



**REPUBLIC OF KENYA**

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

**MISC APPL. NO.88 OF 2008**

**IN THE MATTER OF TAXATION OF COSTS**

**BETWEEN**

**ODHIAMBO OWITI COMPANY ADVOCATES.....APPLICANT/DECREE HOLDER**

**AND**

**STANDARD ASSURANCE (K) LIMITED.....RESPONDENT/JUD-HOLDER**

**KENYA COMMERCIAL BANK LIMITED.....1ST GARNISHEE**

**STANDARD CHARTERED BANK LIMITED.....2ND GARNISHEE**

**CFC STANBIC BANK LIMITED.....3RD GARNISHEE**

**R U L I N G**

1. There are 2 sets of applications herein by the 3rd garnishee hereinafter referred to as the applicant. The application dated 16.11.2015 prays that:

a) there be restraining orders against the respondent/decree holder from executing warrants of attachment and sale of the orders issued on 11th November 2015 and the proclamation dated 11th and 12th November, 2015 by Odongo Auctioneers.

b) The warrants of attachment and sale issued on 11th November 2015 as well as the proclamation dated 11th and the 12th of November 2014 by Odongo Auctioneers be set aside and be declared null and void.

c) The sum of Kshs.5,742,704.55 deposited with the court by the defendant/applicant be released forthwith to the plaintiff in full and final settlement of the decretal amount.

2. The application by the applicant dated 12.11.2015 is in all fours with that dated 16.11.2015.

3. The dispute between the parties herein was well settled by the Court of Appeal on 13th March, 2015 when it stated inter-alia that:

**“The order of the High Court made on the 12th day of June 2009 be and is hereby set aside and substitute thereafter an order that the respondent do pay the appellant the monies in terms of the garnishee order absolute dated 13th March 2004 together with interest at court rates from 13th March 2009 until payment in full.”**

4. From the court proceedings it appears that the applicants did not pay the sum till when the respondent commenced execution proceedings on 5th August 2015. The applicant filed an application wherein the Deputy Registrar ordered that it deposit the sum of Kshs.5,742,704.15 in court within 7 days. The applicant complied and deposited the same on 18.8.2015. This was apparently an *ex parte* order.

5. Mr. Owiti in his replying affidavit has argued that the said amount was and still remained the property of the applicant and the proper recourse was for it to pay directly to the decree-holder. Consequently the auctioneer was right in levying attachment against the applicant. On the other hand Mr. Eliud Ogutu in support of the application argues that it was improper for the respondent to proclaim against the applicant with full knowledge that the funds were resting with the deputy registrar of the court.

6. The fundamental issues to determine are basically two.

- a. **Whether it was proper for the applicant to have deposited the decretal sum in court;**
- b. **Whether the execution proceedings against the applicant had a proper basis.**

7. It is not disputed that the Court of Appeal rendered itself clearly and it is therefore not for this court to make any further determination on that. In other words the interest payable to the respondent was from 13th March 2009 till the same was paid in full. As it is apparent on record that money was not paid to the respondent till execution process commenced. The applicant on 10.8.2015 was ordered to deposit the same in court presumably as security to stop execution process.

8. It is therefore not true that the money was deposited in court by the applicant on its own volition but rather as a condition for the grant of stay of execution. Be it as it may the same cannot be equated to the provisions of Order 22(1) which states that:

**“1(1). All money payable under a decree shall be paid as follows.**

**(a) into the court whose duty is to execute the decree”**

9. In this case it was not paid *suo moto* by the applicant but under the court's compulsion.

10. Did that resolve the question of interest? I do not think so. The amount does not of itself on the face of it meant that it covers both the decretal sum and interest. The final sum in my finding was when a certificate would be issued by the taxing master to that effect..

11. Infact this position is clearly buttressed by the 2nd warrants of attachment which put the figures at Kshs.5,855,880.85 which was between 13.3.2001 and 30.11.15. Consequently the question of computation of interest is an issue which both parties in the presence of the taxing master ought to agree.

12. However does it therefore mean that once the amount is deposited in court it ceases to earn interest? As clearly stated above the amount was not deposited in court by the applicant out of its own volition. The amount was not in the hands of the decree holder/respondent but in court. Had the applicant deposited in line with Order 22(1) of the Civil procedure Rules then I would respectfully find that the interest ought to have ceased accruing once he gets knowledge of the same. The logical step would then have been to apply to the court to have it released to him.

13. This position was however cured by the orders of the deputy registrar of 16.11.2015 which ordered that the decretal sum be released to the respondent. Consequently I find that if there was any interest due to the respondent the same ceased from 16.11.2015 when the orders were issued.

14. Although the orders were issued *ex parte* by the deputy registrar through an application by the applicant, I take judicial notice that by then the respondent was well aware of the position namely that the court was holding the funds. In any event there was nothing prohibiting the respondent from asking the court to release the decretal sum, since in any case it was his money.

15. Having disposed the question of interest and presuming that the respondent has collected its cheque since the order of 16.11.2015 has never been challenged, it shall be incumbent upon the parties to agree on the question of interest thereafter. If they don't then the taxing master I presume shall be of help.

16. The next issue is on the Auctioneers charges. It appears that there was an earlier execution by the auctioneer on 4th August 2015 which prompted the applicant to deposit the decretal sum in court. The said warrants were again re-issued on 11.11.2011 and the figure assessed at Kshs.5,855,880.55. The question is whether there was need to renew the warrants again. In my opinion, once the amount had been deposited in court there was clearly no reason for renewing the warrants as by that time, it was known by the court's registry that the amount was already deposited. To have proclaimed again the applicant's items or goods was in my opinion an exercise in bad faith. If at all there was discrepancy on the figures, that would not have necessarily necessitated another warrants. At any rate the condition issued by the Deputy registrar in ordering the amount to be deposited in court was to pre-empt any execution by the respondent.

17. Clearly it is unfair on the part of the respondent to argue that since the money was not in his custody he had every right to execute against the applicant. All the parties herein including the auctioneers are officers of the court. Despite the knowledge that the money was still held in court, there was no reason to proceed with further execution. Nothing stopped the respondent from asking the court to release the money to it

18. In any case there is and I have stated above nothing that barred the respondent from asking for further interest.

19. I therefore find the execution after 4.8.2015 laced with bad faith. The auctioneers should only be paid for work done upto 4.8.2015 and nothing thereafter. As officer of the court they ought to have stopped at that. The Deputy Registrar 's order were already on board. There was no use for seeking extension of the warrants.

In determining the application therefore I do order as follows:

- a. **The interest due to the respondent and payable by the appellant shall be upto 16.11.2015.**
- b. **The auctioneers charges shall be payable by the applicant for the proclamation of 4.8.2015 only.**
- c. **The respondent shall have the costs of this application.**

**Dated, signed and delivered this 10th day of March 2016.**

**H. K. CHEMITEI**

**J U D G E**