



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

Coram: D. K. Kemei – J

**MISCELLANEOUS CIVIL APPL. NO. 407 OF 2019**

**JAMES N. KILONZO T/A**

**BASE AUCTIONEERS.....APPLICANT/RESPONDENT**

**VERSUS**

**CHINA WU YI LIMITED.....RESPONDENT/APPLICANT**

**RULING**

1. The Applicant herein filed a Notice of Motion dated 4/02/2020 brought pursuant to Order 51 Rule 1 of the Civil Procedure Rules, section 3A of the Civil procedure Act seeking the following reliefs:-

***(i) Spent.***

***(ii) That for purposes of this application, this Honourable court be pleased to consolidate this matter with Misc. Application Numbers 405 and 406 of 2019 – James N. Kilonzo T/a Base Auctioneers –vs- China Wu Yi limited.***

***(iii) That this Honourable court be pleased to strike out the Bill of Costs dated 30/01/2020 as it is an illegality arising from an illegal process.***

***(iv) That the orders to apply to the above two cases.***

***(v) That costs of the application be provided for.***

2. The application is supported by the affidavit of **Dave Khamala** the Advocate in conduct of the matter on behalf of the Applicant as well as grounds on the face of the application. The Applicant's case is that judgement was entered against the Applicant in Machakos HCC Numbers 52/2014, 53/2014 and 54/2014 on the 21/09/2017 whereupon the Applicant felt aggrieved and sought to appeal against the same. It was further the Applicant's case that it filed an application for stay of execution wherein interim orders were granted on 11/01/2019. It was the Applicant's case that the Respondent proceeded to attach the properties of the Applicant on 14/01/2019. The Applicant contends that the purported attachment is illegal, null and void *ab initio* as there were stay orders in place and therefore the Respondent is not entitled to any payment as costs from the Applicant.

3. The application was opposed by the Respondent. The Respondent vide his replying affidavit sworn on 12/02/2020 wherein he raised several grounds of opposition *inter alia*: that upon receipt of instructions from the decree-holder's advocates they proceeded to apply for warrant of attachment of movable property and warrants of sale which were duly issued by the court on 31/12/2018; that on 14/01/2019 he proceeded to proclaim the Applicant's movable goods and that during the exercise no orders of stay of execution were served upon him until the 21/01/2019; that the stay order was issued on 18/01/2019 and served upon him on 21/01/2019 and hence he is entitled to his costs; that he was not made aware of the stay orders until the 21/01/2019; that he is entitled to be paid for the work done which was a lawful court process; that the application is made in bad faith and meant to deny him his lawful costs.

4. Parties relied upon their rival affidavits. The Respondent's counsel filed some skeletal submissions. It was the submissions of the counsel for the Respondent that the Respondent is entitled to his costs since the proclamation was effected prior to service of the stay orders.

5. I have considered the rival affidavits as well as the skeletal submissions of the Respondent. Certain issues appear not to be in dispute namely:- *that judgement in the three (3) matters was entered against the Applicant on 21/09/2017; that warrants were issued to the Respondent on 31/12/2018 and the execution on 14/01/2019; that the orders of stay that were issued on 18/01/2019 were served upon the Respondent on the 21/01/2019 long after the exercise had been undertaken; that during the execution on 14/01/2019 the Applicant did not*

*furnish or serve the Respondent with any orders of stay; that being the position the issues for determination are firstly whether the Respondent was duly served with the order of stay of execution of the warrants of attachment and secondly whether the application has merit.*

6. As regards the first issue, it is noted that the Respondent filed a comprehensive replying affidavit in which he annexed the copies of warrants of attachment, proclamation and the order of stay of execution which clearly indicated that he received the warrants on 31/12/2018 and carried out the proclamation on 14/01/2019 and was served with order of stay on 21/01/2019. The Applicant did not see it fit to file a further affidavit in rejoinder to the averments by the Respondent. The failure to do so is a clear indication that it is in agreement with those averments. As the order of stay was issued on 18/01/2019 and served upon the Respondent on 21/01/2019 it is clear that the Respondent could not have been aware of the court order as none was served upon him when he carried out the proclamation on 14/01/2019. Even though the order of stay of execution was made by the Honourable Judge on 11/01/2019, the same was only issued by the Deputy Registrar on 18/01/2019. The Respondent only came to know about it on 21/01/2019 when he was served. There is no evidence presented by the Applicant that the order of stay was ever made known to the Respondent prior to or on the 14/01/2019 when the proclamation was carried out. I am therefore satisfied that the Respondent was not served with the order of stay of execution prior to or on the date of the proclamation on the 14/01/2019. The Respondent therefore had proclaimed the Applicants goods lawfully. The Applicant's allegation that the process was illegal holds no substance whatsoever and hence the Respondent is entitled to be paid his costs by the Applicant.

7. As regards the second issue and in view of the foregoing observations, it is my considered view that the Applicants application dated 4/2/2020 lacks merit. The same is dismissed with costs to the Respondent. The parties should now proceed to set down the bill of costs for taxation before the Deputy Registrar. This shall apply to Miscellaneous Numbers 405/2019 and 406/2019.

It is so ordered.

**Dated and delivered at Machakos this 8<sup>th</sup> day of December, 2020.**

**D. K. Kemei**

**Judge**