



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO. 16 OF 2013

(An appeal from the Judgment of the Senior Resident Magistrate,

Runyenjes in PMCC No. 48B of 2012 dated 5/7/2013)

PETER NDWIGA DANIEL.....PLAINTIFF/APPLICANT

VERSUS

GIANT AUCTIONEERS.....1ST RESPONDENT

DANIEL NJAGI MURUAMITI.....2ND RESPONDENT

R U L I N G

1. This is the application dated 11/12/2015 seeking an order of temporary injunction restraining the respondent whether by themselves, their agents or servants from completing any sale by auction or interfering with the applicant's ownership, possession of goods or property. The application is supported by the affidavit of the applicant Peter Ndwiga Daniel.

2. The applicant states in his affidavit that he is the owner of the goods proclaimed by the 1st respondent. The 2nd respondent who was the respondent in this civil appeal informed the 1st applicant that he had not issued instructions for proclamation and that the proclamation was illegal. The applicant and the 2nd respondent then visited the offices of the 1st respondent who informed them that he got instructions from Eddie Njiru & Co. advocates. The 2nd respondent wrote a letter to the advocate's firm instructing them to write to the 1st respondent to cancel the sale of the property. It is alleged that the court order for sale of the property was issued was obtained illegally.

3. The applicant further argues that the intended sale of the goods will occasion him irreparable loss as the suit property comprises of family interests and will render the applicant and his family destitute. The applicant states that he has established a *prima facie* case with overwhelming chances of success and that the loss and damage cannot be compensated by way of damages. He further argues that the balance of convenience tilts towards granting the order sought.

4. The 2nd respondent in his affidavit stated that he did not give anyone instructions to act for him in the appeal. He was satisfied with the judgment delivered by the Runyenjes Court on 15/3/2013 and did not give the lawyer instructions to appeal. He argues that the judgment of the High Court in the appeal delivered on 25/11/2013 was null and void as well as fraudulent.

5. Mr. Eddie Njiru swore an affidavit stating that he was given instructions by the appellant to file the appeal following the judgment of Runyenjes Court which was in favour of the applicant. The appeal was set down for hearing and the applicant never raised the issue of representation during the hearing. The counsel states that he prosecuted the appeal up to its conclusion. The bill was taxed and after the applicant refused to satisfy the decree the counsel proceeded to instruct the auctioneer to attach the property. This application was filed after the proclamation in order to defeat justice.

6. The background of this matter as borne by the court record is that Peter Ndwiga Daniel and his three brothers Isaack Ileri, John Nyaga and Nephath Muriithi were sued by their father the appellant in Runyenjes PMCC No. 48B of 2012. The claim was for removal of caution lodged against LR. Kagaari/Weru/446 by the applicant and his brothers measuring 3.03 ha.

7. The trial court entered judgment in the favour of the applicant and his brothers. The appellant/2nd respondent herein successfully appealed against the judgment of the Ag. Senior Resident Magistrate. He was awarded the costs of the suit.

8. The appeal was filed and prosecuted by the firm of Eddie Njiru & Co. Advocates. Mr. Njiru prosecuted the appeal until its disposal on 25/11/2014. The certificate of costs dated 12th October 2015 show the costs as Shs.66,049/= all inclusive. The counsel instructed the 1st respondent Giant Auctioneers to attach the 1st applicant's property to recover the costs.

9. The goods of the applicant including one cow and several household goods were proclaimed on 08/12/2015. The applicant now seeks that the 1st respondent be restrained from selling his goods by public auction on grounds that the order for proclamation was obtained fraudulently. Secondly that the appellant did not instruct Mr. Njiru to file and prosecute the appeal for him.

10. This appeal was filed on 16/4/2014 and judgment delivered on 25/11/2014. During the filing, hearing and determination of the appeal the appellant was alive and in good health. It is said that he fell sick toward the end of 2015 after the goods were proclaimed and died in December 2015.

11. The appeal proceedings show that an advocate one Ken Githinji & Co. was instructed by the applicant to defend the appeal and that his representative one Kinyanjui appeared in court together with the appellant's counsel. On 01/08/2014 the counsels agreed by consent that the appeal be disposed of by way of written submissions. The submissions were filed by both parties and judgment delivered in favour of the appellant. It is trite law that costs follow the event.

12. The Deputy Registry taxed the bill at Shs.66,049/= on 09/07/2015 and a certificate of costs was issued.

13. The applicant's allegation that Mr. Eddie Njiru was not instructed by the appellant to prosecute the appeal has no basis. The record shows that the appeal was filed immediately after the judgment of the lower court. It has not been explained how the counsel could take up a case with instructions and what interests he could be having in the matter.

14. Contrary to the applicant's allegations that his father was unwell, the record does not bear witness to the allegations. The authenticity of the letter written by the appellant after proclamation that he did not instruct the counsel in the appeal cannot be proved. After all, the letter was received after the appeal had been finalized and proclamation of the goods done.

15. The applicant filed an affidavit allegedly sworn on 4/01/2016 by the appellant. Yet, the applicant told the court that his father died in December 2015. How then could he have sworn an affidavit one month after his death? This affidavit raises more questions than answers.

16. The application seeks to restrain the 1st respondent by way of temporary injunction from selling the applicant's goods by public auction. There is no other prayer giving the court direction on where the

applicant wants to go after obtaining the order. If the order sought is granted, it must be pending hearing and determination of a suit. There is no evidence of any suit filed by the applicant against the respondents.

17. I find no merit in this application and dismiss it with costs to the respondent.

DELIVERED, DATED AND SIGNED AT EMBU THIS 4TH DAY OF APRIL, 2016.

F. MUCHEMI

JUDGE

In the presence of:-

The applicant

Mr. Njiru for 2nd respondent