



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NO. 317 OF 2007

IN THE MATTER OF AN APPLICATION BY DAVID NJOMO KIHKA FOR

LEAVE TO APPLY FOR AN ORDER OF CERTIORARI

REPUBLIC.....APPLICANT

VERSUS

SOUTH KINANGOPLAND DISPUTES TRIBUNAL.....1ST RESPONDENT

PRINCIPAL MAGISTRATE NYAHURURU.....2ND RESPONDENT

NJIHIA NJOROGE.....INTERESTED PARTY

DAVID NJOMO KIHKA.....EX PARTE APPLICANT

RULING

1. By an amended Notice of Motion dated 9th August 2012 and amended on 6th June 2013, the ex parte applicant herein, **David Njomo Kihika**, seeks the following orders:

- 1. THAT this application be certified urgent and service be dispensed with.**
- 2. THAT pending inter partes hearing herein, an Order of Stay of Execution of the Warrants dated 4th July 2012 do issue restraining and prohibiting Naisioki Auctioneers whether by his agents, servants and/or all claiming under him from attaching and/or selling the Ex parte Applicant's property**
- 3. THAT pending the hearing and determination of this application an Order of Stay of the Execution of the Warrants dated 4th July 2012 do issue restraining and prohibiting Naisoki Auctioneers whether by his agents, servants and/or all claiming under him from attaching and/or selling the Ex-parte Applicant's property.**

3A. A declaration that the Interested Parties herein their agents and/or servants and all persons claiming under them are not entitled to demand from the Ex parte Applicant for Kshs 45,000/= in respect of the costs herein.

- 4. THAT costs of this application be provided for.**

2. The application is supported by an affidavit sworn by the applicant on 6th June 2013. According to the applicant, on 3rd December 2009, costs herein were assessed against him for the sum of Kshs 75,000/= and he initially paid the advocates for the judgement creditors/interested parties Kshs 30,000/= leaving a balance of Kshs 45,000/=.
3. On 19th January 2011, one **James Katiku** from Legacy Auctioneers Services went to his house in the company of the 2nd interested party, **George Kibe Mbaki**, and a lady who claimed to be a police officer from Central Police Station with copies of warrants of attachment dated 17th December 2010 with the intention of executing the same for the said balance then amounting to Kshs 47,450/=. According to the applicant he, in the company of the said three people went to Haraka Shopping Centre and paid the said **James Katiku** the said sum of Kshs 47,450/= and was informed to go and collect the receipt from their offices in Nairobi. On calling the said Auctioneers' Office through the telephone number furnished to him, the applicant was informed by a lady who received the call, one **Rachael**, that the said **James Katiku** had already left their employment and that he should report the matter to the police which the applicant did. The information that the said **James Katiku** had left the employment of the said Auctioneers was also confirmed by the Director, one **B K Sila**, who promised to take up the matter. However on 8th August 2012, one **Mr Naisoki** from the same firm of Auctioneers went to the applicant's house with the intention of executing warrants and on being informed by the applicant that he had fully paid the costs to the said firm, was told by the said person that he had firm instructions to recover the said sum of Kshs 47,775/= and was given up to 10th August 2012 to pay the same.
4. According to the applicant he has fully repaid the money and if the said execution proceeds he stands to suffer irreparable losses.
5. The application was opposed by way of a replying affidavit sworn by **George Kibe Mbaki**, the 2nd interested party herein on 13th September 2012 and another affidavit sworn on 24th July 2013. According to him, despite the applicant having been permitted to settle the costs by way of monthly instalments of Kshs 15,000/- the applicant only paid two instalments the last being on 23rd March 2010 and thereafter declined to make any further instalments. According to him he only accompanied the representative of Legacy Auctioneers for the purposes of identifying the applicant/judgement debtor's premises. He however denied that the applicant accompanied them to the shopping centre and averred that the applicant was left at home hence did not pay any money at the Shopping Centre.
6. The deponent further averred that no execution was carried by the said Legacy Auctioneers since they had no jurisdiction in the area where the applicant resided and hence they returned the warrants of attachment unexecuted after which the advocates requested for the warrants to be allocated to Naisioki Auctioneers to carry out the execution. The applicant however waited until the lapse of the period of proclamation before filing the present application.
7. In the deponent's view, the said Auctioneers rightfully proceeded with the execution of the warrants following the failure by the applicant to produce proof of the alleged payment. To him the application is a gross abuse of the Court process as he still owes the sum of Kshs 47,775/= exclusive of Auctioneers costs. In his view the prayer for declaration can only be granted in a substantive suit hence the amendment is an abuse of the process of the Court hence the application ought to be dismissed.
8. In the submissions filed on behalf of the applicant it was submitted that the deponent of the replying affidavit admitted that he accompanied **James Katiku** on the material day and that it was admitted that the warrants were given to **B K Sila** T/A Legacy Auctioneers for whom **James Katiku** was working to execute and that the latter went to the applicant's home on 19th January 2011. It is submitted that there was no affidavit by **B K Sila** denying that **James Katiku** was his agent and/or servant and there is likewise no rebuttal by **James Katiku** that he was paid the said sum of Kshs 47,450/= by the applicant. In the applicant's view, the Notice of Motion meets the threshold of the requirements to warrant the grant of the orders sought.
9. On behalf of the interested parties it was submitted that the applicant has not produced a receipt in support of the allegations that the applicant paid the costs to the said **Mr Katiku**. While relying on section 107 of the **Evidence Act** it was submitted the burden was on the applicant to prove that fact a burden which in light of the denial by the 2nd interested party that there was any such payment has not been discharged. In support of this submission reliance was placed on **Joseph**

Mururi vs. Godfrey Gikundi Anjuri [2012] eKLR and **Nation Media Group vs. Communication Concept [2006] eKLR**. In the interested parties' view, it would have made

sense if the applicant had paid the money to the representative of the 2nd interested party who was present under the provisions of Order 22 rule 1 of the Civil Procedure Rules. In light of the fact that this application was brought late in the day after the expiry of proclamation, it is submitted that the application was brought in bad faith. Since the application was brought under Order 22 Rule 22 of the ***Civil Procedure Rules*** which mandates the Court to stay execution for reasonable period pending the hearing of an application for stay of execution, it is submitted that since the application has no merit, the application ought to be dismissed.

10. I have considered the foregoing. It is admitted that on 19th January 2011, one **James Katiku** representing Legacy Auctioneers, armed with warrants of attachment and in the company of the 2nd interested party and a police officer descended upon the applicant's residence with a view to executing for costs which it is not denied were due and payable. According to the applicant he gave the said **Mr Katiku** the sum due and the same day when he called the office of Legacy Auctioneers, he was informed that the said person had left their employment. It is however not denied by the said Auctioneers that the warrants were in actual fact issued to the said Auctioneers. There is no denial from the said Auctioneers that they did not dispatch **Mr. Katiku** to go and execute the said warrants. By a letter dated 3rd February 2011 the said Auctioneers purported to return the warrants of attachment on the ground that they had no jurisdiction where the applicant resided. Why the said Auctioneers did not return the said warrants immediately they received the same is however not clear. Further the role of the police officer in executing warrants of attachment was similarly unclear unless it was meant to intimidate the applicant into making immediate payment. Whereas the presence of the 2nd interested party was explained as that of pointing out the applicant's residence, the presence of the police during the said action was not explained. As was held in **Kamau Mucuha vs. The Ripples Ltd. Civil Application No. Nai. 186 of 1992 [1990-1994] EA 388; [1993] KLR 35**, police should never be involved in securing compliance with civil court orders. In the absence of an explanation coming from the interested parties as to the necessity of enlisting the assistance of the police in executing what was in effect a purely civil matter, I am prepared to find that the presence of the police was meant to intimidate the applicant and in the absence of an affidavit sworn by the said **Mr Katiku**, that payment was not made to him, I am prepared to find on a balance of probabilities that the threat must have succeeded. It is clear that in receiving the money the said **Mr. Katiku** who was executing the warrants was doing so on behalf of Legacy Auctioneers who must have been instructed by the interested parties who even assigned the 2nd interested party to accompany him to the applicant's premises. I am prepared to find that the belated attempt to return the warrants by the said Auctioneers must have been on realisation that the money had been paid to its agent **Mr Katiku** who for reasons known to him did not remit the same to the interested parties. In the absence of an affidavit sworn by the said Auctioneers stating when the said **Mr Katiku** left their employment, the applicant's evidence on oath that he called the said Auctioneers the same day was uncontroverted.
11. Whereas it is true that the burden was on the applicant to prove that he paid the money to the said **Katiku**, in the absence of an affidavit from **Mr Katiku**, I find that on a balance of probabilities that the applicant has discharged the burden on him and I find that the applicant paid the costs to **Mr Katiku** who was then duly authorised by Legacy Auctioneers to act for it. Whether the money was paid to **Mr Katiku** was uniquely within the knowledge of the said **Mr Katiku** and under section 109 of the ***Evidence Act***, the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. As was held in **Kola Chacha vs. Kenya Commercial Bank Ltd & Another Civil Appeal (Application) No. 342 of 2001** a single judge is entitled to believe the explanation given on oath unless there was a challenge to the veracity of those averments. In this case there was evidence from the applicant that he paid the money to **Mr Katiku**. The latter did not counter this allegation. Instead it is the 2nd interested party who deposed that the applicant did not pay the said sum. He did not however state whether this information was given to him by **Mr Katiku** and if it were so the question would arise as to why **Mr Katiku** himself could not say so.

12. In the foregoing premises I allow the amended Notice of Motion dated 9th August 2012 and amended on 6TH June 2013 in terms of prayers 2, 3 and 4 thereof. However as the application was belatedly filed there will be no order as to costs.

Dated at Nairobi this 2nd December 2013

G V ODUNGA

JUDGE

Delivered in the presence of Mr Kuyo for Mr Mureithi for the applicant