



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC MISC. APP. NO. 481 OF 2013

**PAUL OTIENO MUNGLA T/A PAUL MUNGLA & CO.
ADVOCATES.....DECREE HOLDER
=VERSUS=**

GEORGE OGALO ONER.....1ST JUDGMENT DEBTOR

GEONER SYSTEMS LTD.....2ND JUDGMENT DEBTOR

CHARITY ACHIENG OPON.....OBJECTOR

RULING

1. This is the notice of motion dated 11th April 2019 brought under order 6, order 10, rules 6, 10 and 11 of the Civil Procedure Rules and all enabling provisions of the law.
2. It seeks orders:
 1. Spent.
 2. Spent.
 3. Spent.
 4. That the ruling of Hon. I N Barasa Senior Deputy Registrar dated 20th February 2018 and the certificate of taxation arising therefrom issued in this case be and is hereby set aside and all consequential orders be vacated.
 5. That in the alternative this court be pleased to review and vary the ruling of Hon. I N Barasa Senior Deputy Registrar dated 20th February 2018 and the certificate of taxation arising therefrom in the face of an error apparent on the face of the record in that the ruling 20th February 2018 appears to have been erroneously based on instructions for an entire parcel of land measuring 50 acres containing 592 sub plots while there were previous ruling in this very case that the advocate was only instructed for 69 plots.
 6. That the clients/applicants defendants be granted unconditional leave to defend the bill of costs filed against them in this case.
 7. That costs hereof be provided for in any event.
8. The grounds are on the face of the application and are set out in paragraphs (a) to (m).
9. The application is supported by the affidavit of George Ogola Oner, the 1st Judgement Debtor/ Applicant herein sworn on the 11th April 2019.
10. The application is opposed. There is a replying affidavit sworn by Paul Otieno Mungla, Advocate/Respondent herein, sworn on the 23rd April 2019.

11. There is also the notice of motion dated 16th April 2019 by the objector. The same is brought under order 22 rule 51, 52, 53 and 54 of the Civil Procedure Rules 2010 and Section 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the law.

12. It seeks orders:-

1. Spent

2. Spent

3. This honourable court be pleased to issue a declaration that the procedure of attachment herein was unprocedural hence unlawful.

4. Spent.

5. This honourable court be pleased to issue an order directing that the goods taken away by Keysan Auctioneers on instructions from the advocate/applicant herein be returned unconditionally and in the same manner as they were carted away on 12th April 2019.

6. Costs be borne by the advocate/applicant.

13. The grounds are on the face of the application and are set out in paragraphs (a) to (h).

14. The application is supported by the affidavit of Charity Achieng Opon the objector/applicant herein sworn on the 16th April 2019 and a further affidavit sworn on the 24th May 2019.

15. The application is opposed. There is a replying affidavit sworn by Paul Otieno Mungla, advocate/respondent sworn on the 30th April 2019.

16. When the matter came up for directions on the 24th April 2019, the parties agreed and the court directed that the two applications be heard together. The interim orders of stay of execution were extended.

17. On the 27th August 2018 the two applications were canvassed by oral submissions.

18. It is the applicant's/1st judgment debtor's submissions in the notice of motion dated 11th April 2018 that the decision of the Taxing Officer be set aside and/or reviewed. The reason given is that the applicant did not participate in the proceedings which gave rise to the decision of the taxing officer. He was therefore surprised when auctioneers were sent to carry out execution. Further that the taxation was erroneous as there were two previous rulings where the subject matter herein been decided. The applicant therefore prays for a chance to be heard.

19. In response to these submissions, the advocate/respondent submitted that the Bill of Costs dated 2nd May 2013 was first assessed by Hon. E K Makori who delivered a ruling on 27th November 2013. Before the delivery of the ruling the applicant/1st judgment debtor had filed a replying affidavit and submissions through the firm of M/S E M Nyangweso.

20. Following the delivery of the ruling on 27th November 2013 the advocate filed a reference on item. The matter was heard by Hon. J. Gitumbi with due participation of both parties and the matter was referred back to the taxing officer. This time the matter was placed before Hon. S Mwayuli. The Judgment Debtor/Applicant was represented by counsel. Hon. S Mwayuli refrained from assessing item 1 and 2 and a second reference was filed. Parties agreed that the matter be referred back to the taxing officer for assessment in instruction fees (Item No. 1). This time the matter went back before Hon. I N Barasa who gave a ruling. The judgment debtor was represented by an advocate by the name Mr. Mwangi. The Judgment Debtor filed a notice of objection dated 10th April 2018 and filed on 11th April 2018. The same was not pursued.

21. It is the advocate's/respondent's further submissions that there is no substantive application to challenge the taxing officer's decision. This court has to be properly moved. The application is incompetent and should be dismissed with costs.

22. With respect to the notice of motion dated 16th April 2018, the objector submits that the property attached and taken away is matrimonial property despite her not being a party to the suit. She is not aware of what led to the decree and the subsequent actions by the advocate/respondent. She urged the court to see the distinction between herself and the 1st judgment debtor. She relied on the case of **Chai Trading Company Ltd vs Muli Mwanzia & 2 Others [2009] eKLR**.

23. Further that the entire procedure of execution by the advocate/respondent is unprocedural. The warrant of attachment was issued on 6th March 2019 and returned to court on 6th April 2019. That the Auctioneers went to her house on 12th April 2019 which means they (Auctioneers) had no authority from the court. She prays that the application be allowed with costs.

24. In response to these submissions the advocate/respondent submitted that the decree was issued on 15th January 2019. The same had factual errors. It was returned to court for correction of the dates and a fresh one was issued on 27th March 2019 whereafter attachment

ensued. The proclamation was therefore proper as the subsequent process was within time.

25. He further submitted that the objector is the spouse of the 1st judgement debtor. Motor vehicle registration number KBH 302D from the certificate of search shows that it is registered in the name of the 1st judgment debtor. He puts forward the case of **James Kariuki Ng'ang'a t/a Ndungu Merchants vs Joseph Ngae Njuguna & Another HCCA No. 575 of 2003** on what claim a spouse can make against attachment of household goods. The objection herein has failed to prove special ownership of the items. The objector on the basis that the items are matrimonial property is untenable. He prays that the objection proceedings be dismissed.

26. I have considered the notice of motions dated 11th April 2018 and 16th April 2018, respectively. I have considered the affidavits in support, the replying affidavits, the oral submissions of counsel and the authorities cited. The issues for determination are:-

i. Whether the decision of Hon. I N Barasa Senior Deputy Registrar dated 20th February 2018 and a certificate of taxation arising therefrom issued in this case ought to be set aside and all consequential orders be vacated.

ii. Whether the said decision should be reviewed and/or varied as there is an error apparent on the face of the record in that the ruling of 20th February 2018 appears to have been erroneously based on instructions for an entire parcel of land measuring 50 acres containing 592 sub plots while there were previous rulings in this very case that the advocate was only instructed for 69 plots.

iii. Whether the notice of motion dated 16th April 2019 is merited.

iv. Who should bear costs?

27. I will consider issue No. (i) and (ii) together. It is the applicant's/1st judgement debtor's contention that the taxing master erred in principle by allowing instruction fees for the entire parcel of land measuring 50 acres containing 592 sub plots while there were previous rulings that the advocate was only instructed for 69 plots.

28. The circumstances under which the court can interfere with the taxing officer's exercise of discretion are reaffirmed in the case of **First American Bank of Kenya Ltd vs Shah & Others [2002] IEA 64**. It was held;

“.....First, I find that on the authorities, this court cannot interfere with the taxing officers decision on taxation unless it is shown that either the decision was based on error of principle, or the fee awarded was manifestly excessive as to justify the interference. That it was based on an error of principle (see Steel Construction Petroleum Engineering (EA) Limited vs Uganda Sugar Factory (Supra). Of course it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors. And according to the Advocates Remuneration Order itself, some of the relevant factors to take into account include the nature and competence of the cause or matter, the amount of value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any directions by the trial judge”

29. This position was restated in the case of **John Maina Mburu t/a John Maina Mburu & Co. Advocates vs George Gitau Munene (sued as Administrator of the Estate of Samuel Gitau Munene & 3 Others [2015] e KLR**. In the case of **Joreth Ltd vs Kigano & Associates [2002] 1EA 92**, the Court of Appeal was categorical that a taxing officer in assessing costs to be paid to the advocate in an advocate client bill of costs is exercising discretion. That such judicial discretion can only be interfered with when it is established that the discretion was exercised capriciously and in abuse of the proper application of the correct principles of law.

30. The question before this court is whether the taxing officer committed an error of principle or that the amount of fees awarded is excessive to amount to an error in principle or that the taxing officer applied the wrong principles of law.

31. I have gone through the ruling of Hon. I N Barasa, Senior Deputy Registrar dated 20th February 2018. She stated in part:-

“.....I have no doubt in my mind that the conveyances exhibited in the court record do not represent all the plots. From the value disclosed in each conveyance the mean or average price of each plot that arose from the sub divisions of the property is Kshs.435,361/-. I will therefore adopt the figure of Kshs.450,000 for each Plot....”

32. I have gone through the said ruling and I find that the taxing officer did not commit an error of principle. The amount awarded is also not excessive as she was able to demonstrate how she arrived at the said figure. I have not found any reason to conclude that she applied the wrong principles of law.

33. I have gone through the record. Following the consent to refer the matter back to the taxing officer, Mr. Mungla Advocate, and Mr. Nyangweso for the client went before the taxing master on 2nd October 2017. The date for taxation was given to be 9th November 2017. On 9th November 2017 despite being aware, Mr. Nyangweso did not attend. The taxation was put off to 7th December 2017 where notice was issued to the said advocate. On the 7th December 2017 he did not appear and the matter proceeded for taxation.

34. There is no reasonable explanation by the applicant/1st judgement debtor as to why him or his advocate were absent during the taxation on 7th December 2017 given that this matter had been going back and forth between the taxing officer and this court. There is no affidavit by the previous counsel on record as to why he did not attend the said taxation on 7th December 2017.

35. As stated earlier, I find that there was no error in principle committed by the taxing officer. The amount awarded were reasonable and not excessive in the circumstances of the case. I find no reason to interfere with the discretion of the taxing officer. I will also add that the applicant/judgment debtor filed a notice of objection dated 10th April 2018 on the 11th April 2018. The same was not prosecuted. In any case the same would still be out of time as it was filed more than fourteen (14) days from the date of the ruling.

36. With respect to the notice of motion dated 16th April 2019, the objector's contention is that the procedure of attachment was unprocedural hence unlawful. It is her case that the warrants of attachment were issued on 6th March 2019 and returned on instruction of the court on 16th April 2019. The attachment of 12th April 2019 was therefore unlawful. In answer to this, Mr. Mungla the advocate has given an explanation in paragraph 4 of his replying affidavit sworn on the 30th April 2019. He depones that the decree issued on 15th January 2019 had factual errors. The same was corrected and a fresh decree issued on 27th March 2019. By the time of execution therefore the warrants of attachment were valid.

37. This averment by the advocate/respondent has not been rebutted by the objector. I find that he has given a reasonable and justifiable answer. I find that the attachment of 12th April 2019 was lawful.

38. The second issue raised by the objector is that the items taken away are hers. That she is the spouse of the 1st judgement/debtor and a co director of the 2nd judgment debtor but she was not a party to the suit. She also states that the items are matrimonial property. In response to the advocate/respondent has attached a certificate of search which confirms that motor vehicle registration number KBH 302D is registered in the name of the 1st judgement debtor. In her supporting affidavit the objector admits that she is the wife of the 1st judgement debtor and a director of the 2nd judgment debtor. She also claims that the items attached are hers. The said items are a four seater sofa set and a carpet.

39. I have gone through the affidavit in support and I find that the objector has failed to demonstrate that the said items are hers.

Order 22 rules 51 (1) of the Civil Procedure Rules provides that:-

“Any person claiming to be entitled to or to have legal or equitable interest in the whole or part of any property attached in execution of a decree may at any time prior to payment out of the proceeds of sale of such property give notice in writing to the court and/or all parties and/or the decree holder of his objection to the attachment of such property”.

From the above provision it was incumbent upon the objector to prove ownership of the said items.

I am guided by the ruling of Anyara Emukule Ag J (as he then was) in **James Kariuki Nganga t/a Ndarugu Merchants vs Joseph Ngae Njuguna & Another Milimani HCCA No. 575 of 2003**.

40. I also agree with the Advocate/Respondent's submissions that if the items are matrimonial property then both spouses have equal interest and the share of the 1st judgement debtor can be attached.

41. I find that the objector proceedings herein lack merit. The notice of motion dated 16th April 2019 also fails. The interim orders of stay of execution earlier granted are vacated. In essence I find that the notice of motions dated 11th April 2019, and 16th April 2019 lack merit and each is dismissed. Each party do bear own costs.

It is so ordered.

Dated, signed and delivered in Nairobi on this 25th day of September 2019.

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L. KOMINGOI

JUDGE