



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

E.L.C NO 5 OF 2006

ANDREW KIPTONUI BIEGON.....1ST PLAINTIFF/APPLICANT

FRANCIS KIPKORIR BIEGON.....2ND PLAINTIFF/APPLICANT

VERSUS

THOMSA KIPLANGAT CHIRCHIR.....DEFENDANT/RESPONDENT

AND

PETER OKOTH OLOO (Trading as Indomitable Auctioneers.....RESPONDENT

RULING

1. The application before me for determination is a motion on notice dated 2nd April, 2019 and filed on 3rd April, 2019. It was brought under Sections 1A, 1B, 3, 3A, 63(e) of Civil Procedure Act (Cap 21), Order 22 rule 22 (1) of the Civil Procedure Rules and rules 18,22, and 55 of the Auctioneers Rules, 1997. The applicants – **ANDREA KIPTONUI BIEGON** and **FRANCIS KIPKORIR BIEGON** – were the plaintiffs in the suit herein, which was concluded vide a judgement delivered on 12th October, 2017. They lost the case. The 1st Respondent – **THOMAS KIPLANGAT CHIRCHIR** – was the defendant and was awarded costs. He moved to execute for costs and the manner of execution is what aggrieved the applicants. The 2nd respondent is, or represents, the auctioneer who carried out the contested execution. The 2nd respondent is **PETER OKOTH OLOO** and is shown to be trading in the name and style of Indomitable Auctioneers.

2. The application has six (6) prayers, three of which – prayers 1,2 and 3 – are spent while another three – prayers 4,5 and 6 – are the focus of this ruling. The prayers for consideration are as follows:

Prayer 4: That the respondents herein being Thomas Kiplangat Chirchir and Peter Okoth Oloo (Trading as M/s Indomitable Auctioneers) be ordered to render to the court and to the applicants an account of an attachment of the applicants ten (10) cows which they carried out on 26/10/2018.

Prayer 5: That necessary directions be given.

Prayer 6: That the costs of the application be borne by the respondents.

3. The application is anchored on the grounds, inter alia, that no additional party and party Bill of costs was up for taxation, with the only one on record dated 20th June, 2018; that the applicants were not served with a notice of execution or even a proclamation; and that the 2nd respondent has not rendered accounts of the execution carried out on 26th October, 2018.

4. The application came with a supporting affidavit which, inter alia, explained and gave perspective to the applicants' grievance. It emerged that the 2nd respondent went to the applicants' place in the early hours of 26th October, 2018 and attached ten (10) cows without giving prior notice of any intended attachment or showing any document of proclamation. According to the applicants, the attachment was malafides or intendedly mischievous, having been carried out on a Friday, which meant that the applicants couldn't immediately rush to court to obtain orders of stay.

5. And because the requisite notices had not been given or service effected, the attachment was said to be illegal. A related grievance is that the attached animals were sold at less than their merited price, the auction having only realised about 143,000/= while the actual value should have been 1,234,000/=.

6. The 1st respondent responded vide a replying affidavit filed here on 17th April, 2019. According to him, the execution was premised on

costs amounting to Kshs. 202,752 assessed by the court and a certificate of costs duly issued thereof. The attachment and subsequent sale was done by the 2nd respondent. The applicants were faulted for stating that the value of the animals attached was Kshs.1,234,000 yet no valuation was conducted by them to justify that figure.

7. Further, the 1st respondent deposed that he duly applied for execution and served. The application herein was viewed as an afterthought and is meant to frustrate further execution for the amount yet unpaid. The 1st respondent also expressed the view that if the applicants have a claim, it should be against the 2nd respondent and such claim should be taken before the Auctioneers Licensing Board, not the court.

8. The 2nd respondent filed his replying affidavit on 30th April, 2019. He deposed, inter alia, that he received instructions from 1st respondents counsel to undertake execution to realise costs awarded in this suit to the tune of 203,752/=. A visit to the applicants' home was met with hostility and this necessitated enlisting of help from the police. The attachment of applicants cows was later done after the requisite legal procedures were complied with. Later on, the attached animals – said to be five (5) cows and five (5) calves – were sold at 143,000/=. According to the 2nd respondent the animals were sold at the prevailing market price.

9. The response by the respondents elicited the filing of a supplementary affidavit by the applicants on 10th June, 2019. According to the applicants, the 2nd respondent should have had his expenses taxed by the court after sale of the attached animals. He should have caused valuation of the animals before sale. But all this was not done and the attached animals ended up raising a paltry sum of 143,000/= after sale. Issue was also taken with the non-receipting of the 20,000/= expense said to have been paid to the police who provided security. And the process server said to have served the applicants with a Notice to Show Cause was said to be unlicensed, with the respondents being challenged to prove otherwise. Ultimately, the manner in which the execution was conducted was said to be unlawful.

10. The 2nd respondent, in a bid not to be outdone or probably to even out scores, filed a further replying affidavit on 17th June, 2019. He reiterated, inter alia, that the information he availed to the court is true; that the applicants should have contested the value of the attached animals after proclamation; that the execution was lawfully done; and that the police are entitled to be paid for providing security during execution in a civil matter.

11. The application was canvassed by way of written submissions. The applicants' submissions were filed on 9th July, 2019. According to the applicants, there was no service effected on them and they were therefore condemned unheard. It was submitted too that the 2nd respondent's application to be provided with police security should have been filed in this suit, not in a different file as was done. Besides, the applicants should have been served, which was not done. The 2nd respondent was also said to have failed to render accounts and in that regard therefore violated rules 18, 22 and 55 of the Auctioneers Rules. Further, the court was asked to take judicial notice of the fact that the Kshs. 143,000/= said to have been raised from the sale of ten (10) cows was actually a pittance, with a cow on average being sold at 14,300/=:, an unrealistic price for even a calf. The submission was that the best value was not obtained.

12. The execution was also said to have soured relations between the parties, who are relatives. The applicants ultimately asked that their application be allowed.

13. The 1st respondent's submissions were filed on 24th September, 2019. According to the 1st respondent the court would need to determine whether the 2nd respondent has failed to render accounts of the proceedings of sale received after the attached animals were sold. It would also need to consider whether it is necessary to grant an order of stay of execution.

14. And on the first issue, the 1st respondent submitted that it is a matter between the applicants and the 2nd respondent and, that being the case, it should be handled by the Auctioneers Licencing Board. It is the 1st respondent's position that that is where the applicants should have taken the complaint instead of bringing it to court. Section 4 of the Auctioneers Act was cited as providing the way forward in that regard.

15. As regards the order of stay the 1st respondent submitted that he is still owed by the respondents. The execution done earlier did not satisfy or settle all that was owed. The 1st respondent submitted that a Notice to Show Cause was applied for and it was duly served. In the 1st respondent's view, this application is meant to frustrate that process. The application was therefore said to be an abuse of the court process. The court was asked to dismiss it.

16. Just like the 1st respondent, the 2nd respondent's submissions were filed on 24th September, 2019. He submitted inter alia, that he rendered accounts vide his letter dated 14th November, 2018 which was written to his instructing client and copied to court. He further submitted that he filed receipts for the animals sold. The 2nd respondent also sought to clarify that the records he availed – like proclamation of attachment and notification of sale – make it clear that what was attached and sold were five cows and five calves and not ten mature cows as the applicants seek to portray.

17. The 1st respondent then shifted focus to his application for police security which the applicants faulted for being filed in a different matter instead of this suit. He pointed out that the law – Section 9 1(a) (b) (c) and 2 of the Auctioneers Rules, 1997 – allowed him to proceed the way he did. The applicants were further faulted for putting the value of the attached animals at Kshs. 1,234,000 without showing or demonstrating how that amount was arrived at. The court was finally asked to dismiss the application.

18. I have considered the application, the various responses made, rival submissions, and the other proceedings manifest in the record generally. The application seems to be premised on the assumption that the attachment done by the 2nd respondent was excessive, or an overkill if you like, because ten (10) cows worth an estimated value of Kshs. 1,234,000 were seized and driven away to be sold to settle costs amounting to about 200,000/= only. According to the applicants, the cows were then sold for a song. The amount realised from sale was a pittance and didn't even settle the amount owed.

19. It can therefore be readily understood why there was request for accounts and prayers for stay. Here is the scenario: The animals were sold. Not all costs were settled. And another execution looms. I need to point out that contrary to the position that the 1st respondent seems to espouse in his submissions that an order of stay is sought to be issued at this stage, my understanding is that the orders of stay sought were meant to be in force during the pre-determination stage. Both prayers – see prayers 2 and 3 were to be issued “pending interpartes hearing of this application” (prayer 2) and “pending hearing and determination of this application” (prayer 3). This implies that the validity of the two prayers can only exist when the application is pending. This ruling itself effectively puts to an end the pendency of the application. No one can talk of hearing or determination after this ruling. Both will have become past events. The application will have ceased to be pendent.

20. It is clear therefore that the prayers were not meant to last beyond the determination of the application. To be sincere, the prayers commend themselves to me to have been perfunctorily formulated, for both were meant to serve the same purpose during the same period. One wonders why they had to be two and not one. And if one of them was meant to apply during the post-determination stage, when the application can no longer be said to be pending, the language used should have made that clear. I will therefore focus on the prayers set out in the beginning paragraphs of this ruling. The prayers for stay were meant to be handled at the *exparte* stage. And that is clear from the language used in their formulation.

21. That said, it seems to me that the applicants misapprehended the options available to them after perceiving that there were problems surrounding execution and/or attachment. To them, the attachment done seemed to relate to something more than the costs they knew. They talked of not having been furnished with “any additional party and party bill of costs.” But the respondents are clear that the execution or attachment was for the only bill taxed by the court amounting to about 200,000/=. Faced with this information, the applicants felt that the attachment was excessive. What with some ten (10) cows worth over 1,000,000/= being attached to settle a comparatively paltry sum of about 200,000/=?

22. To the applicants, the solution lay in orders of stay against the respondents and requesting for accounts. But as has been pointed out earlier, the orders of stay as prayed for seem misplaced and/or misconceived, with none being meant to effectively forestal or prevent further execution or attachment. The prayer for accounts seem to me answered by the response of the second respondent. He pointed out *vide* a letter dated 14th November, 2018 that the animals were sold at 143,000/=. A chronology of the expenses was then given in the same later showing a total of Kshs. 99,288/=. Based on this then, information is clear as to the money realised from sale – Kshs. 143,000/=: the expenses incurred – Kshs. 99,288/=: and the balance remaining – Kshs 43,712/=: which was forwarded to the instructing client – 2nd respondent – who acknowledged receipt. Based on this, I don't understand which other accounts the applicants want to get.

23. But the applicants gripe with the respondents seems to be about the amount realised from sale and the expenses said to have been incurred. Their animals, they said, were worth 1,234,000/=: not 143,000/=. But its not clear how the applicants arrived at their figure and it is not clear also that this court is the forum to which they should have come complaining. As pointed out by the respondents, Section 4 of the Auctioneers Act (Cap 526) mandates the Auctioneers Licensing Board to be the forum for redress of grievances relating to conduct of Auctioneers in the course of their work. I think that should have been the applicants first port of call. Section 24 of the same act provides further details as to how a person can complain. Infact it makes it clear that the complaint should be before the Auctioneers Licensing Board.

24. Besides, the value of the animals given by the applicants seems to be a figure plucked from the air. Rule 10 of the Auctioneers Rules, 1997, provides as follows:

“A debtor may, at any time before the property seized or repossessed is sold, apply to a court for an order that the property be valued by an independent valuer.”

It would appear to me that the figure put forward by the applicants would make more sense and have more credibility if it was arrived at after a pre-sale valuation done at the option of the applicants. The option of such valuation was open to the applicants but they did not exercise it. Instead, they chose a figure that is largely speculative or conjectural. The court cannot place reliance on it. The applicants should have made use of rule 10 in order to have a stronger basis for their complaint.

25. I think that it is necessary to point out that even assuming that the applicants were not minded to complain against the 2nd respondent before the Auctioneers Licensing Board, under Section 26 of the Auctioneers Act, they can still file a suit to recover damages. This application itself is not one such suit.

26. The applicants chose to file this application. The application itself seems to seek legitimacy under rules 18, 22 and 55 of the Auctioneers Rules, 1997. To me, there is a misapprehension of the import of these rules by the applicants. Rule 18, for instance, enjoins the auctioneer to issue receipt for goods sold and forward the proceeds of sale to the court or to the instructing client. The applicants are not the instructing client. They cannot therefore avail themselves the protection or benefits of that Rule. Rule 22 on the other hand requires the auctioneer to keep books of accounts. Again here, it is clear that the duty owed is to the instructing client, not debtors like the applicants. The rule is about proper keeping and running of accounts, not about accounting to debtors regarding sale or auction money. Finally, rule 55 is about auctioneers fees. A complaint about such fees should be to the registrar of the court, for High Court matters or their equivalent. It should not be before a court like this one. And for matters in the domain of the subordinate court, the complaint should be before a magistrate or before the Auctioneers Licensing Board. I have pointed all this out because in my view, the applicants were completely wrong in the way they approached the matter. The law invoked does not help them and they failed to utilise the options made available to them.

27. The applicants also complained about the application to get security filed in court by the 2nd respondent. According to them, the application should have been made in this file, not in a different as was done. The basis of such application is to be seen under Rule 9 of the Auctioneers Rules, 1997. The Rule reads as follows:

Rule 9 (1) Where an auctioneer has reasonable cause to believe that

(a) he may have to break the door of any premises where goods may be seized or repossessed; or

(b) he may be subject to resistance or intimidation by the debtor or other person; or

(c) a breach of the peace is likely as a result of seizure, repossession, or attempted seizure or repossession of any property, the auctioneer shall request for police escort from the nearest police station in order to carry out his duties peacefully.

(2) An application under this rule shall be by motion by way of a miscellaneous application supported by an affidavit and may be heard exparte.

28. From the above, particularly from sub-rule 2, the 2nd respondent seems to me to have been in order to proceed the way he did. The rule envisages a miscellaneous application. An application filed in this file would not be a miscellaneous application. It would be a Notice of Motion in this suit, which is not a miscellaneous matter. Besides, such application are routinely handled exparte and the law envisages that too. In any case, it is enough that a competent court of law duly deemed it necessary to entertain the application, in the end granting the order sought. On my part, I wouldn't fault the application even if it were to be filed in this suit but I feel bound to observe that the 2nd respondent was right to handle it the way he did.

29. Then there was the issue of service. The applicants said they were not served. The respondents said there was service. There was then an apparent shift by the applicants and they averred that the alleged service was done by an unlicensed process server. They even challenged the respondents to show that the server was licensed. I have looked at the records. It appears to me that there was service. I think the applicants themselves may have noticed this, hence the shift to allege that the server was not licensed. In my view, if the applicants wanted the court to fault the respondents for seeking services of unlicensed server, they should have done more than merely allege. Such an allegation should have been accompanied by a letter or any other relevant document from the licensing body showing that the alleged server had no licence. That is what is normally done. But the applicants merely allege and shift the burden to the respondents. This is not acceptable. They should have done it well themselves before shifting the burden.

30. Besides, a more prudent move of calling the sever for cross-examination in court by them may have helped. Again this was not done. On a mere allegation therefore, the court is supposed to believe that the server was not licensed and, on that basis too, task the respondents with the duty to prove otherwise. Needless to say, this is not the proper way to do it.

31. The upshot, when all is considered, is that the application herein has no demonstrated merits. It is therefore for dismissal and I hereby dismiss it with costs to the respondents.

Dated and signed at Kericho this 15th day of November, 2019.

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A. K. KANIARU

JUDGE