



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI

CIVIL CASE NO.508 OF 2016

SALIM MOHAMED ADEN.....1ST PLAINTIFF/RESPONDENT

ABDI FATAH ALI HASSAN.....2ND PLAINTIFF/RESPONDENT

MOHAMED ABDINOOR.....3RD PLAINTIFF/RESPONDENT

MOHAMED AHMED SIYAD.....4TH PLAINTIFF/RESPONDENT

MOHAMED HAJI ISSACK.....5TH PLAINTIFF/RESPONDENT

MOHAMED ALI ELIM.....6TH PLAINTIFF/RESPONDENT

HASSAN HUSEIN GABABA.....7TH PLAINTIFF/RESPONDENT

HASSAN ABDI.....8TH PLAINTIFF/RESPONDENT

AHMED ALIO MOMO.....9TH PLAINTIFF/RESPONDENT

VERSUS

W.E.TILLEY (MUTHAIGA) LIMITED.....DEFENDANT/APPLICANT

R U L I N G

This is a ruling on the Defendant's Notice of Motion application dated 30th January, 2018 brought under Certificate of Urgency. It seeks the following orders

1. Stay execution of the decree dated 12th July 2017,
2. Have the Court review its orders directed to the Defendant on 8th December, 2017 regarding the payment of auctioneer fees,
3. Extension of time to file Defendant's defence

Grounds On The Face Of the Application are as set out hereunder:-

· **THAT** on 8th December 2017, the Court set aside exparte judgment and consequential orders on condition that thrown away costs of Kshs. 30,000 plus auctioneers fee was paid within 30 days; further that upon fulfillment of the conditions defence in the file to be deemed duly filed.

· **THAT** the Defendant has recently been informed of the amount being sought by the auctioneer being **Kenya Shillings Two Million, Two Hundred and Forty Eight Thousand, Nine Hundred and Seventy Eight (Kshs. 2,248, 978)** as costs for attaching and/or proclaiming the Defendant's assets on 29th August 2017 .

· **THAT** the Defendant has calculated the amount of costs due to the Auctioneers as under the ***Fourth Schedule of the Auctioneer Rules*** and is of the opinion that the Auctioneer's fees amount to **Kenya Shillings Nine Hundred and Twenty One Thousand, Five Hundred and Seventy Five (Kshs. 921,575)**.

· **THAT** the Defendant cannot settle the auctioneer's costs as its bank account and assets have been frozen since October 2015, by virtue of the Court order in ***HCC 522 of 2015- Imperial Bank Ltd (under receivership) Vs. W.E Tilley (Muthaiga) Ltd and Others***, which froze the Defendant's account and forbade dealings therein.

· **THAT** this Honorable Court found that the Defendant's defence is merited and issues raised should be addressed at trial and that this application was made without any unreasonable delay and ought to be granted in the interest of Equity and Justice.

The application is supported by Affidavit dated 30th January, 2018 sworn by Zulfikar Haiderali Jessa who is the Director of the Defendant Company. He averred that he was informed by his Advocate on record that a judgement in this matter was entered against the Defendant for the sum of **Kenya Shillings Ninety Million, Four Hundred and Thirty Thousand, One Hundred and Thirteen and Eighty Eight Cents (Kshs. 90, 430,113.88)** in favour of the Plaintiff on 10th April, 2017 for failure to enter appearance and file defence within the stipulated time.

He restated grounds on the face of application in respects of Court's ruling setting aside *ex parte* judgement.

He averred that the Moran Auctioneers issued an invoice of Kshs. 2,248,978 to their Advocate being the fee for attaching property worth **Kshs. 26,145,000** but upon the Defendant calculating the amount of costs due to the Auctioneers as under the ***Fourth Schedule of the Auctioneer Rules*** is of the opinion that the Auctioneer's fees amount should be **Kshs. 921,575**).

He further averred that the auctioneer fee cannot be paid due to the Court order in ***HCC 522 of 2015- Imperial Bank Ltd (under receivership) Vs. W.E Tilley (Muthaiga) Ltd and Others***, which froze the Defendant's account and forbade dealings therein. He further averred that him and his family have tried to raise the auctioneer fee in vain and can only pay once the Court order is lifted.

In response the Plaintiff filed grounds of opposition dated 16th March 2018 stating the following grounds:-

· **THAT** the dispute arising out of the amount of fees payable to auctioneers in proceedings before the High Court is a matter that can be determined by the registrar as provided for under **Rule 55 of the Auctioneer Rules, 1977** and is not ground for review under **Section 80 of the Civil Procedure Act and Rule 45 of the Civil Procedure Rules, 2010**.

· **THAT** the interim orders issued on **HCCC No. 522 of 2015** does not bar the Defendant from settling the auctioneer costs and complying with the orders issued on 8th December 2017.

· **THAT** allowing a review application on the basis of difficulties in execution is not only abuse of the Court process but would also lead to endless litigation as was held by the Court of Appeal in ***Mapalala Vs. British Broadcasting Corporation [2002] 1EA 132***.

· **THAT** the power to extend and enlarge time for filing is discretionary as provided for under **Section 95 of Civil Procedure Act and Order 50, Rule 6 of the Civil Procedure Rules, 2010**.

· **THAT** stay of execution under **Order 22, Rule 25 of the Civil Procedure Rules, 2010** can only be granted where there are two suits pending between the same parties therefore granting the orders sought as prayed for by the Defendant would be nullity.

· **THAT** the Defendant has failed to prove discovery of any new matter or evidence, or mistake or error apparent on the ruling delivered on 8th December, 2017 therefore has not met the conditions to warrant the exercise of this Court's discretion.

DEFENDANT'S SUBMISSIONS

Counsel for the Defendant restated the grounds on the Notice of Motion and the Supporting Affidavit. He cited the case of ***Michael Muriuki Ngubuini Vs. East African Building Society Limited [2015]***, where the Court stated:-

“The overriding objective is a principle from the Civil Procedure Rules. The purpose of the overriding objective is for civil litigation and dispute resolution process to be fair, fast and inexpensive. The principle is that each case should be treated proportionately in relation to size, importance and complexity of the claim and the financial situation of the parties. The Courts must consider the overriding objective when they make rulings, give directions and interpret the Civil Procedure Rules.”

PLAINTIFF'S SUBMISSIONS

Counsel for the Plaintiff restated the grounds of opposition and cited the case of ***Stephen Gathua Kimani vs Nancy Wanjiru Waruingi t/a Providence Auctioneer [2016] eKLR*** where the Court held as follows:-

“...the Applicant has not satisfied that the orders in question were not within his knowledge...there is no allegation that there is an error apparent on the face of record. It has not been shown that there is sufficient reason to warrant the review.”

Plaintiff submitted that the order of 27th October 2015 in HCCC No.522 of 2015 does not bar the Plaintiff from filing and executing against the Defendant and neither does it bar the Defendant from settling costs and fees ordered by the Court of concurrent jurisdiction.

Plaintiff further submitted that the Environment and Land Court in the case of **W.E.Tilley (Muthaiga) Limited & Another Vs Victoria Distributers Limited & Another [2017]** in interpreting the orders in HCCC.No.522 of 2015 as follows:-

“That, this Courts reading of the order as set out in (c) above is that the persons affected by the injunctive orders are the twenty named Defendants/respondents, their servants and or agents” who are restrained form removing from this jurisdiction, disposing of, mortgaging (and/or further mortgaging) charging, and/or further charging) assigning, diminishing, transferring, disposing, alienating, operating and or otherwise interfering and or dealing with any of the assets within the jurisdiction’ that the order does not injunct the parties’ landlord like the 1st Defendant who, is not among the injuncted Defendants and has not been shown to be a servant of agent or acting at the behalf of any of the names 20 Defendants, form exercising his statutory right to distress for arrears of rent which is owed to him.”

Plaintiff submitted that the Environment and Land Court declined to grant the Applicant interim orders to stop the proclamation done on 14th May 2014.

Plaintiff further submitted that the Applicant was successful in application dated 29th August, 2017 and that the orders were granted on condition that thrown away costs and auctioneers fee is paid. Plaintiff further submitted that difficulties in execution is not a ground for seeking review and cited the Court of Appeal decision in **Mapalala vs British Broadcasting Corporation [2002]1EA132** where the Court held as follows:-

“There was no aggrieved party as the appellant had a favorable judgment. The fact that a decree cannot be executed is not a new or important matter as the Court gives judgments on the basis of the prayers sought in the plaint. To allow a review application on the basis of difficulties in execution is not only an abuse of the process of the Court but would lead to endless litigation.”

Further in **Frank Owen Wainaina Vs Enock Tuitoek & Another [2008] eKLR** where the Court held that the Defendants inability to pay the decretal sum because of financial difficulties.

Plaintiff submitted that the Defendant has failed to prove discovery of new matters or evidence or error apparent on the ruling delivered on 8th December 2017 to warrant exercise of discretion by this Court.

ANALYSIS

I have considered arguments by both parties and perused documents attached to affidavits filed. I wish to consider the following issues:-

1. *Whether sufficient grounds have been demonstrated to warrant review of orders granted*
2. *Whether time for filing of defence should be extended.*

The Applicant seeks review on order for payment of auctioneer fee on two main grounds; one being that the amount is excessive and two that the Applicant is unable to pay the auctioneers fee on ground that its account is frozen.

I have considered averments by parties herein. I have perused the documents attached and I have also perused the submissions filed by the parties herein.

On the first issue the Applicant submitted that under the ***Fourth Schedule of the Auctioneer Rules*** Auctioneer’s fees in respect of Kshs. **26,145,000** should be **Kshs. 921,575** and not **Kshs. 2,248, 978**. The second ground is that the Applicant is unable to pay by virtue of the Court order in **HCC 522 of 2015- Imperial Bank Ltd (under receivership) Vs. W.E Tilley (Muthaiga) Ltd and Others**, which froze the Defendant’s account and forbade dealing with its assets.

On the issue of auctioneer’s fee being high, appropriate fee can be determined by subjecting auctioneers bill to assessment by the Deputy Registrar. The Applicant was required to deposit the amount within 30 days from the date of delivery of the ruling. The Applicants succeeded in the application to set aside exparte judgment. Order setting aside the exparte judgment was granted on condition of payment of the auctioneer fee and the thrown away costs. The orders were to take effect on conditions being met.

I note that in prayer 4, the Applicant herein sought stay of decree issued on 12th July 2017. This is the decree issued following exparte judgment entered on 10th April 2017. Prayer 4 was therefore considered in the ruling delivered in respect of application dated 29th August 2017.

What remain is the issue of auctioneer fee. As earlier noted, in the event dispute of fee demanded by an Auctioneer the proper procedure is to file auctioneer Bill of Costs before the Deputy Registrar for assessment. A review cannot therefore issue on that ground. As concern ability of the Applicant to pay, I have not seen an order staying dealings in any property proclaimed in respect of auctioneer fee. This Court while giving conditions for setting aside exparte judgment considered all the issues raised. I do not see any new issue to warrant varying the conditions given. After evaluating all arguments raised herein I find that the Applicant has not raised sufficient grounds to warrant review of the conditions given by this Court for setting aside exparte judgment and consequential orders. If the Applicant finds the auctioneer fee excessive the same should be taxed by the Deputy Registrar; however while awaiting assessment of the fee by the Deputy Registrar the

amount of Kshs. 921,575 which is admitted by the Applicant as being the correct fee should be paid to the auctioneer awaiting the assessment.

FINAL ORDERS

1. Kshs. 921,575 being auctioneer fee admitted be paid to the auctioneer within 30 days from today's date.
2. Auctioneer Bill of Costs to be filed before the Deputy Registrar to determine the amount payable.
3. Defence to be deemed duly filed upon payment of Auctioneer fee set out in order 1 above and thrown away costs of Kshs. 30,000 within 30 days from today's date.

Dated and Delivered at Nairobi this 13th day of July, 2018

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF

CATHERINE: COURT ASSISTANT

MS AGWATA H/B FOR ISSA: COUNSEL FOR PLAINTIFFS/RESPONDENTS

MS DAVI: COUNSEL FOR DEFENDANT/APPLICANT