



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. 604 OF 2016

STANLEY T. MUGACHA

ELIUD KING'ARA

PETER WAWERU T/A PANGANI AUCTION CENTRE.....APPLICANTS

-VERSUS-

JOSEPH M. NG'ANG'A

JOSEPHINE MUCHINA

SIMON CHEGE.....RESPONDENTS

RULING

1. Before me is the Chamber Summons dated 21st February, 2019 taken out by the applicants herein. The same is supported by the grounds set out on its body and the facts deponed in the sworn affidavit of the applicants. The applicants are seeking the orders hereunder:

i. THAT the decision delivered by the Learned Deputy Registrar on 15th February, 2019 on the applicants' Bill of Costs dated 28th November, 2018 be set aside and this Honourable Court be pleased to tax the Bill of Costs as drawn.

ii. THAT in the alternative to prayer (i) above, the Learned Deputy Registrar or any other Deputy Registrar be directed to re-evaluate her decision and tax the applicants' Bill of Costs based on the ruling delivered by this Honourable Court on 11th November, 2016 in Nairobi Misc. Application No. 45 of 2015 (Joseph M. Ng'ang'a & 2 others-v-Lawrence Muriungi Gichunge & Another).

iii. THAT the costs of the reference be provided for.

2. The summons is opposed by the respondents who filed the replying affidavit of Isabella Nyambura the legal officer of M/s Direct Line Assurance Company Ltd.

3. When the summons came up for interpartes hearing, learned counsels made brief oral submissions.

4. I have considered the grounds set out on the face of the summons and the facts deponed in the affidavits filed in support and against the application together with rival oral submissions.

5. The history of this matter started on the filing of Nairobi C.M's Civil Case No. 4526 of 2013 (Lawrence Muriungi Gichunge v Joseph M. Ng'ang'a & 2 others) where the judgment in the sum of ksh.4,519,343 was entered against the respondents. The respondents were aggrieved hence they preferred an appeal before this court.

6. Thereafter, the respondents filed an application seeking for an order of stay execution of the decree pending the hearing and which application was later compromised by consent where the parties inter-alia agreed that the respondents would cater for the auctioneers' charges.

7. While the negotiations were ongoing over the said auctioneers' charges, the respondents' motor vehicle registration no. KMB 090B was attached and advertised for sale. The action prompted the respondents to the respondents, prompting the said respondents to file Nairobi H.C. Misc. Application No. 45 of 2015 (Joseph M Ng'ang'a & 2 others v Lawrence Muriungi Gichunge & Another) in which they

successfully sought the release of the said motor vehicle.

8. In its ruling delivered on 11th November, 2016 this court found the judgment debtors, (the respondents) liable to settle the auctioneers charges. This court further stated that the auctioneer ought to first have its costs agreed and or taxed.

9. The applicants herein subsequently filed an Auctioneers Bill of Costs dated 28th November, 2016 seeking to be paid Kshs.210,715/= against the respondents. The respondents resisted the Bill and filed Grounds of Opposition. The aforesaid Bill of Costs was heard and dismissed by Hon. L. Mbacho vide her ruling delivered on 15th February, 2019.

10. Having considered the material placed before this court and the rival submission it is clear that the learned Taxing Officer determined the question as to whether the applicants had locus to file the Bill of Costs. The respondents were able to show that the Auctioneer who was appointed to execute the warrant of attachment is one Stephen M. Mbijiwe T/A Line Line Auctioneers. The aforesaid Auctioneer had approached Pangani Auction Centre to store the attached motor vehicle. Pangani Auction Centre filed the Bill of Costs dated 28.11.2016 seeking to be paid storage charges

11. The respondents raised an objection arguing that the applicantn had no right to file the Bill of Costs since it was not appointed to execute the arant of attachment. The learned Taxing Officer proceeded to dismiss the Bill of Costs on the basis the applicant was not appointed to execute the warrant. The applicant has argued that this court to find that the learned Taxing Officer had no jurisdiction to determine the issue.

12. With respect, I do not think that is the correct exposition of the law. The learned Taxing Officer has inherent jurisdiction to determine the question as to whether or not the parties are properly before the court. The auctioneer who was not appointed to execute a warrant of attachment cannot approach the court to assess storage costs. The applicants can only make their claim through Lifeline Auctioneers.

13. The Taxing Officer cannot therefore be faulted for making a determination over the issue. The applicant was not contracted by the court hence it could only lodge its claim through the party it gave storage space. The learned Taxing Officer should have struck out the summons instead of dismissing it for being improperly before the court.

14. The other issue requiring my determination is whether storage costs can be recovered under the Auctioneers Act. It is the applicants' position that the learned Taxing Officer applied the wrong principles in holding that storage costs are not recoverable under the Auctioneers Act.

15. The respondents on their part have taken the viewpoint that whereas this court vide its ruling of 11th November, 2016 ordered them to cater for the storage charges during the period in which the subject motor vehicle was deposited with the applicants until issuance of the release order of 27th July, 2016, the ruling did not give the applicants the go-ahead to tax their costs.

16. In her ruling, the taxing master held that the storage costs could only be claimed by the applicants against Lifeline Auctioneers by virtue of the arrangement/contract entered into between the two (2) parties. The Taxing Officer also opined that under Schedule 4, part 2 of the Auctioneers Rules, storage costs are claimed by the Auctioneer as part of the exercises.

17. I have looked at the Auctioneers Act and noted that the same does not expressly provide for storage costs. However, under **Part II** of the **Auctioneers (Amendment) Rules 2009**, storage costs are claimable as part of fees/expenses under Auctioneers Charges. It therefore follows that an auctioneer, specifically, can claim storage as part of the fees or expenses incurred. With respect, the learned Taxing Officer came to the correct decision.

18. The upshot is that the Chamber Summons dated 21st February, 2019 is dismissed for being unmeritorious. In the circumstances of this matter, a fair order on costs is to direct that each party meets its own costs.

Dated, Signed and Delivered at Nairobi this 5th day of July, 2019.

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J. K. SERGON

JUDGE

In the presence of:

.....**for the Applicants**

.....**for the Respondents**