



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MIGORI

ELC MISC CASE NO. 16 OF 2018

(FORMELY HC Misc. Application No. 169 of 2018)

KENNEDY OOKO

JACOB t/a SSEBO INTEL CO. AUCTIONEER.....APPLICANT

Versus

AGRICULTURAL FINANCE CORPORATION.....RESPONDENT

Versus

LEGACY AUCTIONNERING SERVICES

AGRICULTURAL FINANCE CORPORATION.....DEFENDANTS/DEBTORS

RULING

1. By a ruling delivered on 10th July 2018, in respect of an application by way of Notice of Motion dated 30th April 2018, the learned trial Deputy Registrar (Hon M.M Wachira) referred the instant matter to this court for determination wherein he remarked, inter alia;

“I find the matter ought to be referred to the court for determination of the legality or otherwise of the bill of cost before I proceed with the taxation.”

2. In the application expressed under sections 1A,1B,3A and 63(e) of the Civil Procedure Act,2010 and rules7 and 55(2) of the Auctioneers Rules 1997, the applicant, Kennedy Ooko Jacob T/a Ssebo Intel Co. Auctioneer is seeking:

- a) THAT this Honourable court be pleased to assess the Auctioneer’s bill of cost attached therein and issue certificate of costs thereafter for Ksh. 78,378/=.
- b) THAT the (RESPONDENT)/ JUDGEMENT DEBTOR herein be ordered to settle/pay the assessed cost.
- c) THAT this Honourable court be pleased to enter judgment in terms of certificate of Auctioneer’s cost in favour of the Applicant as against the (RESPONDENT/JUDGEMENT DEBTOR).
- d) THAT the costs incidental to the application be provided for.

3. The application is premised on grounds (a) to (c) set out therein. The application is further anchored on the applicant’s affidavit of seven (7) paragraphs of even date. The applicant averred, inter alia, that the respondent/ judgment debtor has since paid in full the decretal amount less the costs of the applicant as per the bill of costs duly served as at the time of proclamation and that the court does assess the applicant’s cost and order the respondent to pay or satisfy the same.

4. The respondent/judgment debtor opposed the application by way of a 12-paragraphed replying affidavit sworn on 17th May 2018 by the respondent’s legal officer, John Kithinji Mutuma. The said officer averred, inter alia, that after judgment was entered in favor of the plaintiff, Walter Otieno Obala, on 31st May 2017 and on receipt of the bill of costs, the respondent filed a response dated 2nd February 2018 to the bill of costs.

5. The respondent further deposed that the learned Deputy Registrar was to rule on the application on 8th March 2018 but the counsel for the respondent could not attend court due to his sickness. That on 19th April 2018, the applicant prematurely purported to proclaim the assets of the respondent in fulfillment of the decree which had been secretly extracted and not served on the respondent. That the respondent has shown good faith by payment of the decretal sum in full save for the applicant's fees which should be borne by the instructing law firm of Nyauke and Company Advocates thus sought dismissal of the matter with costs.

6. On 11th June 2018, the respondent through learned counsel Mr. Rashid Ngaira, filed a preliminary objection dated 6th July 2018 on the following ground:

THAT the Deputy Registrar lacks jurisdiction to hear and determine the miscellaneous application dated 30th April 2018.

7. By submissions dated 6th June 2018 filed on 11/6/18, learned counsel for the respondent urged that the taxing master lacks jurisdiction to hear and determine the issue raised in the respondent's preliminary objection dated 4th June 2016 and that the case should be referred to a judge for hearing and determination. He relied on the case of **Abincha and company Advocates vs Trident Insurance Company Ltd (2013) eKLR** whereby it was held that it was the High Court to determine whether or not there were any costs due to the advocate that could be taxed. He also cited **sections 3(1) and 15 of the Agricultural Finance Corporations Act (cap 323), section 4 of the State Corporation Act (Cap 446), Articles 189(1), 227 and 260 of the Constitution of Kenya, 2010** as well as the case of **Githunguri Dairy Farmers Co-operative Society Ltd v Attorney General & 2 others (2016) eKLR** on the legal status of the respondent.

8. Counsel further cited section 32 of the Government Proceedings Act (Cap 40) which provides that any Government expenditure shall be defrayed out of the moneys provided by Parliament. That in the case of **Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza (2012) eKLR** quoted in **Republic v The Permanent Secretary, Ministry of Internal Security Exparte Joseph Githinji Mwai and another (2012) eKLR**, it was held that that it is the responsibility of the government to make contingency provisions for its liabilities in tort in each financial year to satisfy decrees against the Government for successful litigants.

9. In his submissions dated 11th June 2018 and filed on 12th June 2018, the applicant made reference to the case of **Joseph Gikonyo t/a Garam Investment v National Social Security Fund (2016) eKLR** where it was held, inter alia, that this court should not usurp the jurisdiction of the Taxing Master. That it is the responsibility of a judgement debtor to pay auctioneer's fees.

10. The applicant also cited the case of **Peter W Mwangi T/a Thames Traders Auctioneers v Ann Wairimu Wanyeki & another (2013) eKLR** regarding the restriction of execution against property of postal corporation of Kenya. He urged the court to exercise its discretion and assess his costs as per the bill of costs in the just and fair circumstances of the case.

11. I have carefully examined the entire application, the replying affidavit, the preliminary objection, the parties' respective submissions and ruling of the learned Senior Resident Magistrate/Deputy Registrar. The applicant framed two (2) issues for determination which I embrace accordingly. The issues are:-

a) Whether the respondent is a government and the original proceedings is a proceeding in the meaning of Government proceedings Act (Cap 40).

b) Whether there is illegality in the accruing auctioneer's cost or otherwise.

12. On the first issue, it was contended that the 2nd respondent is a state corporation performing functions of the Government. That all its assets belong to the Government of the Republic of Kenya hence should not be attached.

13. On the other hand, the applicant asserted that a body corporate like the 2nd respondent is not equal to Government as it operates in an environment completely detached from the main stream Government. That there is no statutory provision giving the respondent immunity to attachment. That it is the respondent's responsibility to pay fees of the applicant.

14. This court is aware of the definition of the terms "**public office**", "**public officer**" and "**state organ**" under **Article 260 of the Constitution of Kenya 2010**; see **Githunguri Dairy Farmers** case at paragraphs 62 and 63 (supra).

15. **Black's Law Dictionary, 10th Edition** defines "**public entity**" as:

"A governmental entity such as a state government or one of its political subdivisions."

16. Under **Article 1(4) of the Constitution of Kenya, 2010**, the sovereign power of the people is exercised at National and County levels of Government. The first (1st) schedule to the same constitution sets out the functions of the respective levels of government which are expected to have close cooperation between them as provided for under **Article 189 of the Constitution**.

17. Basically, the respondent is established under section 3(1) of the Agricultural Finance Corporation Act (cap 323) as read with section 3 of the State Corporations **Act (Cap 446)**. In that regard, the respondent is a public entity and it is funded, functionally controlled and regulated by the state under Articles 227 and 260 of the Constitution as recognized in **Githunguri Dairy Farmers** case (supra).

18. Be that as it may and as to the second issue, it is common baseline that the 2nd respondent/judgment debtor has paid the decretal sum in full further to the judgment delivered on 31st May 2017 in Migori ELCC No. 149 of 2017 (formerly Kisii ELCC No. 198 of 2014). In this

application, what is sought is the applicant's unpaid costs in respect of the aforesaid civil suit.

19. In the case of **Republic v The Permanent Secretary, Ministry of Internal Security** ExParte Joseph Githinji Mwai and Grace Muthoni (supra), C.W. Githua J took a stand point which I find very relevant for endorsement herein and she expressed herself that:-

“As I held in the case of Republic v The Permanent Secretary, Ministry of State for Provincial Administration & Internal Security & Another, Exparte Fredrick Manoah Egunza, Misc. App. 31 of 2012, it is the responsibility of the Government to make contingency provisions for its liabilities in tort in each financial year so that successful litigants who obtain decreed against the Government are not left without a remedy at any time of the year.”

Once a certificate of order against the government was issued and the same was served on the Hon. Attorney General, the Applicants' right to payment accrued and the Applicants were at liberty to enforce it at any time of the year..... As is evident from Section 21(3) of the Government Proceedings Act, the respondent being the accounting officer in the Ministry of Internal Security had a statutory duty to settle the decretal amount, costs and interest awarded to the Applicants in the aforesaid civil suit. (Emphasis laid).

20. In the instant application, it would be the responsibility of the respondent duly served to satisfy the decretal amount and costs in the civil suit. I find that there are lawful costs due to the applicant that the Taxing officer would tax in the prevailing circumstances; see also **Abincha case** (supra).

21. There is no doubt that the Deputy Registrar being a Taxing officer has the requisite jurisdiction to entertain the application under Rule 55 of the Auctioneers Rules, 1997. The 2nd respondent as the judgment debtor is obligated to pay the applicant's costs under section 7 of the Auctioneers Act.

22. To that end, I find the respondent's preliminary objection dated 6th June 2018 and filed on 11th June 2018 want of merit. It is hereby dismissed.

23. Accordingly, I refer back this application dated 30th April 2018 to the Deputy Registrar who is the taxing officer for taxation of the applicant' bill of costs as sought in the application. Mention before the Deputy Registrar on 24th April 2019. The respondent/judgment debtor be served.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 2nd DAY OF APRIL 2019.

G.M.A. ONGONDO

JUDGE

In the presence of:-

The applicant in person

Tom Maurice – Court Assistant