



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT BUN GOMA**

**CIVIL MISC. APPL. NO.312 OF 1999**

**NZOIA SUGAR CO. LTD.....APPLICANT/1ST RESPONDENT**

**VRS**

**NZOIA SUGAR CO. LTD.....RESPONDENT/2ND RESPONDENT**

**AND**

**MANUEL OTIANGALA t/a**

**KURONYA AUCTIONEERS.....AUCTIONEER**

**SAMSON I. TUMBO t/a**

**DOMINION YARDS AUCTIONEERS.....NOMINEE/APPLICANT**

**PAUL BARASA WAMOTO**

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

**RULING**

1. The Motion for determination is dated 28/05/12 by the Auctioneer. It is brought under Sections 3 and 3A of the Civil Procedure Act and Rules 7 and 55 of the Auctioneers Act. It seeks an order that the Court determines who between the Nzoia Outgrowers Company Ltd (“the Applicant”) and Nzoia Sugar Company (“the Respondent”) is liable to meet the Auctioneers charges for the execution of the Warrants of attachment and sale dated 11/10/11 and 12/10/11, respectively. It also seeks an order that the Auctioneers Bill of Costs dated 16/2/12 be validated and for the costs of the application.
2. The Auctioneer contended that on 11<sup>th</sup> and 12<sup>th</sup> October, 2011, he was assigned Warrants of Attachment and sale to execute the same against the Respondent. Those warrants were issued on the instructions of the the Applicant. That on 11<sup>th</sup> October, 2011 the Auctioneer proclaimed the moveable assets of the Respondent as per the proclamations dated 11/10/2011. Subsequently, the Applicant and the Respondent entered into a consent whereby the matter was fully settled and which consent recalled and annulled the warrants that had been issued to the Auctioneer. That order however, did not settle the Auctioneers charges. The Auctioneer therefore sought to know who amongst the two was liable to pay his charges.
3. Ms. Kiarie and Company filed submissions on behalf of the Respondent. It was submitted that since the warrants of attachment had been issued at the instance of the Applicant but were later recalled and

annulled, they were a nullity from the beginning. That it was the Applicant who was therefore liable to pay the auctioneers charges. The case of **Galaxy Auctioneers -vs- E. N. Ngenga & Co. Advocates & Anor NBI Misc. appl. No.177 of 2001 (UR)** was cited in support of that submission. There was no representation on the part of the Applicant.

4. I have considered the affidavit and written submissions on record. I have seen the Warrants of Attachment and Sale dated 11<sup>th</sup> and 12<sup>th</sup> October, 2011, respectively. I have also seen the Proclamations dated 11/10/2011. They were served upon the Respondent by the auctioneer. Accordingly, it cannot be disputed that the auctioneer had acted upon the said warrants when they were issued to him. He is entitled to his costs.

5. On the other hand, it is not disputed that the Warrants were issued at the instance of the Applicant. It is also not disputed that the said Warrants were recalled and annulled by the consent of both the Applicant and Respondent. The effect of the recall and annulment was that the said Warrants were a nullity from the beginning. They did not have any effect of law. Anything done on them was a nullity. However, that it did not mean that the costs incurred in respect thereof affected the rights of 3<sup>rd</sup> parties who had been affected by their issuance. This is the auctioneers position. He was innocent in their issuance, recall and annulment. He is not bound by that consent.

6. As far as I know, the position in law is that, the effect of issuance of Warrants against a judgment/debtor is that any costs incurred in their execution is upon such debtor. However, when such Warrants are recalled and annulled, it means that whatever was done pursuant to their issuance is also a nullity. The debtor is absorbed from acting on them. That leaves the Court with the party who applied for their issuance, in this case the Applicant. It is the Applicant who caused the issuance of the Warrants that were a nullity. Any costs incurred as a result thereof must fall where they lie, at the Applicant's doorstep.

7. Accordingly, I hold that the charges of the auctioneer in the execution of the Warrants dated 11<sup>th</sup> and 12<sup>th</sup> October, 2011 are payable by Nzoia Outgrowers Company Ltd.

8. As regards the second prayer, the same was not opposed and I see nothing wrong in granting the same. Accordingly, I allow the application as aforesaid and award the costs thereof to the auctioneer.

Orders accordingly.

Dated and Delivered at Bungoma this 12<sup>th</sup> day of May, 2014.

**A. MABEYA**

**JUDGE**