affidavit deponed by Nicholas Mwaka on 5.6.2020. It was averred that the orders in Civil Appeal 1 of 2018 lapsed and were superseded by the orders granted on 18.7.2019. It was pointed out that the auctioneer/applicant did not proclaim the goods within 14 days indicated in the notice and that the 14 days lapsed on 6.12.2018. The deponent admitted paying the auctioneer Kshs 150,000/- towards his costs and that the auctioneer proceeded to proclaim goods under a dubious decree. It was pointed out that the applicant had not produced receipts to support his claim for expenditure of Kshs 195,000/-. The deponent denied any obligation to pay the applicant his disbursements for execution of his contract with the respondent.

4. On record are grounds of opposition dated 5.6.2020 filed by counsel for the appellant/respondent where it was pointed out that the subject

matter of the application is no longer in existence hence there is no cause of action and that the application ought to be struck out as the same had been overtaken by events.

5. The application was canvassed vide written submissions. It is only the appellant/respondent's submissions that are on record. According to counsel, Order 1 Rule 10(2) of the Civil Procedure Rules did not envision joinder of a stranger to the proceedings for the purpose of challenging an order that was made pursuant to *inter-partes* hearing. It was pointed out that Order 45 Rule 1 did not deal with joinder of parties and that Order 40 Rule 6 dealt with injunctions hence did not empower the court to consider the orders sought by the applicant. It was submitted that the execution of a decree was in 3 stages being proclamation, attachment and then sale and that since the execution process was halted then the goods ought to be returned to the respondent. It was pointed out that there was no decree in existence on 22.12.2017 hence the execution was levied on the basis of falsehood.

6. I have considered the Application and the submissions by counsel. It is my considered opinion that the issue that arises for determination is whether the application has merit.

7. The applicant's case is to the effect that he is a Licensed Auctioneer under the law and was ordered by the lower court to commence execution of the lawful decree in Machakos PMCC 132 & 133 of 2010 that has now become HCCA 1 of 2018. To that end I expected to see Warrants of Attachment and Sale that the court issued for the decretal sum. I have seen the proclamation notice dated 22.11.2018 in respect of a decree that was issued on 22.12.2017 which decree I have not seen. The applicant stated that he partially executed the decree and he incurred fees that he would like reimbursed and that the execution process was frustrated by the orders that were issued in the instant appeal hence the instant application.

12. In respect of prayer (b) in the application, it is trite law that a party cannot have the *locus standi* to address the Court unless and until they are properly on record. The applicant has sought that he be joined as interested party. Case law has posited that for a party to be so enjoined, his presence must be necessary in determining the matter. Hence, the Applicant has to show that the intended interested parties have a stake in the proceedings and his presence will help determine the issues at hand. The mere mention of the interested party does not entitle him to be enjoined as a party to the proceedings. See **Raila Amolo Odinga & Anor v Independent Electoral and Boundaries Commission & 2 Others & Michael Wainaina Mwaura (as Amicus Curiae) [2017] eKLR** and **Trusted Society of Human Rights Alliance v Mumo Matemu & 5 Others SCK Petition No.12 of 2015 (2015) eKLR**.

13. The Black's Law Dictionary 9th Edition, page 1232 defines an interested party as;

"A party who has a recognizable stake (and therefore standing) in the matter"

14. The Black's Law Dictionary, 9th Edition defines a "Necessary Party" as being

"A party who being closely connected to a lawsuit should be included in the case if feasible but whose absence will not require dismissal of proceedings"

8. In the case of **Pravin Bowry v John Ward & Another (2015) eKLR** it was stated the test to be met is whether the applicant has an identifiable interest in the subject matter of the suit.

9. In the case of **Judicial Service Commission v Speaker of the National Assembly & Another (2013) eKLR**, the court rendered itself on the aspect of an interested party thus;

"From the foregoing it is clear that an interested party as opposed to an amicus curiae or a friend of the court may not be wholly indifferent to the outcome of the proceedings in question. He is a person with an identifiable stake or legal interest in the proceedings hence may not be said to be wholly non partisan as he is likely to urge the court to make a determination favourable to his stake in the proceedings."

10. Does the applicant have a legal and identifiable interest in this case? Will he in any way be affected by the decision of the Court when it is made either way as the question of whether or not the trial court erred in its decision? The answer is a resounding no. I therefore decline to grant prayer 2 in the application.

11. More related to the applicant's gravamen is Rules 7 and Rule 55 of the Auctioneers Rule, 1997. The fees chargeable to an Auctioneer are provided for under Part II of the FOURTH SCHEDULE.

12. Rules 7 and 55 of the Auctioneers Act provide as follows: -

"7. Payment of auctioneer's charges

A debtor shall pay the charges of the auctioneer unless—

(a) that debtor cannot be found; or

(b) he has no goods upon which execution can be levied; or

(c) the sale proceeds are insufficient to cover the charges,

in which cases the creditor shall pay the charges or the deficiency thereof.

Rule 55 Fees and disbursements payable to an auctioneer

(1) 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 movable and immovable property under court warrants or letters of instructions shall be charged in accordance with these Rules.

(2) 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 fee payable.

(3) In any other case where a dispute arises as to the amount of fees payable to an auctioneer a magistrate or the Board may, on the application of any party to the dispute, assess the fees payable.

(4) An appeal from a decision of a registrar or a magistrate or the Board under subrules (2) and (3) shall be to a judge in chambers.

(5) The memorandum of appeal, by way of chamber summons setting out the grounds of the appeal, shall be filed within 7 days of the decision of the registrar or magistrate.”

13. The input of the above provisions is that Rule 55(3) of the Rules envisages a dispute between the Auctioneer and his client, in this case the respondent- Caroline Nthenya who instructed the auctioneer. Did the applicant demand for payment from his client? The evidence on record does not speak to the same. His concern was that he did not receive payment for the partial proclamation of the goods and seeks that the same be paid hence in his words as per the supporting affidavit, he sought directions from the court.

14. As per the above cited provisions of the Auctioneers Rules, the journey to the realization of his fees and disbursements begin at the debtor and then the magistrate’s court and not this court. His first port of call ought to have been the service of a demand on the debtor and if there was a dispute then he ought to have approached the magistrate’s court that issued the order and not this court. It is only when dissatisfied with the decision of the magistrate’s court that he was to approach this court on appeal or if the pecuniary subject matter of the proclamation was within the jurisdiction of this court. This means that the application is not properly before this court. The applicant’s claim is on his charges as an auctioneer yet this court deals with an appeal in which he has no interest at all. He is advised to approach the trial court as well as engage his client over his claim.

15. In the result it is my finding that the applicant’s application dated 19.12.2019 lacks merit. The same is dismissed with costs to the appellant.

It is so ordered.

Dated and delivered at Machakos this 4th day of November, 2020.

D. K. Kemei

Judge