



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

(CORAM: R. MWONGO, J)

MISC CIVIL APPLICATION NO.8 OF 2016

SAVANNAH INTERNATIONAL LTD.....APPLICANT

VERSUS

ZIPPORAH KWAMBOKA ONCHARI.....RESPONDENT

JUDGMENT

1. The applicant filed a notice of motion on 16th January, 2018 praying that this that this court should:

“...order the plaintiff Council (sic) to re-imbers (sic) the funds deposited with him as auctioneers fees amounting to Kshs 83,449.00 vide the Applicant’s advocates cheque No 010111 for the vehicle to be released to the applicant pursuant to the Court Order dated 23rd February, 2016, to the Applicant’s Advocates M/s Mukite Musangi & Company Advocates, Nakuru for their onward transmission to the Appellant”

2. The genesis of the matter is that the respondent obtained judgment against the applicant in the lower court. As judgment creditor, the respondent caused the attachment of the applicant’s vehicle through auctioneers for payment of the decretal sum. By an application, the applicant resisted the attachment.

3. According to the proceedings, when the matter came before Meoli, J on 23/2/2016, the respondent agreed through their counsel Mr Lukorito, to release the said vehicle:

“...upon payment of Shs 83,443/= but sum to be paid directly to the auctioneer who has incurred the expenses.”

In response, the applicant through their counsel Mr Terer said:

“We are asking to deposit the cheque with the court or pay with the rider for repayment/refund if the auction found not valid”

4. The court then directed that:

“Meanwhile, auctioneers fees of Kshs 84,443/= be paid directly to the defendant through his advocates whereupon motor vehicle KBE 614H be released to the Applicant. Matter of which party finally bears the auctioneers costs will be canvassed during applications and determined by the court.” (see proceedings).

The amount is shown to have been paid to the auctioneer through the lawyers for the respondents on 24th February, 2016.

5. By its ruling on 20th May, 2016 (at page 7) this court found that there were anomalies in the attachment by the auctioneer, and held that:

“...The auctioneer and the Respondent are therefore jointly and severally liable for the charges arising from the defective attachment procedure and I so find”.

6. It would have been easy enough to merely require that the respondent and auctioneer be required to refund the auctioneer’s fees. However,

the judgment debtor sought to appeal the lower court's decision, and filed **HCC Appeal No 38 of 2016** (being an appeal from CMCC No 698 of 2011).

7. Noting the appeal, the respondent's advocates, seeking to pre-empt further costs, wrote to the applicants on 1st July, 2016 to compromise the matter. The letter made a proposal as follows:

“Our proposal is that we enhance our liability from 15% as had been awarded by the court to 25%

The letter then re-tabulated the figures for damages, costs court attendance fees and party and party costs. The figure came to 473, 358/=. The amount subsequently paid in settlement appears to have been Kshs 427,000/=.

8. The respondent's sent a reminder to the applicants on 21st September, 2016. None of the letters are marked without prejudice and hence constitute open offers with probative value. The letters are not disputed.

9. On 11th May, 2017, the parties entered a consent in the following terms:

“CONSENT:

We the undersigned have the honour to request that the following consent be recorded:-

1. That by consent of the parties herein, the appellant's suit be and is marked as fully settled”

The applicant asserts that the consent covered only the figures identified under each head. The respondent asserts that the settlement was all inclusive as a full settlement. The consent is not disputed by any party, and the only issue that arises is whether the consent did take into account the auctioneer's fees.

10. The parties did not provide any authorities in their submissions. I have perused the consent. A reading of it suggests that the matter in court was “fully settled”. In **Black's Law Dictionary, 10th Edition**, the definition of “Full settlement” re-directs one to “Settlement 2”, that is, the second definition of “settlement”.

That definition is as follows:

“2. Settlement. An agreement ending a dispute or lawsuit...also termed a settlement agreement”

In the same Dictionary, a ‘full settlement’ is defined as follows:

“a settlement and release of all pending claims between parties”

11. In my view, and based on an interpretation premised by the foregoing definitions of terms and common sense, the consent entered into by the parties ended the dispute between the parties; it was a settlement and release, so that the parties had no further dispute or disputes to be determined.

12. One must understand the nature of settlement negotiations. Parties enter into the same in order to give and take. Each party is willing to take a broad approach so that the dispute is resolved without additional expense, loss of time or legal and procedural entanglements. Hence the give and take. It is a process fully in the control of the parties. The courts merely enforce the outcome of the parties as expressed in their words.

13. A party engaged in negotiations and who enters into a final settlement, must be careful to qualify the settlement or except any aspect of the dispute which is not being settled. If such a party does not exercise due diligence and care, it will only have itself to blame if the matter is recorded as fully settled yet there remained issues pending to be determined.

14. In light of the foregoing, the application is dismissed with costs.

15. Orders accordingly

Dated and Delivered at Naivasha this 9th Day of April, 2019

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Mukungu holding brief for Langat for the Applicant

2. No representation for the Respondents

3. Court Clerk - Quinter Ogutu