



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL MISC. APPL. NO. 45 OF 2015

JOSEPH M. NG'ANG'A.....1ST APPLICANT

JOSEPHINE MUCHINA.....2ND APPLICANT

SIMON CHEGE.....3RD APPLICANT

V E R S U S –

LAWRENCE MURIUNGI GICHUNGE.....1ST RESPONDENT

STEPHEN NYAMBU MBIJIWE T/A

LIFELINE AUCTIONEERS.....2ND RESPONDENT

RULING

1) The subject matter of this ruling is the motion dated 29.8.2016 in which Stanely T. Mugacha, Eliud M. King'ara and Peter G. Waweru T/A Pangani Auction Centre, the applicants herein are praying for inter alia:

1. That this court does stay its orders of 27th July 2016 and/or maintain the prevailing status quo pending the hearing and determination of this application.

2. The honourable court be pleased to determine who as among the parties to this cause and the auctioneer to whom this court order issued on 27th July 2016 is addressed should meet the applicants charges for the storage of motor vehicle registration number KBM 090B at their yard (Pangani Auction Centre) following its deposit by Stephen Nyambu Mbiyiwe T/A Lifeline Auctioneers.

3. The costs of this application be met by the respondent/s the court will ultimately find liable.

The motion is supported by the joint affidavit of the applicants.

2) Stephen Nyamu Mbiyiwa T/A Lifeline Auctioneers, the 5th respondent herein filed a replying affidavit to support the motion. This court also permitted learned counsels appearing in the matter to make oral submissions on the application despite filing no formal responses.

3) When the motion came up for inter partes hearing, Mr. Makumi, Learned advocate for the applicant

informed this court that he was only pursuing prayer 3 of the motion in which he asked this court to:

determine who as among the parties to this cause and the auctioneer to whom this court order issued on 27th July 2016 is addressed should meet the applicants' charges for the storage of motor vehicle registration number KBM 090B at their yard (Pangani Auction Centre) following its deposit by Stephen Nyambu Mbijiwe T/A Lifeline Auctioneers.

4) The learned advocate urged this court to exercise its discretion under Section 34 of the Civil Procedure Act to determine the question as to who should meet the auctioneer's charges. He proposed that the judgment debtor should pay those charges.

5) Mr. Wanjohi, learned advocate for the 5th respondent supported the motion by adopting the submissions of Mr. Makumi. The learned advocate pointed out that there was a consent order on record in which the judgment debtor undertook to settle the auctioneers costs within 60 days.

6) Mr. Kuria, learned advocate for the applicant opposed the motion arguing that the applicant in the motion is not a party to the dispute and that neither is an affected party.

7) He further argued that the auctioneer was bound to obey the court order by releasing the attached motor vehicle instead of waiting for a whole year thus attracting storage charges. It was pointed out that the motion was filed with the sole intention of circumventing the pending application for contempt. The learned advocate pointed out that the charges demanded were arbitrary. He proposed that the auctioneers should tax their bill and sue for recovery under Section 22 of the Auctioneers Act.

8) Mr. Kaburu, learned advocate for the plaintiff was of the same view with Mr. Makumi, that the judgment debtor should settle the auctioneers charges. He stated that the auctioneers charges were paid outside the consent period of 60 days.

9) I have considered the grounds stated on the face of the motion and the facts deponed in the supporting affidavits. I have also considered the rival oral submissions of learned counsels. This court has been asked to determine the singular question as to who should pay the auctioneer charges. In my humble view, the answer to the above question is straight forward, the judgment debtor is bound to settle the decretal sum plus the consequential execution costs. In other words, the judgment debtor should settle the auctioneers charges. In this dispute there is an allegation that the auctioneers continued holding the attached property in defiance of the court order issued directing the release of the same on the basis that the auctioneers charges should be settled first before complying with the order. A judgment debtor is not bound to pay any storage charges which accrued in the period the attached goods were retained by the auctioneer in defiance of the release order. However, the judgment debtor is bound to pay the auctioneers charges including storage charges for the period before the release order was issued. However, the auctioneer must first tax its cost or in the alternative ascertain the same by agreement.

10) In the end the motion dated 29.8.2016 is allowed costs but subject to the auctioneers taxing their costs.

Dated, Signed and Delivered in open court this 11th day of November, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

.....for the Defendant