



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL DIVISION**  
**MISC APPLICATION NO. 227 OF 2010**  
**IN THE MATTER OF THE ARBITRATIONS ACT 1995**

**VIOLET MERAB SONGA**

**EUGENE HARRY SONGA**

**EUNICE JEANETTE SONGA**

**(Administrators of the estate of DAN OYALO SONGA –**

**Deceased).....DECREE-HOLDERS**

**VERSUS**

**JAMES MUGA OGODA**

**EMMANUEL OCHOLA ODHIAMBO**

**CELESTINE LUSWETI WOSE**

**(T/A SONGA OGODA & ASSOCIATES)...JUDGMENT-DEBTORS**

**AND**

**S T MUGACHA (T/A GALAXY AUCTIONEERS)...AUCTIONEER**

**R U L I N G “B”**

1. The issue of who, as between the then Decree-Holders and the then Judgment-Debtors in this matter, should pay the Auctioneer's costs was raised by the Auctioneer by notice of motion dated 29<sup>th</sup> March 2012. That issue was canvassed *inter partes*. By a **considered ruling dated 17<sup>th</sup> and delivered on 19<sup>th</sup> July 2013** the Court (Waweru, J) found that the Auctioneers' costs should be paid by the Decree-Holders.
2. Two months down the line the Decree-Holders applied by **notice of motion dated 19<sup>th</sup> September 2013** seeking to review and set aside the said order. The application is the subject of this ruling.

3. The application is made under **Order 45, rules 1 and 2** of the **Civil Procedure Rules, 2010** (the **Rules**). The main ground for the application is that at the hearing of the notice of motion dated 29<sup>th</sup> March 2012 the parties withheld from the court information pertinent to the case. That withheld information is stated to be –

- (i) That the Decree-Holders filed the original proceedings herein in order to enforce an arbitral award.
- (ii) That unknown to the Decree-Holders, the Judgment-Debtors had filed Misc. Application No. 195 of 2010 challenging the arbitral award.
- (iii) That the Decree-Holders only became aware of Misc. Application No. 195 of 2010 after execution in the present proceedings.
- (iv) That the Decree-Holders were only thereafter served with Misc. Application No. 195 of 2010 after they had applied for execution, the Auctioneers lawfully approved by the court, warrants issued and proclamation made. The Judgment-Debtors therefor only “woke from slumber upon execution”.
- (v) That by consent of both parties the present proceedings were stayed pending hearing and determination of Misc. Application No. 195 of 2010.
- (vi) That the court ruled in favour of the Judgment-Debtors in Misc Application No. 195 of 2010, but against them in the present proceedings (Misc Application No. 227 of 2010) and condemned them to pay costs, which they did, including the Auctioneers’ charges of KShs 300,000/00.

4. I have read the supporting affidavit sworn by **Wilfred Mutubwa**, the Decree-Holders’ learned counsel. I have also read the grounds of opposition dated 15<sup>th</sup> January and 5<sup>th</sup> February 2014 filed respectively by the Auctioneer and the Judgment-Debtors. Finally, I have read the ruling of the court dated 17<sup>th</sup> and delivered on 19<sup>th</sup> July 2013. It was noted in that ruling that the Decree-Holders never filed any replying affidavit to the application dealt with in that ruling. They filed only grounds of opposition.

5. I have considered the submissions of the learned counsels appearing. I find no new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the Decree-Holders, or which they could not produce at the hearing of the application. Nor do I find any mistake or error apparent on the ace of the record, or any other sufficient reason to interfere with the order sought to be set aside.

6. The Decree-Holders are merely trying to have another go at the application, a second bite at the cherry as it were. They cannot be permitted to do so. Contrary to their assertion, the other proceedings (Misc. Application No. 195 of 2010) and how they related with the present proceedings, were brought to the attention of the court by the Judgment-Debtors, and the court fully appreciated their import.

7. I find no merit in the notice of motion dated 19<sup>th</sup> September 2013. It is hereby dismissed with costs to the Judgment-Debtors and the Auctioneer. It is so ordered.

**DATED AND SIGNED AT NAIROBI THIS 30<sup>TH</sup> DAY OF JUNE 2014**

**H. P. G. WAWERU**

**JUDGE**

**DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF JULY 2014**