



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA
AT NAIROBI

MISCELLANEOUS CAUSE NO. E072 OF 2021

ENDMOR STEEL MILLERS LIMITED.....APPELLANT

VERSUS

VINCENT ONDARI ONG'AYO.....RESPONDENT

GEOFFREY KANG'ETHE t/a KANG'ETHE

ENTERPRISES AUCTIONEERS.....PROPOSED INTERESTED PARTY

RULING

1. The Application before me is the Interested Party's Notice of Motion Application dated 22nd June 2021 seeking the following orders:

- 1) *Spent*
- 2) THAT the Auctioneer herein be granted leave to appear in this suit as an interested party.
- 3) THAT the Appellant and the Respondent herein be ordered to pay the Auctioneer's fees and costs or in the alternative:
- 4) THAT the amount invoiced by the Auctioneer be deposited in court pending the taxation of the bill and consequently the motor vehicle registration number KBA 602 M Isuzu Truck be released to the Appellant.
- 5) THAT the Appellant do meet the cost of the Application to be calculated as per the Advocates Remuneration Order or as agreed.

2. The Proposed Interested Party asserts he attached the suit Motor Vehicle Registration Number KBA 602M, make Isuzu Truck which is the subject of this Application following warrants of attachment and sale issued in Mavoko Chief Magistrate's Court CMEL Suit No. 115 of 2019. The Proposed Interested Party asserts that the Applicant herein resisted attachment to an extent that he had to get a police assistance order after the Applicant issued cheques to the Decree holder (Respondent herein) and the Interested Party which were returned unpaid. The Proposed Interested Party asserts the whole exercise became extremely expensive and the Interested Party issued an invoice dated 30th April 2021 to the Applicant's Advocates. On 18th May 2021 the Applicant and the Respondent entered into a Consent which was adopted by the Court. The Proposed Interested Party asserts the said consent was entered into without the involvement of the Interested Party herein and the same was silent on who is to pay the Auctioneer's fees/charges. The said consent was also silent about release of the subject motor vehicle.

3. The Applicant asserts that the parties herein filed a consent dated 18th May 2021 which was adopted in court on 22nd July 2021. It asserts the consent was duly served upon the proposed interested party via email and acknowledged by the proposed interested party. It is asserted that the consent orders were full and final and that the thrown away costs therein were paid and the primary suit Mavoko CMEL No. 115 of 2019 has since been re-opened for hearing on merits. The Applicant asserts that pursuant to the said consent the proposed interested party was required to engage the parties herein on reasonable amount payable or alternatively draw his bill of costs for taxation.

4. The Proposed Interested Party (hereinafter 'Auctioneer' and the Applicant (hereinafter 'the Appellant' filed submissions. In his submissions the Auctioneer submits that the issues for determination in this Application: are

- a. Whether the Auctioneer should be enjoined in this suit as an interested party.
- b. Whether the Appellant and the Respondent herein should pay the Auctioneer's fees and costs or whether the Auctioneer's charges should be deposited in Court.

c. Who is to bear the costs of this Application?

As to the issue as to whether the Auctioneer should be enjoined in this suit as an interested party. It is submitted that **The Black's Law Dictionary** defines an interested party as "A party who has a recognizable stake (and therefore standing) in the matter." It also defines a "Necessary Party" as "a party who being closely connected to a lawsuit should be included in the case if feasible but whose absence will not require dismissal of proceedings." Further, it is submitted that Rules 2 and 7(2) of The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 define an interested party as follows:

"interested party" means a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation;" He submits that Rule 7(2) provides that:

A court may on its own motion join any interested party to the proceedings before it. The broad principles which should govern disposal of an application for joinder are that the court can, either on an application made by any interested party or on its own motion direct any person as party to be enjoined in the proceedings.

The Auctioneer's submits his presence before the court is necessary as this will enable the Court to completely adjudicate upon and settle all the issues in the suit herein. The Auctioneer submits the issue of auctioneer's costs will be adjudicated upon and that he stands to suffer damages if not enjoined as his fees and charges have not been paid.

5. As to whether the Appellant and the Respondent herein should pay the Auctioneer's fees and costs or whether the Auctioneer's charges should be deposited in Court. The Auctioneer submits that the Appellant and Respondent herein entered a Consent on 18th May 2021 and the same was adopted as an order of the Court. He submits that it was a term of the Consent that the Auctioneer's costs to be agreed upon or be taxed and that on 30th April 2021 the Auctioneer sent a fee note to the Respondent's advocates in which all charges were tabulated. He submits that it is important to note that during the attachment process, the Appellant resisted attachment causing the Auctioneer to get an order for Police assistance after the Appellant issued cheques to the decree holder and Auctioneer which were returned unpaid. He submits that Rule 7 of the Auctioneers Rules, 1997 provides as follows: *A debtor shall pay the charges of the auctioneer unless (a) that debtor cannot be found; or he has no goods upon which execution can be levied; or (c) the sale proceeds are insufficient to cover the charges in which cases the creditor shall pay the charges or the deficiency thereof.*

As to who is to bear the costs of this Application, the Auctioneer submits that the motor vehicle having being released, both the Appellant and the Respondent herein ought to be ordered to jointly deposit the amount. It is worth nothing that an auctioneer as a court officer is independent of the litigation and should therefore be insulated by the court from extreme losses like the one incurred by the Auctioneer herein. He submits that both the Appellant and the Respondent should bear the costs of this Application as well.

6. The Appellant submits that it is worth noting that this application was not certified urgent and the Auctioneer never bothered to seek leave at the earliest opportunity since May 2021 when he became aware of the proceedings, for leave to come on record. The Appellant submits he waited until the matter was concluded in order to move the court. The Appellant submits there is also no evidence of service of the instant application by the Auctioneer to the Respondent, who is the instructing party. On the issue of joinder of a party, the Appellant submits that Order 1 Rule 10(2) of the Civil Procedure Rules provides that:

"...The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added..."

7. The Appellant submits that the same ought to have been filed when the parties herein were still prosecuting the application for leave to appeal out of time and release of the subject motor vehicle. To come to court when the parties herein have already concluded a matter is thus guilty of inordinate and unexplained delay. The Appellant submits that prayer 2 and 4 of the instant application have been overtaken by events since the subject motor vehicle was released to the Appellant and cause concluded and therefore there is no suit. The Appellant submits it and the Respondent herein are equally awaiting a date for directions in the primary suit, MAVOKO CMEL NO. 115 OF 2019 VINCENT ONDARI ONG'AYO VERSUS ENDMOR STEEL MILLERS LIMITED pursuant to a consent dated 18th May 2021 and adopted in court on 22nd July 2021 (months after participation by the proposed interested party). It submits that the said consent order was full and final marking this miscellaneous cause as closed. It submits that the thrown away costs were paid and the primary suit re-opened. The Appellant submits the Auctioneer chose not to appear in court when the same came up in court even for adoption of the consent despite having been served with the same and duly notified. It is submitted that it would be totally unfair to condemn the Appellant who is not the instructing party the exaggerated and exorbitant amount as per the invoice attached by the Appellant.

8. The Appellant cited the case of **Lilian Wairimu Ngatho & Another v Moki Savings Co-operative Society Limited & Another [2014] eKLR** where the court in dismissing an application filed by a party who was guilty of laches in filing a joinder application held as follows:

*"...The provisions of Order 1 Rule 10(2) state that joinder of a party can be made "at any stage of the proceedings". "Proceedings" are defined in **Black's Law Dictionary Ninth Edition** at page 1324 as "the regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment". A party can therefore only be joined to a suit at any time during the pendency of the suit, but not after the same has been concluded. This finding is premised on the basis that the purpose for joinder is to enable the court effectually and completely adjudicate upon and settle all questions involved in a suit. It is therefore of no use if a party seeks to be joined when the court has already made its findings on the issues arising.*

Similarly, the main purpose for joining a party as a Defendant under Order 1 Rule 3 of the Civil Procedure Rules is to claim some relief from the said party, and therefore such joinder can only be made during the pendency of a suit. As this court has declined to set aside the judgment herein, there is no suit pending before this court, and the Applicants cannot therefore be joined as parties at this stage.

The upshot of the foregoing is that the various Notices of Motion brought by the Applicants fail. The Applicants shall individually bear the costs of their respective Notices of Motion...”(emphasis theirs)

9. The Appellant submits that there is no dispute that the Auctioneer was instructed by the Respondent herein to execute against the Appellant herein. It is also not disputed that the Auctioneer proclaimed the Appellant’s motor vehicle. The Appellant submits the set precedence is that the Auctioneer could have then recovered the fees from the judgment debtor had the sale of the attached property went through but since the same was stopped pursuant to court orders issued herein then the circumstances are that the instructing party (who is the principal) is liable to meet the auctioneer’s costs for instructions given out. Further, it is submitted, if at all the Auctioneer files a bill for taxation the same ought to be taxed against the Auctioneer’s instructing client, the Respondent in the suit and not the Appellant. In support of the foregoing submissions, the Appellant relied on the case of **Francis Mwatha Macharia T/A Freeman Auctioneers Services v Tata Africa Holdings (Kenya) Limited [2019] eKLR** where the court was faced with a similar application of who is pay the auctioneer’s fees/charges, assessment of the charges and costs of the application. The Appellant submits that similarly, in the case of **Kenya Oil Company Limited v Jovan H. Kariuki T/A Moran Auctioneers [2020] eKLR** in an application which only sought leave to appeal out of time against the decision of the taxing master but also addressed the pertinent issue of who is liable to meet the auctioneer’s fees and costs, Onkwany J. held as follows:-

“...14. Be that as it may, this court is still minded, in the interest of justice, to address the pertinent question of who should pay the auctioneers fees in this case. The answer to this question could have been found in the ruling in respect to the application dated 25th March 2015 which was however withdrawn by the Auctioneer on 28th May 2018.

15. In the impugned ruling of 25th May 2019, the Taxing Officer stated as follows on the subject of the party liable to pay the auctioneers costs: “From the proceedings the auctioneer could have recovered he fees from the debtor if the sale went through. He is entitled to fees for work done. The sale was called off meaning that the instructing party was to pay for the instructions given out.”

16. Having regard to the above extract of the ruling, this court finds that the party liable to settle the auctioneers costs is instructing party in the suit that gave rise to the execution which was West Mont Power (K) Ltd...”

Further, it is submitted that the Auctioneer in his submissions correctly submits that Rule 7 of the Auctioneers Rules 1997 is clear as to when a debtor should meet the auctioneer’s costs that is when there is a lawful attachment and sale is successful unless the said debtor cannot be found, he has no goods upon which execution can be levied or the sale proceeds are insufficient to cover the charges. The Appellant thus urged the Honourable Court to exercise its discretion judicially and by dismissing the Auctioneer’s notice of motion application dated 22nd June 2021 with costs to the Appellant.

10. It is not in doubt that the Auctioneer attached the suit Motor Vehicle Registration Number KBA 602M, Isuzu Truck which is the subject of this Application following warrants of attachment and sale issued in CMEL Suit No. 115 of 2019 at Mavoko Law Courts. It is also not in doubt that a consent was entered and the motor vehicle subsequently released by order of this Court. The factual position is that the Respondent and Appellant herein are parties in the primary suit and the Auctioneer was agent of the Respondent herein when he attached the motor vehicle owned by the Appellant. As the Court gave directions on the costs, it would be imperative that the Auctioneer actualizes the determination of the Court which was to the effect that auctioneer’s costs be agreed or taxed. The present application is therefore misplaced as all the Auctioneer has to do is tax the costs as these are seemingly not agreed nor did they form the consent entered into by the Appellant and the Respondent herein. As such the application is unmerited and is dismissed albeit with no order as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF DECEMBER 2021

NZIOKI WA MAKAU

JUDGE