



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

ENVIRONMENT AND LAND COURT

MISC. APPL. NO. 84 OF 2015

KENNEDY SHIKUKU T/A ESHIKONI AUCTIONEER.....APPLICANT

VERSUS

KENNETH OKUKU OLULU

DANIEL OPONDO OLULU.....RESPONDENTS

R U L I N G

1. The application under consideration in this ruling is a Notice of Motion dated 19/7/2017 and filed on 18/7/2017. It is expressed to be brought under Order L Rule 1, 3 and 15(2) of the Civil Procedure Rules and Rule 8 of the Auctioneer Rules 1997 (Amended 2009). The Applicant – **KENNEDY SHIKUKU T/A ESHIKONI AUCTIONEER** – is actually an auctioneer and was instructed by Ashioya for 2nd and 3rd Respondents in the suit – **AFRICA POLYSAC LIMITED** (2nd Respondent) and **BUSIA SUGAR INDUSTRIES LIMITED** (3rd Respondent) – to execute for costs against the Applicant in the suit – **KENNETH OKUKU OLULU**. Kenneth and another person – **DANIEL OPONDO OLULU** – are stated to be Respondents/Objectors in this application.

2. There are two prayers in the application and they are as follows:

Prayer 1: This court be pleased to make an order for the Respondent/Plaintiff or any other party herein to deposit a reasonable sum of money for the safe custody, health, feeding and watering of the seized livestock pending hearing and final determination of the matters herein.

Prayer 2: The cost of this application be provided for.

3. From the application, it is clear that upon being instructed to carry out execution, the Applicant attached some animals thought to belong to Kenneth Olulu (1st Respondent/objector). But the second Respondent/Objector – **DANIEL OPONDO OLULU** – emerged claiming the attached animals as his own. The issue of attachment was brought to court and an order of stay was granted. What this in effect meant was that the Applicant had to continue keeping the attached animals until the court directed otherwise. The Applicant has kept the animals for some time but the mounting costs of further upkeep is what impelled him to seek court's intervention via this application.

4. The Objectors/Respondents opposed the application vide grounds of opposition filed on 19/9/2017. According to the Objectors/Respondents the application is without merit, is brought under non-existent provisions of law, has not shown sufficient cause for granting the orders, and is bad in law and therefore unsustainable. It was alleged that the Applicant has the responsibility of maintaining the animals and that he needs to pay for one cow that has already died in his custody.

5. The application was canvassed by way of written submissions. There are three (3) sets of submissions. The first set was filed by the Applicant on 5/10/2017. Much of the substance in the submissions is in accord with the substance of the application. In particular, the Applicant submitted that his application is within the law; that he has been taking care of the attached animals for over one year, and that the Objector should be made to meet the costs of maintaining them; and also that the court should grant the orders sought.

6. The second set of submissions was filed on 15/2/2018 by Ashioya for the instructing clients. The submissions are short and contain expression of support for the application.

7. The third set of submissions is by Objectors/Respondents. The submissions were filed on 4/10/2017 and are based on two postulates viz: That the jurisdiction of the court was properly invoked and that the attachment carried out was illegal.

8. On jurisdiction, a number of definitions and/or explanations from various sources – like Halsbury Laws of England (4th Ed.) Vol. 9, **The**

Owners of Motor Vessel “Lilian S” Vs Caltex Oil Kenya Ltd [1989] KLRI and MACHARIA & Another Vs KENYA COMMERCIAL BANK LTD & 2 others: Civil Application No. 2 of 2011 – were given. It was then stated that the application herein was bought under order 50 Rule 1, 3 and 15 of Civil Procedure Rules, 2010, which according to the submissions, relate to time while rule 15(2) was said to be non-existent. The Applicant was said to have invoked the wrong law and has therefore improperly invoked the court’s jurisdiction.

9. On the alleged illegality in attachment, the submissions dwelt on what illegality entails and how courts should react to it. It was then submitted that the attachment in this matter was carried out despite existence of this court’s order dated 9/2/2016. This is what is alleged to constitute an illegality. The attaching entity, or Applicant if you like, was said not to have performed duties according to law and is therefore underserving of the orders sought. The parting shot was that **“the application dated 19/7/2017 lacks merit and is an abuse of the court process and the same should be dismissed with costs to the Objector(?)”**.

10. I have considered the application, the response made, rival submissions, and the case as filed generally. Before the attachment was done, there was the order of 9/2/2016 referred to by the Respondents. It was an order of stay issued regarding an earlier still pending application. It was purely a temporary order that required extension from time to time for its continued validity. Such extensions were sought and granted, with 23/2/2016 being an example. But there was a lapse. Records show that the matter came up before the court Deputy Registrar on 12/4/2016 and no extension was sought. The protection afforded by an order of stay ceased at that point and the other side exploited the situation to carry out the attachment.

11. The Objectors side is therefore not correct to say that the order of 9/2/2016 was in force when the attachment was carried out. Infact, had that been the case, and seeing how hotly contested this matter is, it would be reasonable to expect that the Objector’s side would have sought to punish somebody for contempt or disobedience of a court order. Instead, the Objector’s side filed yet another application seeking to stay sale of the attached animals. Strictly speaking then, no law or order was violated in carrying out the attachment. The order of 9/2/2016 lapsed on 12/4/2016. The other order of stay was granted on 28/6/2016. The attachment was carried out on 24/6/2016. No court order existed prohibiting or staying it. The Objector’s argument on illegality therefore fails.

12. I now come to the issue of jurisdiction. I have already adverted to it elsewhere in this ruling. Simply put, the Applicant is said to have improperly invoked court’s jurisdiction because he had relied on the wrong law. This is a simple issue and again, the Objectors are wrong. And here is why: Order 51 rule 10(1) and (2) state as follows:

“10 (1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of failure to comply with this rule.

(2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application”.

13. If the Objectors had paid due regard to this provision, they would not have based their issue of jurisdiction on the law invoked. They would have realised that the law invoked is not what guides the court. The court is guided by the substance contained in the application. It is clear too that the issue of jurisdiction as raised is merely technical. Save for the wrong law that is invoked, the application is otherwise sound in substance. And contrary to the averment that the Applicant has the sole responsibility to maintain the attached animals, it is clear that Rule 8 of the auctioneer Rules 1997 (amended 2009) clearly entitles him to seek the kind of help he is seeking.

14. Yet, even if the Objector’s/Respondent’s submissions do not provide guidance on the issue of maintenance or upkeep of the attached animals, I find myself unable to grant the prayers sought for different reasons. I need to explain: Although no law was violated when attachment was carried out, there were pending issues regarding the taxed costs that gave rise to the attachment. Yet attachment was done inspite of the fact that these issues remained unresolved. If the attaching side was well-meaning, it would have waited a little while longer. I need to exercise abundant caution here.

15. It is not clear to me who really should maintain the animals at this point. I think clarity will only come after hearing the objection. What I am grappling with is this: What if the objection is heard and a finding is made that the Objector’s are right? Wouldn’t this mean that the attaching side was wrong in carrying out the attachment? And if things turn out this way, would it be right to force the Objectors to incur costs to sustain an attachment that they are vehemently opposed to? To me, if the attachment done was wrongful, it has already hurt the Objectors unjustifiably. If they are then forced to fork out money to maintain the attached animals, that means more hurt.

16. But just supposing the attaching side is right? In a scenario like that, all costs incurred by the attaching side including the costs of maintenance and upkeep of the animals would have to be paid by the Objectors. The attaching side, including the Applicant, will lose nothing. That is why in my view the Applicant should consult with his instructing client to decide what to do. The court does not also deem it right to order the instructing client to pay. And this is because it does not also know at this stage whether the instructing client is right or wrong.

17. The upshot is that the application herein cannot be allowed. I hereby dismiss it. Costs to be in the cause.

Dated, signed and delivered at Busia this 16th day of July, 2019.

A. K. KANIARU

JUDGE

In the Presence of:

Applicant: Absent

Objectors/Respondents: Absent

Counsel for the Applicant: Present

Counsel for the Objectors/Respondents: Present

Court Assistant: Nelson Odame