



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 29 OF 2006

STEEL CENTRE LTD.....APPELLANT

VERSUS

JOSEPH OCHIENG.....1ST RESPONDENT

JAMES O. JOSIAH T/A NYALUOYO AUCTIONEERS....2ND RESPONDENT

J U D G M E N T

- 1). This appeal raises from the trial court's ruling dated 7-2-2006 which it dismissed an application to cancel the warrant of attachment issued against the appellant and to order that the process of execution was irregular.
- 2). Prior to the said application the 1st respondent **Joseph Ochieng** had been awarded a total sum of Kshs. 300,000/= being damages on behalf of the estate of the late **Goretty Akinyi** who had died in a road traffic accident. He was equally awarded costs of Kshs. 45, 271/= By then he was being represented by the firm of **Otieno Yogo Advocates**.
- 3). Later during the execution process he retained **M/S Nyaluoyo Auctioneers** to carry out the execution. On 23-5-2002 a consent was entered between Mr. Otieno now acting for the auctioneers and Mr. Masese for the judgment debtor in which the auctioneer's costs were assessed at Kshs. 40,326.50/=. The same was however not paid.
- 4). On 6-2-2009 the auctioneer through the firm of Otieno Yogo filed the bill of costs. On 20-12-2009 the bill was assessed at Kshs. 8552.45/=. On 22-12-2005 warrants of attachment were issued to the auctioneer ex-parte. The said auctioneers served a proclamation upon the appellant on 27-12-2005 and on 5-1-2006 they attached the appellant's lorry. The appellant filed the application which is the subject of this appeal.
- 5). The parties did file written submissions in support and in opposition of this appeal. There are seven grounds in this appeal which can be summarized into three namely:
 - a. **Whether there was compliance with the auctioneer's rules, namely the mandatory seven days after prosecution as required.**
 - b. **Whether there was conflict of interest on the part of the advocates.**
 - c. **Whether the provisions of Order III Rule 9 of the Civil Procedure Rules were complied with.**

6). From the proceedings herein there is no doubt that the proclamation was done on 27-12-2005. The auctioneer proceeded on 5-1-2006 to attach the proclaimed goods.

7). The provisions of order 49 Rule 3 (a) (repealed) stated that:

“Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty first day of December in any year and the sixth day of January in the following both days included shall be omitted from any computation of time (whether under these rules or any order of the court) for the amending, delivery or filing of any other act”.

In this regard it is clear that the attachment ought to have taken place after 13th January 2006 and not before.

8). The other issue to determine is the question of whether there was or there is any conflict of interest on the part of the advocate and therefore would in any way prejudice the appellant's case.

9). From the proceedings it is apparent that the firm of Otieno Yogo filed the plaint and acted for the plaintiff throughout in the lower court. In this appeal they are appearing for the appellant. Certainly there is a conflict of interest.

In arriving at this decision this court is guided by the case of **Uhuru Highway development Ltd & Others -VS- Central Bank & Others [2002] 2 E.A 654** where the court of appeal was of the view that an advocate would not be allowed to act against a client where he could consciously or unconsciously or even inadvertently use confidential information acquired when he acted for such a client to his detriment. The court held that where it was established that such a client would suffer prejudice, then the court would have no alternative but to order that such an advocate ceases to act for the opposing party. In the present appeal the appellant's advocate acted for the respondent in the lower court. First it acted for the 1st respondent and then the 2nd respondent. In this appeal they are now acting for the defendant in the lower court.

10). There is all the likelihood that the parties may suffer prejudice as a consequence of the said firm acting for either parties. In the lower court it is the appellant's advocate who entered into a consent on behalf of the 2nd respondent herein for the payment of the costs. When it came to taxation of the bill he started acting for the defendants. It is unlikely that the counsel for the appellant will not be influenced by the much he knows in this case having acted for all the parties in the suit.

11). The final issue to determine is the representation by the firm of **Abuta & Co. Advocates** who apparently filed the appeal. Apparently they filed their appearance on 11-1-2006 taking over supposedly from the firm of Olago Aluoch. This takeover was after judgment had been delivered. Clearly they failed to comply with the provisions of Order III Rule 9A. They are illegally on record.

12). The sum total of this appeal is that the same shall partially succeed; namely that the attachment was illegal in the first instance as it was done without following the relevant provisions of the law, as no clear 7 days notice being issued. The appeal shall fail on the other hand as there was clearly a conflict of interest on the part of the counsel representing the appellant namely the firm of Otieno Yogo & Co. Advocate.

Each party shall consequently bear their respective costs.

Dated, signed and delivered this 5th day of February, 2014.

**H.K.
JUDGE**

CHEMITEI

HKC/va