



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI CIVIL COURTS
MISC. APPLICATION NO. 771 OF 2013

**ST. MUGACHA T/A GALAXY AUCTIONEERORIGINAL
APPLICANT**

VIOLENT MERAB SONGA

EUGENE HARRY SONGA

EUNICE JEANETTE SONGA

(Sued as Administrators of the Estate

of

DAN OYALO SONGA, Deceased)ORIGINAL RESPONDENTS

RULING

In a ruling dated 17th and delivered on 19th July, 2013 Waweru J found that the auctioneer's costs in this matter should be paid by the decree holders. The decree holders moved the court (Waweru J) to review its ruling aforesaid but the court declined to do so in a ruling dated 30th June, 2014 and delivered on 9th July 2014. The auctioneer then filed a bill of costs which was taxed by a taxing master who delivered a ruling on 14th October, 2014.

A party who is aggrieved by a decision of a taxing master following an Auctioneer's bill of costs is supposed to move the court within seven days to challenge the said ruling. In the instant case, the applicant moved the court after 33 days from the date of the said ruling.

Such an application is supposed to be filed by way of Chamber summons but the applicant moved the court by way of Notice of Motion. The application is opposed by the respondent who is the original applicant. Both learned counsel have filed submissions in addressing the said application. There are also cited authorities copies of which are on record.

Following the ruling of Waweru J declining to review his ruling, that the judgment creditor should pay the Auctioneers charges an appeal was lodged and that appeal is pending hearing.

The Notice of Motion by the applicant seeks several orders as follows;

1. That the court sets aside the taxation of the Bill of Costs dated 14th October, 2014 for Kshs. 1,375/862/=.
2. In the alternative that the said bill of costs be set aside or altered.
3. In the alternative the court to stay the execution of the said bill pending the hearing and determination of the appeal to the ruling in Miscellaneous Application No. 227 of 2010 delivered on 9th July, 2014 by Waweru, J.
4. That this court makes such other or further orders as it may deem just and necessary in the circumstances.

The application is supported by an affidavit sworn by Wilfred Akhonya Mutubwa, the advocate for the applicant/original respondents.

I have read the material before me with a view to determining the said application. The time lines for filing such an application and the provisions of law related thereto are clear and unequivocal. The application ought to have been brought within seven days and the fact that it was brought after 33 days makes it way out of time.

The learned counsel for the applicants/original respondents has blamed his inexperience in moving the court the way he has and submitted that he has come with clean hands.

Again, notice of objection to taxation should have been brought under Rule 55 (4) and (5) of the Auctioneers Rules. Instead the court has been moved under Rule 11 of the said Rules.

The learned counsel for the applicant /original respondents submits that this is a technicality which should not lock him out of the court.

There is a complaint by the respondent/original applicant that this is an omnibus applicant in that it seeks several orders that refer to different provisions of law.

This court appreciates the concern raised by the respondent/original applicant in the written submissions and oral submissions made in court about the approach used by the applicant/original respondent. I subscribe to the position that a mistake by counsel should not be visited upon his clients.

The candid admission by the learned counsel for the applicants/original respondents of inexperience and citation of wrong provisions of law persuades me that the mistake was not deliberate. This is excusable in advertence.

It has been submitted that the judgment debtor and not the judgment creditor should have been made to pay the Auctioneers costs. In fact it is the ruling of Waweru J, that led to the filing of the bill of costs now in contention.

Such a submission in my view cannot be advanced in the absence of the judgment debtor. The judgment debtor is not a party in this application and therefore any decision cannot be made without being given an opportunity to be heard.

This court cannot sit on appeal of a ruling made by Waweru J, this being a court of concurrent jurisdiction. I note however that an appeal is pending from the said ruling. The orders sought by the applicants/original respondents are in the alternative and therefore this cannot be said to be an omnibus application. The respondent /original applicant knew what case he was facing and no prejudice has been occasioned.

Having said that I cannot address the issues relating to prayers 1 and 2 in the absence of the judgment debtor, the only issue that is left is that of a stay of execution of the said bill pending the hearing and determination of the appeal arising from the ruling of Waweru J.

The application for stay of execution is ordinarily conditional. It is true that there is no security proposed for such a stay. It has also not been shown that the original applicant shall not reimburse the original respondent should the appeal succeed. That notwithstanding I believe some safeguards can be placed to ensure that the applicant/original respondent is not driven from the seat of judgment.

I am inclined to allow a stay of execution pending the hearing of the said appeal on the following grounds;

1. The applicants/Original respondents shall deposit a sum of Kshs. 500,000/= in court within the next 30 days.
2. The applicants/original respondents shall prepare and serve the record of appeal within 30 days of today (if not already done) and take directions for purposes of prosecuting the same.
3. The applicants /original respondents shall pay the costs occasioned by this application to the respondent/original applicant.
4. There shall be liberty to apply.

Dated and delivered at Nairobi this 11th Day of June, 2015.

A.MBOGHOLI MSAGHA

JUDGE