



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**MISC. CIVIL APPLICATION NO. 216 OF 2014 (JR)**

**MUNGAI KIVUTI & CO ADVOCATES.....DECREE HOLDER/RESPONDENT**

**VERSUS**

**EMBU COUNTY GOVERNMENT.....JUDGMENT DEBTOR/RESPONDENT**

**AND**

**MUGAMBI RUTERE**

**T/A GIANT AUCTIONEERS.....INTERESTED PARTY/APPLICANT**

**RULING**

1. This is an application dated 3/11/2016 by the Interested Party/Applicant. It seeks for orders that this court determines who is to pay the auctioneers fees. In the supporting affidavit, the applicant who is an auctioneer depones that he was instructed to attach the property of the judgment debtor/2<sup>nd</sup> respondent which he did.
2. Thereafter the respondents entered into a consent for release of the attached motor vehicle without catering for payment of the applicants fees. He further stated that storage charges were incurred and ought to be paid before the vehicle may be released.
3. The decree holder/1st respondent said through his advocate Ms. Gachie orally in court that he principally supported the application but filed no replying affidavit.
4. The 2<sup>nd</sup> respondent opposed the application relying on the grounds of opposition dated 10/9/2016. it was stated that the applicant was not a party to the case and has no capacity to set aside the consent order of the parties. He was only an agent of Ms. Mungai Kivuti & Co. Advocates and should recover his fees by suing in the manner authorized by the law under Section 22(1) of the Auctioneers Act No. 5 of 1996.
5. The 2<sup>nd</sup> respondent contends that the attachment was illegal and the 2<sup>nd</sup> respondent is not liable to pay the auctioneers fees. This issue was deliberated by the parties and agreed on before the consent was recorded.
6. The facts leading to this application is that the 1<sup>st</sup> respondent represented the 2<sup>nd</sup> respondent in this matter Misc. Application No. JR. 216 of 2014. The record shows that the advocate/client bill was taxed between the respondents and consent recorded. It was taxed at Kshs.174,367 as the taxation certificate dated 8<sup>th</sup> June 2016.

7. The record further shows that warrants of attachment undated were issued in respect of the decree dated 3/6/2016 to be executed against the 2<sup>nd</sup> respondent. The applicant was instructed by the 1<sup>st</sup> respondents to attach for the debt as per the undated warrant. Proclamation was done on 9<sup>th</sup> September 2016 and attachment of vehicle registration number KAW 665 Z Toyota Double Cabin attached on 30/9/2016. It is after the attachment that the 2<sup>nd</sup> respondent filed an application dated 5/10/2016 for stay of sale and nullification of the orders leading to the attachment.

8. The parties recorded a consent for release of the attached vehicle in the application dated 5/10/2016 pending hearing and determination of the same. The applicant filed this application and obtained temporary stay of the consent order pending hearing of the application.

9. I proceed to deal with the issues raised in this application and in the grounds of opposition. I have carefully interrogated the said issues and the record of the court.

10. It is not in dispute that the applicant is not a party to this JR application No. 216 of 2014 which is yet to be determined. The 2<sup>nd</sup> respondent appointed another advocate after Mr. Mungai Kivuti was appointed a judicial officer. It was after the exit of the former counsel that the scenario of attachment began.

11. On perusal of the court file it appears the Deputy Registrar taxed the advocate-client bill *ex parte* in his undated ruling at Kshs.174,367/=. The record is not clear when the date for taxation of the bill was fixed by the registry or before the Deputy Registrar.

12. The applicant herein did not apply to be enjoined in this application as an interested party. He just filed this application and referred to himself as the interested party. The parties to the suit had already recorded the consent for stay and for release of the vehicle pending hearing of the application challenging the orders of the Deputy Registrar on taxation of the bill.

13. I find the argument of the 2<sup>nd</sup> respondent tenable that the applicant is not party to this application. He has not been enjoined and as such his application is not properly before the court.

14. The 2<sup>nd</sup> respondent states that both parties had principally agreed that the attachment was illegal and that the vehicle ought to be released forthwith. Based on this recognition, the payment of the auctioneers fees was not a part of the consent order. The issue of the illegality of the attachment is yet to be determined by the court in a pending application of the 2<sup>nd</sup> respondent. I will therefore not deal with the issue herein.

15. However, the 2<sup>nd</sup> respondent's contention was not controverted by the 1<sup>st</sup> respondent who played safe by not filing a replying affidavit and said through his advocate he principally agreed with this application.

16. The other issue is whether the applicant/interested party is entitled to the that he is a stranger to this judicial review application, it follows that he has no *locus standi* to seek any orders herein. The law provides a remedy on recovery of costs and fees by the auctioneers incurred in the cause of official duties. For the foregoing reasons, this court has no business going into to the merits of this application.

17. In conclusion, I find the application incompetent and strike it out accordingly. Considering the predicament the applicant finds himself in, I hereby order that each party meet its own costs.

**DATED, DELIVERED AND SIGNED THIS 24TH DAY OF JANUARY, 2017.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Ms. Thungu for Applicants**

**Mr. Ileri for Respondents**

**Mr. Rutere for Interested Party**