



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT BUNGOMA**  
**CIVIL APPEAL NO.71 OF 2007**

**EUNICE NAFULA TEMBE ..... APPELLANT/ RESPONDENT**

**VRS**

**MULTIPLE HAULIERS (E.A) LTD..... RESPONDENT/APPLICANT.....**

**AND**

**MANUEL OTIANGALA**

**t/a KURONYA AUCTIONEERS ..... AUCTIONEER**

**SAMSON I. TUMBO**

**t/a DOMINION YARDS ..... NOMINEE/APPLICANT**

**PAUL B. WAMOTO**

**t/a PAWABA TRADERS ..... NOMINEE/APPLICANT**

**R U L I N G**

1. This is a Ruling on the Motion dated 05/08/13 by Multiple Hauliers (E.A) Ltd (hereinafter ‘the Respondent’). In that motion, the Respondent sought two (2) substantive orders. Firstly, that an order to the effect that the warrants herein had been issued in error and that they should be recalled and cancelled and secondly, that Roselyne Makokha Kirapa (alias Roselyne Aburili) be ordered to meet the same (sic), meaning the costs. The Motion also sought the costs of the application. The application was expressed to be brought under Sections 1A, 1B, 3A and 34 of the Civil Procedure Act. The application was supported by the Affidavit of Geoffrey Yogo, Advocate sworn on 5<sup>th</sup> August, 2013.

2. The basis for the application was that did on 4<sup>th</sup> December, 2012, this Court set aside the judgment that had been entered herein in favour of the Appellant and all consequential orders emanating therefrom. The Court also ordered that the costs, if any, be paid by Roselyne Kirapa *alias* Roselyne Aburili and that for that reason, the Respondent was not required to pay any costs. That the Auctioneer had failed to disclose this fact when he took out warrants against the Respondent.

3. Although the Court had on 13<sup>th</sup> November, 2013 ordered that the parties do file submissions on the application, the Applicant did not file any.

4. The application was opposed by the Auctioneer, Samson I. Tumbo who filed a Replying Affidavit sworn on 12/08/13. The Auctioneer contended that having been nominated by Kuronya Auctioneers on 15/11/11 as their nominees under Section 15 of the Auctioneers Act, on 02/04/13 he filed an application in this Court seeking the Court's direction as to who between the Appellant and the Respondent should pay the Auctioneer's charges that had been incurred in the aborted execution of sometimes in May, 2012. That by a ruling delivered on 17<sup>th</sup> June, 2006 (sic), the Court ordered that the Respondent (Multiple Hauliers) do pay the auctioneers charges.

5. That subsequently, the Auctioneers Bill of Costs was properly taxed after having been served upon the Respondent and a Certificate of Costs duly issued. It was the Auctioneers contention that the consent order that had been entered into between Kuronya Auctioneers and the Respondent on 18/05/12 was never set aside and that that consent as to payment of costs of the Auctioneer still stood. In addition, he objected to the application on the ground that the Affidavit in Support of the motion was sworn by an Advocate. The Auctioneer did file his written submissions and authorities which I have carefully considered.

6. The background to this matter is that on 23/2/2011, the Appellant Eunice Nafula Temba obtained a judgment in her favour of Kshs.629,520/= in this appeal having appealed against the judgment of the lower Court that had dismissed her case. The Respondent applied for stay of execution which application was dismissed on 16/05/2012. Warrants of Attachment were issued to Kuronya Auctioneers on 17<sup>th</sup> June, 2011 for Kshs.786,677/= against the Respondent. On the same day, the Respondent's goods were proclaimed. Upon the dismissal of the application for stay on 16/05/12, fearing attachment, the Respondent entered into a consent dated 18/05/12. In that consent which was executed by the Advocates for the Appellant, the Respondent and the Auctioneer, it was agreed that the Respondent was to pay the auctioneers fees upon agreement or taxation.

7. On 7<sup>th</sup> June, 2012, the Respondent applied for the setting aside of the said consent and for an order that, the Warrants issued by the Court be recalled and be canceled. The Respondent also sought for an order that the proceedings undertaken by the firms of Roselyne Aburili and Co. and Otsiula Kweyu and Company Advocates were a nullity for having been undertaken by unqualified persons. Upon hearing the parties on that application, Muchelule J held that the subject warrants were issued prematurely as the decree had not been approved by the Respondent's Advocates in breach of Order 21 Rule 8 (2) and (3) of the Civil Procedure Rules. Those warrants were therefore recalled.

8. Further, the Court made a finding as follows:-

***“Quite unfortunately, when Roselyne ceased to hold a practicing certificate, her firm ceased to be properly on record for the appellant and all documents filed, all appearances made on behalf of the firm and Appellant and all proceedings conducted were invalid because of the illegality pointed out ..... Quite unfortunately for the Appellant, the request to set aside the judgment delivered on 23/2/10 (Sic) and all consequential orders succeeds. I ask that Roselyne Makokha Kirapa (alias Roselyne Aburili) to pay the costs of this application.”***

9. In the face of that order, the Auctioneer went to court on 02/04/13 for an order to be made as to who between the Appellant and the Respondent was liable to pay the auctioneer's charges for the execution of June, 2011 and in pursuance of the consent order of 18/05/12. The Court adjudged that it was the Respondent who was liable to pay those charges. Subsequently, the Auctioneer taxed his costs and had warrants issued against the Respondent for Kshs.181,622/= in respect of his charges. It is these warrants that the Respondent's current motion seeks that they be recalled and that the costs certified in favour of the Auctioneer be paid by Roselyne Makokha Kirapa (alias Roselyne Aburili).

10. I have already set out the respective parties' contentions above. It is clear from the Ruling

of Muchelule J. of 4<sup>th</sup> December, 2012 that the Judgment of the court of 23<sup>rd</sup> February, 2011 and all the subsequent orders and proceedings were set aside. The question for determination therefore is whether that decision affected the consent order of 18<sup>th</sup> May, 2012 between the Respondent and the Auctioneer.

11. Firstly, that decision was in respect of the Respondents' application dated 7<sup>th</sup> June, 2012. In that application, the Respondent sought three (3) prayers one of which was that the consent of 18/5/12 between the Respondent and the Auctioneer be set aside. After hearing the parties, the Court granted the other two (2) prayers for the recall of the warrants and setting aside of proceedings but said nothing about that prayer.

12. I have always known the law to be that a relief that is sought in a pleading and is not expressly granted by the decision is deemed to have been refused. Section 89 of the Civil Procedure Act provides that:-

***“The procedure provided in this Act in regard to suits shall be followed as far as it may be applicable in all proceedings in any Court of Civil jurisdiction.”***

Explanation (5) of Section 7 of the Civil Procedure Act on its part provides:-

***“..... Any relief claimed in a suit, which is not expressly granted by the decree shall for the purposes of this section, be deemed to have been refused.”***

A suit has been defined under Section 2 of that Act as:-

***“..... all civil proceedings commenced in any manner prescribed.”***

13. In this regard, my view is that the Notice of Motion dated 07<sup>th</sup> June, 2012 which was instituted by the Respondent was a civil proceeding that had been commenced as provided for by the law. That upon the Court granting the other two prayers sought and refusing to grant the prayer to set aside the consent of 18/05/12, which had been expressly sought in that application, by implication had declined the same.

14. Secondly, the order of 4<sup>th</sup> December, 2012 set aside the judgment and all consequent proceedings for reasons of actions undertaken by the unqualified persons being the firm of Roselyne Makokha Kirapa. The consent order of 18<sup>th</sup> May, 2012 was entered, *inter alia*, as between the firms of Bulimo & Company, Advocates for the Auctioneer and the Respondent's Advocates. That was a binding contract between the two parties. Ms. Bulimo & Company were not one of the Advocates whose proceedings were vitiated. The actions of that firm as well as those of the Advocates for the Respondent were regular, valid and lawful. Their actions were never set aside by the Court on 4<sup>th</sup> December, 2012.

15. Thirdly, on an application by the Auctioneer for determination as to who pays his charges, which was properly served upon the Respondent, the Court ordered on 30<sup>th</sup> May, 2013 that the Respondent was the one to pay those charges. Subsequently, the Auctioneer's Bill of Costs was taxed by the Deputy Registrar and a Certificate of Costs issued in respect thereof. It is those costs that had been certified as payable to the Auctioneer and which the Auctioneer was attempting to execute for. Those are the costs the Respondent is challenging.

16. As properly submitted by the Auctioneer, under Rule 55 of the Auctioneers Rules 1997, a challenge to a taxation undertaken by the registrar can only be by way of an appeal to a Judge. That rule provides:-

***“55 (4) An Appeal from a decision of a registrar or magistrate or the board under sub-rules (2) and (3) shall be to a Judge in chambers;”***

Under sub-rule 5 of that Rule, the Memorandum of Appeal, by way of Summons in chambers is supposed to be filed within 7 days of the decision of the registrar.

17. The decision of the Deputy Registrar of this Court on the Auctioneer's bill of costs was made on 04<sup>th</sup> July, 2013. The Motion before me was lodged on 06<sup>th</sup> August, 2013 well over the seven (7) days prescribed. In any event, the Motion is not by way of a Chamber Summons setting out grounds of appeal against the decision of the registrar in terms of Rule 55 (5) of the Auctioneers Rules.

18. For the foregoing reasons, the prayer to recall the warrants and canceling them is untenable and cannot stand as the warrants were properly issued.

19. As regards the prayer that the costs be paid by Roselyne Makokha Kirapa, my view is that, if that was the intention of the Court in its decision of 04<sup>th</sup> December, 2012, it would have expressly stated that the said Roselyne Makokha was to pay '*the costs of the proceedings*'. However, the Court restricted the costs to only those of the application before it.

20. In this regard, I am not satisfied that the application has any merit and the same is hereby dismissed with costs to the Auctioneer.

It is so ordered.

**DATED** and **DELIVERED** at Bungoma this 12<sup>th</sup> day of May, 2014.

**A. MABEYA**

**JUDGE**