



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

MISC.APPL. NO.68 OF 2013

KENNEDY KWEYU SHIKUKU T/A

ESHIKHONI AUCTIONEERSAPPLICANT

VERSUS

1. BEATRICE OMBISA1ST RESPONDENT

2. ELIZABETH AVUMBA2ND RESPONDENT

3. MARGRET A ATUNDOINTERESTED PARTY

CONSOLIDATED WITH

MISC. APPL.NO.70 OF 2013

MARGARET A. ATUNDOAPPLICANT

VERSUS

1. BEATRICE OMBISA

2. ELIZABETH AVUMBA

3. CLIFTON WAFULARESPONDENTS

4. JARES OKOTH

5. KENNEDY SHIKUKU T/A ESHIKHONI AUCTIONEERS

R U L I N G

1. This Ruling addresses a singular question whether costs are payable to the Applicants for two Applications compromised by way of a consent order on 12th November 2013.
2. In Busia High Court Miscellaneous Civil Application NO.68 of 2013 The Applicant sought, inter alia, the following orders:-

“1.

2.

3. That this Honorable Court be pleased to transfer Busia PMCC.No.111 of 2013 to Mumias Senior Principal Magistrates Court for hearing and final determination.”

Vide Busia High Court Miscellaneous Civil Application NO.70 of 2013, this Court was asked for similar orders as follows:-

“a.

b.

c.

d) That further and or on the alternative the Lower Court suing Busia CMCC No.111 OF 2013 AND Busia CMCC No.133 of 2013 be transferred to the Senior Principal magistrates Court at Mumias.”

3) Let us first understand the parties in these proceedings. The Applicant in No.68 of 2013 is an auctioneer who carried out execution in Mumias SPMCC No.181 of 2007 Margret Anyango Alundo -vs- Godfrey Odongo (hereinafter the “Mumias” case) and Butere SPM CC 17 OF 2012 Moses Wafula Bwayo -vs- David Obias Ororimong & Another (hereinafter the “Butere” case). The 2nd and 3rd Respondents were objectors to both executions. The Interested Party is the Plaintiff in the Mumias case.

4) In Application 70 of 2013, The Applicant is the Plaintiff in the Mumias case. The 1st and 2nd Respondents are the objectors therein. The 3rd and 4th Respondents are Defendants in Busia CMCC 133 of 2013 1) Beatrice Ombisa 2) Elizabeth Arumba -vs- Clifford Wafula & Jared Okoth. The 3rd and 4th Respondents are employees of the 5th Respondent.

5. By agreement of the Parties in the two Applications, the two were consolidated for hearing and disposal. Application No.68 of 2013 was to be the lead file. Subsequent to that consolidation a consent was entered herein on 12th November 2013 in the following terms:

COURT “By consent of all Counsel Busia CMCC No.111/2013 be and is hereby transferred to the Senior Principal Magistrates Court at Mumias for hearing and final disposal. While Busia cmcc No.133/2013 be and is hereby transferred to the Senior Principal Magistrate Court at Butere for hearing and final disposal. The Respondent is granted 30 days from today to move the lower Courts for formal stay. The parties to address the Court on who should meet costs of these proceedings.”

6. The Applicants insist that they deserve costs and they predicate their insistence on the legal mantra “costs follow the event”. Besides, it was argued, the 1st and 2nd Respondents should be punished in costs because the Busia cases are an abuse of Court process as any questions in respect to execution ought to have been asked and answered in the Butere and Mumias proceedings. It being pressed that the 1st and 2nd Respondent had in the Busia matters deliberately failed to disclose the existence of the Mumias and Butere cases. This material non-disclosure should attract the censure of this Court by way of costs.

7. On the part of the 1st and 2nd Respondents, the argument made was that although what triggered the cause of action in the Busia cases was the execution of warrants in the Mumias and Butere proceedings, the foundation of the action was that the executions were unlawful. That this Constituted separate causes of action outside the provisions of Section 34 of The Civil procedure Act and that they were perfectly entitled to commence fresh suits.

8. On the question of Jurisdiction the 1st and 2nd Respondents argued that the Auctioneers have offices in Busia and the Plaintiff is resident in Busia and the placing of the suits in Busia was in

the contemplation of Section 15 of The Civil Procedure Act. The 1st and 2nd Respondents maintained that their concession to the transfer of the suits was for the sake of a convenient and speedy determination on the validity or otherwise of the executions. That gracious concession, I was beseeched, does not deserve a punishment in costs.

9. It will not be necessary for this Court to get into too much background of the related matters. Starting with the Mumias matter, it is sufficient for this Court to note as follows:-
- a. Margaret Anyango Alundo successfully sued one Godfrey Odongo and obtained a money decree in her favour.
 - b. Execution of the warrants in respect to that Decree were unsuccessfully resisted by objections raised by the 1st and 2nd Respondents.
 - c. Pursuant to those warrants, there seems to have been attachment of motor vehicle KAW 012M. There is a contention by the 1st and 2nd Respondents that the 3rd and 4th Respondents herein are guilty of illegally and unlawfully carrying out that attachment and that forms the complaint the Busia CMCC 133 of 2013.
 - d. The 3rd and 4th Respondents are employees of the 5th Respondent.
- 10) In the Butere matter, the Court would note as follows:-
- a. Moses Wafula Bwayo sued and obtained a money decree against David Obias Ororimong and Tadayo Mark Opiyo.
 - b. When Kennedy Shikuku (the 5th Respondent) attempted to levy execution in realization of that decree, the 1st Respondent raised an objection.
 - c. That objection was dismissed on 11th April 2013 and the dismissal paved the way for attachment of motor vehicle KBH 875Y said to belong to the Defendant in that suit.
 - d. The 1st and 2nd Respondent filed Busia CMCC 111 of 2013 against the auctioneer challenging the legality of the said attachment.
11. As I determine this Application I must bear in mind that the civil suits Nos. 111/2013 and 133/2013 which were transferred from Busia are still pending before the Subordinate Court for determination. I must refrain from making any findings on issues that the Lower Court will have to determine even if I think I have an answer to them. An issue that will certainly arise before the Lower Court is whether the transferred suits breach the provisions of Section 34(1) of Civil Procedure Act and are therefore an abuse of Court process. Section 34 (1) provides:-

“34.(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.”

Another issue that may arise is whether the transferred suits were an abuse of Court process for failing to disclose the existence of the related matters. **But** it is not for this Court to make a finding on these issues and use the outcome as a basis for making an order on costs on the Applications for transfer.

12. On another plane, rival positions have been taken as to whether the two suits were properly placed at Busia. To the Applicants the very act of the 1st and 2nd Respondents conceding to the Application for transfer was an admission that the Busia civil suit No. 133/2013 should have been filed at Butere and Busia civil suit no. 111/2013 at Mumias. For the Respondent it was maintained that the concession was purely to allow for the matters to be dealt with conveniently where the related matters domiciled.
13. I have looked at the Applications keenly and noticed that in none of the many grounds and reasons given for seeking the transfer of the two suits do the Applicants allege that the suits are instituted in breach of the provisions of the law in respect to place of suing (Sections 11 through to 15 of The Civil Procedure Act). For that reason I accept the explanation given by Counsel for the 1st

and 2nd Respondents that his concession to transfer was driven by the need for the matters to be dealt with conveniently at the same Courts which had dealt with related matters. In other words the concession made by the two Respondents was not an acknowledgement that suits were wrongly placed as that issue was not raised in the Applications. I also accept this explanation because the grounds (like the Section 34 issue) upon which the Applications were predicated were not compromised or determined when the consent was entered and remain very much alive for determination by the Trial Courts.

14. In my discretion thereof, I make an order that each party bears its own costs.

F. TUIYOTT

J U D G E

DATED, DELIVERED AND SIGNED AT BUSIA THIS 12TH DAY OF FEBRUARY 2014.

IN THE PRESENCE OF:

KADENYICOURT CLERK

.....FOR APPLICANT

.....FOR INTERESTED PARTY

.....FOR THE 1ST & 2ND RESPONDENTS