



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 484 OF 2013

SECUREX AGENCIES KENYA LIMITED.....APPELLANT

-VERSUS-

PAUL OTIENO WAMBEDHA.....RESPONDENT

RULING

1. This ruling relates to the issue of who between the appellant and the respondent should pay the auctioneer's charges.
2. When the parties appeared before this court on 24th October, 2019 they agreed by consent to have the above issue canvassed by way of written submissions which both parties have since filed.
3. On its part, the appellant submitted that the respondent did not comply with the provisions of Order 22, Rule 18 of the Civil Procedure Rules which stipulate that where an application for execution is issued more than one (1) year following the date of the decree, the court shall issue a notice to show cause against the debtor.
4. According to the appellant, rather than apply to the court to issue a notice to show cause against it, the respondent directly obtained an attachment order and caused it to be executed against the appellant, despite the fact that the said appellant has provided security for the due performance of the decree. On that basis, it is the appellant's contention that it should not be made to pay the auctioneer's fees.
5. In his submissions dated 31st October, 2019 the respondent argued that pursuant to the provisions of Section 7 of the Auctioneers Act, a debtor is held responsible for paying auctioneer charges save in the instances set out thereunder.
6. The respondent further referred this court to Order 22, Rule 18(1) and (2) of the Civil Procedure Rules. Sub-rule (1) provides thus:

“Where an application for execution is made—

a. more than one year after the date of the decree;

...

the court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him

...Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom the execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the court has ordered execution to issue against him.”

Whereas Sub-rule (2) reads as follows:

“Nothing in sub-rule (1) shall be deemed to preclude the court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice.”

7. It was the respondent's view that since the last order made against the appellant was on 8th November, 2018 then the above proviso of sub-rule (1) becomes applicable, since the application for execution was made in April, 2019. In the end, the respondent urged this court to find the appellant liable to pay the auctioneer's charges.

8. In rejoinder, the appellant vide its supplementary submissions dated 16th November, 2019 contended that since the attachment was illegal and unprocedural to begin with, the respondent cannot be heard to rely on Rule 7 of the Auctioneers Rules, 1997 and that it would only be in the interest of justice for this court to order the respondent to cater for the charges in question. Furthermore, the appellant was of the view that Order 22, Rule 18(1) (*supra*) denotes a previous order made in respect to a previous application for execution and in the present instance, the respondent made no application for execution prior to May, 2019 hence aforesaid provisions could not apply to him.

9. I have considered the contending submissions placed before me. To begin with, **Rule 7 of the Auctioneers Rules, 1997** is clear that:

“A debtor shall pay the charges of the auctioneer unless:-

a) That debtor cannot be found or

b) He has no goods upon which execution can be levied; or

c) The sale proceeds are insufficient to cover the charges, in which cases the creditor shall pay the charges or the deficiency thereof.”

10. Going by the record, it is not in dispute that the subordinate court entered judgment for the respondent on 23rd August, 2013 in the sum of Kshs.345,188/ plus costs and interest. It is equally not disputed that warrants of attachment and sale were issued in favour of the respondent on 10th May, 2019. That said, the appellant took the view that owing to the illegality of the application for execution, it should not be made to pay the auctioneer's charges.

11. Order 22, Rule 18(1) of the Civil Procedure Rules as read together with **sub-rule (2) (*supra*)** lay out the procedure for executing a decree and exceptions attached thereto.

12. From my study of the record, I have established that upon entering judgment, the trial court granted the appellant 30 days' stay of execution. Thereafter, the appellant filed the application dated 16th September, 2013 seeking an order for stay of execution pending the hearing and determination of the appeal, which order for stay was granted by consent of the parties on 20th September, 2013 and was in force until such time as the appellant failed to comply with the orders made by this court on 8th November, 2018.

13. The record shows that the appellant subsequently filed another application dated 16th May, 2019 seeking another order for stay of execution and which application was conditionally allowed by this court on 7th October, 2019.

14. Be that as it may, the record also shows that the decree was issued on 25th April, 2018 which then means that the warrants of attachment and sale dated 10th May, 2019 were issued more than one (1) year thereafter. Moreover, the respondent did not indicate that he had ever filed an application in execution of the decree previously. From my reading and understanding of **Rule 18(1) of Order 22 (*supra*)**, the respondent was required to apply to the court for issuance of a notice to show cause against the appellant before taking out the warrants of attachment and sale but did not, which is to say that the warrants issued were irregularly issued and hence unlawful.

15. Consequently, I find the respondent liable to pay the auctioneer's charges.

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

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L. NJUGUNA

JUDGE

In the presence of:

..... for the Appellant

.....for the Respondent