



**Atingo v Borderless Tracking Limited (Cause 713 of 2017)
[2024] KEELRC 954 (KLR) (30 April 2024) (Ruling)**

Neutral citation: [2024] KEELRC 954 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 713 OF 2017
JK GAKERI, J
APRIL 30, 2024**

BETWEEN

READON ELISHA ATINGO CLAIMANT

AND

BORDERLESS TRACKING LIMITED RESPONDENT

RULING

1. Before the court for determination is the Respondent's Notice of Motion dated February 27, 2024 seeking orders that;
 1. Spent.
 2. Spent.
 3. Spent.
 4. Spent.
 5. The applicant be allowed to pay the balance of the decretal amount of Kshs.64,177.59 in two monthly instalments.
 6. The court makes such further orders and/or directions as it may deem fit.
 7. The costs of the application be provided for.

2. The Notice of Motion filed under Certificate of Urgency is expressed under Section 3A of the *Civil Procedure Act* and Order 40 Rules 1, 2, 3 and 4 of the *Civil Procedure Rules, 2010* and is based on the grounds set out on its face and the affidavit of Mark Nduati Advocate sworn on February 27, 2024 who deposes that the applicant was shocked by the Proclamation of Beta Base Auctioneers and attempts to



reach the law firm of Odera Osiemo & Company was unsuccessful and was not privy to the fact that a judgement had been entered against it and mistakes of counsel ought not be visited on a litigant.

3. That the applicant had paid Kshs.320,000/= to the Decree-holder, having paid Kshs.120,000/= to the auctioneer after harassment and intimidation by one Nicholas Musee Mwanja and having already paid Kshs.300,000/= to the Claimant's advocates, only the sum of Kshs.64,177.59 was outstanding.

Response

4. In his Replying Affidavit sworn on March 14, 2024, the Claimant avers that the instant application is brought in bad faith and intended to delay the execution process.
5. That when the auctioneers visited the Respondent for purposes of attachment, Mr. Nduati Advocate contacted the affiant's advocate and pleaded for the Judgment-debtor to pay the decretal sum by instalments with an initial payment of Kshs.200,000/= and the balance at the end of March 2024 and counsels proceeded as agreed and the sum of Kshs.200,000/= was paid only for the Judgment-debtor's counsel to file the instant application.
6. The affiant states that Mr. Nduati Advocate is not party to the suit and had not disclosed on whose authority he has sworn the Supporting Affidavit and the sources of information and was therefore a stranger and the affidavit is defective and should be struck out.
7. That counsel's allegation that the Respondent was unaware of the judgment was intended to annoy as no appeal had been filed and the law firm has come on record for the Judgment-debtor without notice or consent.
8. That the Judgment-debtor was accommodated on request to pay the decretal sum by instalments and cannot now turn round to claim that the amount paid to the auctioneer was part of the decretal sum.
9. The affiant states that the Respondent had the means to make good the decretal sum.
10. That the amount paid to the auctioneer was the agreed auctioneer fees and counsel for the Judgment-debtor cannot allege that it was part of the decretal sum.

Submissions

11. Counsels tendered oral submissions.
12. Mr. Nduati for the Judgment-debtor submitted that when the auctioneer commenced execution, counsel reached out to the Claimant's counsel and it was agreed that the decretal sum be paid in two instalment of Kshs.200,000/= for the auctioneer to vacate the premises and the auctioneer was subsequently paid Kshs.120,000/=.
13. Counsel further submitted that an auctioneer who receives the decretal sum, accounts the same to the client.
14. Mr. Aencha for the Decree-holder stated that the pertinent question is who pays auctioneer fees when executing its mandate?
15. Counsel submitted that his law firm gave instructions to the auctioneer on February 15, 2024 and it begun the process on February 16, 2024 by Proclamation of attachment and after 7 days, the auctioneer went on site on February 23, 2024 and that's when the Respondent's counsel reached out to the counsel and in the spirit of settlement they indulged the Respondent on condition that the Respondent paid the auctioneer for services rendered.
16. That the auctioneers charges amounted to Kshs.219,564/= but the Respondent paid Kshs.120,000/=.



17. Counsel wondered how the Decree-holder should pay the auctioneer.
18. Counsel submitted that the Supporting Affidavit contravened Order 19 Rule 3 of the *Civil Procedure Rules, 2010* as the deponent has sworn on facts not within his knowledge or cannot prove and had not sought leave to come on record.
19. Counsel prayed that the application be dismissed with costs to the Respondent.
20. In his rejoinder, Mr. Nduati submitted that he sought and was granted leave to come on record.
21. That auctioneers are agents of the party that appointed them and there was no agreement that the Respondent would pay auctioneers charges as they were too much.
22. That the auctioneer cannot collect fees without collecting the decretal sum.

Determination

23. The salient issue for determination is the amount payable to the Decree-holder by the Judgment-debtor after payment of the sum of Kshs.200,000/= to the Decree-holder's advocate and Kshs.120,000/= to the auctioneer.
24. Following the judgment delivered by the court in the Claimant's favour, counsel for the Claimant filed the Party and Party Bill of Costs dated August 23, 2022 of Kshs.148,718.00 which was served and taxed on November 15, 2023 to Kshs.117,075.00 and a Certificate of Taxation dated December 8, 2023 issued.
25. It is important to note that contrary to the Respondent's counsel's deposition that the Judgment-debtor was unaware of the judgment against it, the correct position is that the Judgment-debtor was at all times privy to the proceedings and tendered evidence in court during the hearing and was represented by counsel other than the advocate on record.
26. Documents on record and as submitted by the Decree-holder's counsel demonstrate that the law firm engaged an auctioneer on February 15, 2024 to proclaim the Judgment-debtor's motor vehicles and motor cycles after 7 days, effective February 16, 2024 for the recovery of Kshs.384,117.56 excluding auctioneers charges estimated at Kshs.219,564.60.
27. Although counsels agree that the Judgment-debtor reached out to the Decree-holder's advocate on a settlement, they disagree on the terms of the settlement. However, what is decipherable is that after the disputed settlement, the auctioneer dropped off from the equation.
28. It is not in contest that the Judgment-debtor paid the Decree-holder's counsel the sum of Kshs.200,000/= in two tranches sent by one Lucy Luchinga to Atuti and Associates Advocates on February 26, 2024.
29. It is also not in dispute that Judgment-debtor paid the auctioneer, one Mr. Mwanja Nicholas Kshs.120,000/= on February 26, 2024 at 5.35 pm.
30. Records reveal that the sum of Kshs.150,000/= and Kshs.50,000/= was sent to the Decree-holder's counsel on record at 7.10 pm and 7.12 pm respectively, more than one (1) hour after the auctioneer had been paid.
31. For unexplained reasons, the Judgment-debtor paid the auctioneer Kshs.120,000/= before sending Kshs.200,000/= to the Decree-holder's counsel on record, the law firm to which the entire decretal sum was payable.



32. Could this have been what the parties had agreed as submitted by the Decree-holder's counsel who reads mischief in the Judgment-debtor's Notice of Motion herein, having indulged it to pay the decretal amount by instalments?
33. In the supporting affidavit, the affiant deposes that the sum of Kshs.120,000/= was paid after harassment and intimidation by the auctioneer, Mr. Nicholas Mwanja.
34. Was the Kshs.120,000/= paid to the auctioneer part of the decretal sum or the auctioneer fees as agreed between the Judgment-debtor and the auctioneer and the Decree-holder's counsel when it indulged the Judgment-debtor?
35. From the documentation on record, it is clear that the auctioneer is not claiming anything as his fees.
36. Could this be on account that he was paid by the Judgment-debtor pursuant to the purported agreement?
37. Regrettably, the Judgment-debtor's contact person did not swear an affidavit as to what transpired on February 26, 2024 and in particular why it paid the auctioneer Kshs.120,000/= before sending Kshs.200,000/= to the Decree-holder's counsel on record.
38. Based on the averments and submissions by counsel, it is surmisable that the Decree-holder's counsel's explanation of the events is more probable as the concatenation of events on that day as it indulged the Judgment-debtor at its instigation.
39. The foregoing is fortified by *inter alia* the fact that the Supporting Affidavit makes no reference to the fact that the sum of Kshs.120,000/= was paid to the auctioneer for transmission to the Decree-holder's advocate as part of the decretal sum and if that was the intention, why was the sum of Kshs.200,000/= sent to the advocate? Would it not have been more convenient and cheaper to pay the entire sum to the auctioneer during the day as opposed to paying counsel at 19.10 pm?
40. Based on the evidence on record, the court is persuaded that the Decree-holder's counsel indulged the Judgment-debtor on condition that it paid auctioneer charges and proceeded to do so at 5.35 pm on February 26, 2024 before part of the decretal amount was sent to the Decree-holder's counsel at 19.10 pm and 19.12 pm respectively.
41. In the circumstances, it is the finding of the court that the Judgment-debtor owes the balance of the decretal sum other than the Kshs.200,000/= already paid to the Decree-holder's counsel being the sum of Kshs.184,177.56 payable in 3 monthly instalments effective end of March 2024.
42. Parties shall bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 30TH DAY OF APRIL 2024

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of April 21, 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the [Civil Procedure Rules](#), which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article



159(2)(d) of the [Constitution](#) which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the [Constitution](#) and the provisions of Section 1B of the [Civil Procedure Act](#) (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

