



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**ELC CASE NO.948 OF 2017**

**(Formerly Milimani ELC No. 328 OF 2016)**

**DAVID KASHONGA PULEI.....PLAINTIFF**

**VERSUS**

**NOAH MONERIA OLE KURRARRU.....1<sup>ST</sup> DEFENDANT**

**FRIDTJOVWIJK.....2<sup>ND</sup> DEFENDANT**

**ROSELYNE ACHIENG OKOTH.....3<sup>RD</sup> DEFENDANT**

**DISTRICT LANDS REGISTRAR, KAJIADO.....4<sup>TH</sup> DEFENDANT**

**RULING**

What is before me for determination is the Plaintiff's Notice of Motion application dated the 9<sup>th</sup> December, 2019 brought pursuant to Order 40 Rules 1 and 2, Order 51 Rule 1, Order 42 Rule 6 of the Civil Procedure Rules, Sections 1A, 1B & 3A of the Civil Procedure Act and Section 7 of the Appellate Jurisdiction Act. The Plaintiff seeks the following orders:

1. Spent
2. That pending the inter partes hearing of this application the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants through their auctioneers Siuma Auctioneers or any other auctioneers whatsoever be restrained from selling motor vehicle registration number KCJ 324K belonging to the Plaintiff.
3. That pending the inter partes hearing of this application the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants through their auctioneers Siuma Auctioneers or any other auctioneers whatsoever be ordered to forthwith hand over motor vehicle registration number KCJ 324K to the Plaintiff at the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants costs.
4. That there be a stay of execution of judgment delivered on 6<sup>th</sup> May, 2019 by the Honourable Lady Justice Christine Ochieng pending the hearing and determination of the appeal already filed in this matter.
5. That the Honourable Court grants leave to the Plaintiff/ Applicant to extend the duration within which the Plaintiff/ Applicant can file his Notice of Appeal.
6. That the costs of this application be provided for.

The application is premised on the grounds on the face of it and the affidavit of DAVID KASHONGA PULEI where he deposes that he is the registered owner of motor vehicle registration number KCJ 324 K which has been proclaimed and impending sale by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants through their auctioneers SIUMA Auctioneers. He confirms that subsequent to the judgement delivered on 6<sup>th</sup> May, 2019 where he was condemned to pay costs together with the 1<sup>st</sup> Defendant neither his former Advocates nor himself were served with any other court process including proceedings requisite of party and party bill of costs so as to arrive at a decretal amount. He contends that on 30<sup>th</sup> November, 2019, he was ambushed when Siuma Auctioneers acting on instructions from the firm of messrs W. G Wambugu & Company Advocates forcefully took away his motor vehicle registration number KCJ 324 J. Further, that he was served with a proclamation notice which did not give any timeframe for the impending sale neither did it indicate the decretal sum sought to be realized. He claims the

purported proclamation notice issued on 30<sup>th</sup> November, 2019 is an abuse of the Court process as it was served with a Court Order issued by Milimani Principal Magistrate's Court Miscellaneous Application No. 1352 of 2019 on 22<sup>nd</sup> November, 2019 purportedly enabling the attachment of the subject motor vehicle in Kajiado ELC Case No. 948 of 2019. He insists the Costs have not been assessed. Further, that his immediate former advocates on record already lodged a Notice of Appeal on the 28<sup>th</sup> May, 2019.

The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants opposed the application and filed a replying affidavit sworn by WANJA G. WAMBUGU who is the Advocate acting on their behalf where she confirms that the Bill of Costs and Notice of Taxation were served upon the Plaintiffs then advocates. She contends that execution has already taken place and the judgment debtors motor vehicle registration number KCJ 324K has been sold in satisfaction of the costs which were duly taxed by the Court on 29<sup>th</sup> July, 2019. She avers that this Court lacks jurisdiction to grant leave to extend time to file appeal. She insists the Applicant has not satisfied the conditions to merit the exercise of the courts discretion to grant an order for stay. Further, the Applicant has not demonstrated what prejudice he will suffer unless the orders sought are granted. She states that the Applicant is guilty of delay.

The Plaintiff DAVID KASHONGA PULEI filed a supplementary affidavit where he contends that the Bill of Costs taxed off at Kshs. 571, 998.32 referred to by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants was between them and their Advocate and not payable by him. He insists no party to party Bill of costs has been taxed between the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants against the 1<sup>st</sup> Defendant and himself, hence no attachment legal in law can be effected. Further, that the Bill of Costs and Ruling attached to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants replying affidavit is with respect to Kajiado ELC Misc Application No. 52 of 2019 which on the face of it is with respect to a cause for taxation of advocate client bill of costs. He intends to file a reference on taxation out of time. He insists no Decree has been passed subsequent to a properly taxed party and party bill of costs and hence the attachment and sale of the motor vehicle is premature. Further, there is no evidence of sale of the motor vehicle registration number KCJ 324 J and if indeed the same was sold then the sale was illegal. He denies being guilty of laches as he was waiting to be served with the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' party and party bill of costs. He averred that he was not seeking extension of time to lodge a notice of appeal.

The 1<sup>st</sup> and 4<sup>th</sup> Defendants never filed their response to the application.

The Plaintiff, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants filed their respective submissions to canvass the instant application.

### Analysis and Determination

Upon consideration of the Notice of Motion application dated the 9<sup>th</sup> December, 2019 including the parties' affidavits and submissions, the following are the issues for determination:

- Whether a proper party and party bill of costs has been taxed between the parties herein.
- Whether the attachment of the Plaintiff's motor vehicle registration number KCJ 324 K was legal.
- Who should bear the costs of this Application.

As to whether a proper party and party bill of costs has been taxed between the parties herein.

The Plaintiff contends that no party and party Bill of costs was taxed. Further, that his previous advocate was not served with the said Bill of Costs. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants insist the same was taxed. The Plaintiff has relied on paragraph 13 (3) of the Advocates Remuneration Order 2009 and the case of **Ahmednasir Abdikadir & Co. Advocates V National Bank of Kenya Limited (2005) eKLR** to support his arguments. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in their submissions relied on paragraph 11 of the Advocates Remuneration Act and the case of **Hezekiah Oyoo Abuya v Kuguru Food Complex Limited Miscellaneous Application No. 400 of 2001** to buttress their arguments. On perusal of the Ruling dated the 29<sup>th</sup> July, 2019, by the Taxing Master, I note he clearly indicated as follows: **'The Applicant's Party and Party Bill of Costs ( the Bill) is dated the 29<sup>th</sup> May, 2019 and was filed on 30<sup>th</sup> May, 2019. Service has been effected on the Respondents and return of service filed. It is therefore before me for taxation.'**

From the said Ruling, it is evident that the said Bill of Costs emanated from the KAJIADO ELC 948 of 2017 (instant suit) and I find that party and party Bill of Costs was indeed taxed contrary to the Plaintiff's averments that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants failed to do so. The Plaintiff contends that his previous lawyers were not served but in the said Ruling, the Taxing Master confirmed service and since this is not a reference, I will uphold the finding of the Taxing Master. Further, I opine that if he was indeed aggrieved with the said taxed Bill of Costs, he had a recourse in law to lodge a reference to challenge the same as envisaged under paragraph 11 of the Advocates Remuneration Order but as at now, since he failed to do so, the same is still valid. The Plaintiff further contends that no liability for any decretal sum can attach to him since the Bill of Costs taxed was between 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and their lawyer through the miscellaneous cause. I note the Plaintiff and 1<sup>st</sup> Defendant were supposed to pay the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants the costs of the suit and the said taxed costs were what the said Defendants had incurred. It seems to me the Plaintiff is hell bent on relying on technicalities to defeat the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants claim for costs but he has not demonstrated how they intend to pay the same. It is my considered view that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are indeed entitled to be paid the said unchallenged taxed costs.

As to whether the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants legally attached the motor vehicle registration number KCJ 324 K. As per the Court Records, a Decree was extracted indicating that the costs of the suit were to be borne by the Plaintiff and 1<sup>st</sup> Defendant equally. The Plaintiff claims no Decree has been passed subsequent to the taxed costs but I note that judgement had been entered for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in respect to the Counterclaim with a Decree extracted thereafter. The said 2<sup>nd</sup> and 3<sup>rd</sup> Defendants hence did not have any reason to seek for a fresh Decree to be extracted in respect to costs but include their costs in the Decree already issued. On perusal of the Application for execution of the Decree within the Court Records, it indeed indicates the taxed costs. Further, warrants of attachment of movable property in execution of

decree for money dated 30<sup>th</sup> August, 2019 were extracted and issued to SIUMA Auctioneers. The Plaintiff's Motor Vehicle was proclaimed on 30<sup>th</sup> November, 2019 as per the Proclamation and the decretal sum sought indicated therein contrary to the Plaintiff's averment that it did not. Further, Warrants of Sale of property in execution of the Decree for money dated the 16<sup>th</sup> December, 2019 were extracted and issued to SIUMA Auctioneers. All these point to the fact that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants adhered to the proper legal process to attach the Plaintiff's motor vehicle. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants contend that the application has been overtaken by events since the attached motor vehicle has since been sold which fact is disputed by the Plaintiff. **Order 42 Rule 6** of the Civil Procedure Rules provides that:

**“No order for stay of execution shall be made under subrule (1) unless-**

**(a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and**

**(b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”**

Based on the facts as presented above and noting while noting that there was no order for stay of execution and in associating myself with the cited legal provisions including the decision of James Wangalwa & Another V Agnes Naliaka Cheseto [2012] eKLR where the Court held as follows:

**“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein N. Chesoni [2002] 1KLR 867, and also in the case of Mukuma V Abuoga quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5 (2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:**

**“.....the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”**

I find that the instant application has been overtaken by events as execution process had already been put in motion and the Plaintiff has failed to demonstrate the substantial loss he will incur. He has also failed to offer security in terms of the costs awarded to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. Further, I opine that an order of stay of execution at this juncture will not serve any useful purpose as the attached motor vehicle has since been sold. In the circumstances, I find the instant application dated the 9<sup>th</sup> December, 2019 unmerited and will dismiss it with costs. I will further proceed to vacate the order of stay granted on 15<sup>th</sup> January, 2020.

**Dated Signed and Delivered via email this 24<sup>th</sup> Day of April 2020**

**CHRISTINE OCHIENG**

**JUDGE**