



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL MISCELLANEOUS APPLICATION 231 OF 2010

**FELIX APOLLO OWUOR T/AVICTORIA BLUE SERVICES
AUCTIONEERS.....APPELLANT**

VERSUS

**LAKE BASIN DEVELOPMENT AUTHORITY.....
.....RESPONDENT**

J U D G M E N T

The appellant's chamber summons dated 14-7-2012 prays for the following orders:-

- 1. That the ruling and or order of the subordinate court delivered on 25-3-2010 on the preliminary objection raised by the respondent be set aside and with place the appellant be allowed to proceed with its costs before any other magistrate other than the one who heard the said preliminary objection.**
- 2. That the said preliminary objection raised by the respondent be dismissed with costs.**
- 3. Costs to the appellant.**

The parties herein on 1-9-2009 entered into a consent order on the following terms:-

- 1. That the suits filed under this series to remain consolidated and the decretal sums due be treated as though it emanated from the file number Nyando SRMCC No. 40 of 2007 and orders granted herein shall apply to all other files consolidated herewith.**
- 2. That the defendants be allowed to settle the entire outstanding decretal sum due and payable to the plaintiff's counsel in equal monthly installments of Kshs. 200,000/= till payments in full.**
- 3. That the aforesaid monthly installments shall be paid on or before the 15th of each successive month commencing with the month of September for which payment shall be made on or before the 30th September, 2009.**
- 4. That in default of any one installment the plaintiff/decretal holder shall be at liberty to execute for the entire decretal sum which shall be found due at the material time without further notice.**
- 5. That the defendant's application dated 26-5-2009 and the plaintiff's application dated 28-5-2009**

be both compromised by the consent.

6. That the suits herein be marked settled upon the payment of the entire decretal sum.

7. The part of the decretal sums which have been paid to the plaintiff's counsel on record herein Kshs. 1,530,500/= together with the outstanding balance shall be deposited for safe keeping in the said advocate's client's account pending full payments of the entire decretal sums upon which the funds shall be disbursed to the individual clients in settlement of their respective suits.

The respondent apparently defaulted in payments of the decretal sum which had been agreed upon. The decree holder instructed the appellant to execute. The court dutifully granted several warrants to the appellant.

The warrants were issued on 19-5-2009. In the course of executing the parties entered into the above cited consent.

The lower court upon hearing a preliminary objection by the respondent delivered its ruling on 24-3-2012 upholding the preliminary objection by the respondent. The substance of the said preliminary objection was premised on the following grounds:-

(a) That bills of costs and the intended taxation thereby were in violation and or were contrary to the terms of the consent order.

(b) That the bills were incompetent, illegal null and void to the extent of their inconsistency with the said consent order.

(c) The intended taxation if allowed to proceed will be tantamount to the court trampling upon its own orders which it ought to jealously guard and or shield from violation.

The appellant's appeal is composed of six grounds as hereunder:-

1. The learned trial magistrate erred in law and in fact by relying on the consent order dated 27th August 2009 entered into between the respondent's advocates and the plaintiff's advocates in respect of each of the suits, as a basis for her finding that the execution process could only have arisen from the file No. Nyando SRMCC No. 40 of 2007 in which all the above matters had been consolidated and hence taxation of the auctioneer's costs should have been restricted to that matter only.

2. The learned trial magistrate erred in law and in fact in failing to appreciate that the auctioneer while executing warrants issued to him by court is not an agent or servant or employee of the parties to the suits but an officer of the court who cannot therefore be bound by a consent order between the parties in circumstances in which he was not a party to the consent itself.

3. The learned trial magistrate erred in law and in fact in upholding the preliminary objection by belatedly restricting the appellant's costs to be taxed on the basis of a single matter namely Nyando SRMCC No. 40 of 2007 yet the same court had issued warrants of attachment and sale to the appellant to execute in respect of each of the above twenty nine matters separately in circumstances in which not having been a party to those suits he could not have been aware of the alleged consent at all.

4. The learned trial magistrate erred in law and in fact in failing to appreciate that having issued separate warrants of attachment and sale to the appellant in respect of each of the above twenty nine matters it was not open to court to belatedly make a finding that the costs of the auctioneers could only be taxable in respect of the single matter namely Nyando SRMCC No. 40 of 2007 yet no warrants of attachment and sale had been issued in respect of that case if all.

5. The learned trial magistrate erred in law and in fact by upholding that preliminary objection whose effect was to purport to have the appellant's costs taxed in a matter in which no warrants of attachment and sale had been issued at all and for which no services had been rendered by the auctioneer to form a basis of such taxation thereby going against the express provisions of the Auctioneers Act 1996.

6. The learned trial magistrate erred in law and in fact by upholding that preliminary objection whose effect would have rendered the purported taxation exercise that was to ensue thereafter to be ridiculous, unreasonable and without any basis in law.

Having perused the application together with the supporting affidavit of Jude Ragot as well as the replying affidavit of Erick Gumbo, both advocates for the parties herein and having further perused the submission as well as the authorities submitted by the parties herein, there are several issues to be determined.

Firstly, it is not in dispute that a consent order was entered by the parties herein. The substance of the consent was to consolidate all the suits and to have them sorted under one suit namely suit No. Nyando SRMCC

No. 40 of 2007. It is not further in dispute that the parties at the trial court argued their preliminary objection under suit No. SRMCC 41 of 2007 and not No. 40 of 2007.

The appellant has argued that this was not proper. I have perused the proceedings and it appears that on 26-5-2009 when this matter came up ex-parte the lead file No. 40 of 2007 was missing and the trial court granted orders based on No. 41 of 2007.

The parties further proceed to file the consent under the said file No. 41 of 2007.

I do not see any prejudice suffered by the applicant in this regard. In any event he ought to have raised the same at the earliest opportunity before the trial court.

The next issue to determine is whether the auctioneer was an agent of the instructing party or the court. I do agree with the appellant that at all times the auctioneer is the officer of the court in as much as he derives his instructions from the instructing client or agent. His fiduciary responsibility is first of all to the court, as he is ordinarily an officer of the court and by extension the instructing agent. It follows therefore that he must of necessity execute as instructed and pursuant to the court record. He cannot create his own orders or execute as he wishes. He must act as per the records of the court.

What was the effect then of the consent ordered dated 27-8-2009? As clearly seen from paragraph 1 thereof the same consolidated all the files. **Consolidation** has been defined by Black's Law Dictionary 8th Edition as:

"To combine, through court order, two or more actions involving the same parties or issue into a single action or sometimes in separate judgments".

This was the effect of the consent. Paragraph 7 of the consent is worth reproducing again:

"The part of the decretal sums which have been paid to the plaintiff's counsel on record herein of Kshs. 1,530,500/= together with the outstanding balance shall be deposited for safe keeping in the said advocates clients account pending full payments of the entire decretal sum upon which the funds shall be disbursed to the individual clients in settlement of their separate suits".

I was further told by both counsels for the applicant and the respondent that there was default after the consent had been recorded. Apparently the lower court proceeded to issue separate warrants to the auctioneer for each of the files. According to the appellants this was proper. The respondents think otherwise.

My finding is that once the parties entered into the consent dated 27-8-2009 they are bound by the terms of the said consent. Paragraph 1 thereof consolidated all the suits into one namely **Nyando SRMCC 40** of 2007. Further paragraph 2 thereof agreed that they were to pay the same by equal monthly installments of Kshs. 200,000/=.

Further paragraph 7 indicate that some portion of the money amounting to Kshs. 1,530,500/= had been paid already. From the consent therefore it is not very clear to appreciate how much had been paid from each of the consolidated files and how much was outstanding.

Infact paragraph 4 of the consent has a default clause permitting the decree holder to execute in the event that any one installment is not paid.

From my understanding of the consent therefore it is apparent that the same ought to be read commulatively. Execution therefore would not be issued under separate file. The decretal sum although not stated in the consent had been consolidated and the same ought to have been paid in monthly installments. There was nothing to stop the parties from agreeing that execution be levied against each individual file in the event of breach of payments by installments.

Even for argument sake having looked at the warrants issued and in line with paragraph 7 of the consent, I am unable to know from the sum of Kshs. 1,530,500/= already deposited with the lawyers how much is for each individual file.

Consequently, the warrants ought to have been issued in one consolidated file for the specific amount due and owing instead of splitting them into various files.

I do therefore find that the trial magistrate did not misdirect herself. The application dated 14-7-2010 is disallowed. The auctioneer shall proceed to tax his bill on one consolidated file under Nyando SRMCC 40/2007 or 41/2007 whichever is appropriate as agreed in the consent. The taxation may be taken to a different court. The respondent shall have costs of this application.

Dated, signed and delivered at Kisumu this 13th day of July, 2012.

H.K. CHEMITEI
JUDGE

In the presence of:

.....for the appellants

.....for the respondent

HKC/va