



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 133 (N) OF 2008

(Before Hon. Lady Justice Maureen Onyango)

APHONSE MWANGEMI MUNGA

PETER MUCHIRI MUIRUNGI

MICHAEL ONYANGO OCHIENG

PETER N. MAKAU

CHIVATSI KATAMA

MARICOS NYAMWANGA OKONGO

STEPHEN NZIOKA KASINA

SHADRACK C. LEWA

BENEDICT ORWARU

NICHOLUS MUOKI

JAMES KINGELEL (Suing on behalf and on behalf of 367 employees of African Safari Club Limited).....**CLAIMANT/APPLICANTS**

VERSUS

AFRICAN SAFARI CLUB LIMITED.....**RESPONDENT**

ERDEMANN PROPERTY LIMITED.....**1ST INTERESTED PARTY**

STEPHEN KIMANI KARUU T/A

KIRIIYU MERCHANTS.....**2ND INTERESTED PARTY**

RULING

There are several applications for determination in this file. The first is dated **23rd October 2017**. It is filed by the 2nd Interested Party Stephen Kimani Karuu T/A Kiriiyu Merchants and seeks the following orders –

1. That this application be certified as urgent and be heard ex-parte on the first instance.
2. That pending the hearing and determination of this application inter partes this honourable court be pleased to issue an order

staying the warrant of arrest against the 2nd Interested Party issued and extended by this Honourable court on 13th September 2017.

3. That pending the hearing and determination of this application inter partes this honourable court be pleased to stay the hearing of the application dated 9th October 2017 until the 2nd Interested Party bill of costs is taxed.

4. That pending the hearing and determination of this application inter partes this honourable court be pleased to review and set aside the orders of consent issued herein on 10th September 2015 and set aside all consequences ensuing therefrom.

5. That this honourable court be pleased to issue an order lifting the warrant of arrest against the 2nd Interested Party issued and extended by this court on 13th September 2017.

6. That this honourable court be pleased to stay the hearing of the application dated 9th October 2017 until the 2nd Interested Party bill of costs is taxed.

7. That this court be pleased to review and set aside the orders issued herein on 10th September 2015 and set aside all consequences ensuing therefrom.

8. That costs of this application be provided for and be paid by the respondents.

The other application is dated **9th October 2017**. It is filed by the claimants and seeks the following orders –

a) That this application be certified urgent.

b) That this Court be pleased to forthwith order execution of the warrants of arrest against Stephen Kimani Karuu T/A Kiriiyu Merchants Auctioneers for purposes of committing him to Civil Jail for Six (6) months as ordered by Hon. Justice Mathews N. Nduma on 14th April, 2016 for disobeying the consent orders of this Honourable Court dated 10th September, 2015 by failing to deposit a sum of Kshs.4.5 Million hereof.

c) That this Honourable Court be pleased to forthwith order Stephen Kimani Karuu T/A Kiriiyu Merchants Auctioneers in conjunction with Ms Murphy Merchants Auctioneers to give a full statement of accounts and to pay the Claimants The proceeds of sale pursuant to the attached goods on 23rd August, 2011 land the order of Hon. Lady Justice Wasilwa dated 19th September, 2017 hereof.

d) That the Court be pleased to grant further reliefs as it may deem.

e) That the costs of this application be awarded to the Applicants.

The 3rd application is the notice of preliminary objection dated **14th October 2017** filed by the claimant's on the following grounds –

a) The said Application is incompetent, fatally defective, superfluous, vexatious, frivolous and an abuse of the court process and a waste of court's time.

b) The said application is an abuse of the Court process because the purported auctioneers' bill of costs is grossly exaggerated and offends the provisions of the Auctioneers Act.

c) The said application is similar to the Application in High Court Misc. Civil Application No. 367 of 2015 (Nairobi) dated 25th August, 2015 and Amended on 18th February, 2016 thus the instant application ought to be stayed or dismissed hereof.

d) The Auctioneer is guilty of contempt of court by failing to pay a sum of Kshs.4.5 million and ought to be denied court audience until he complies with the court order hereof.

e) The Respondents shall urge the court to have the said Application struck out with costs.

There is another preliminary objection dated **6th November 2017** filed by the 1st Interested Party, is follows –

1. The Applicant/2nd interested party's application dated 23/10/2017 is fatally defective as his Advocates are not properly on record.

2. The Advocates for the Applicant/Auctioneer have not complied with the express provisions of Order 9 Rule 9 of the Civil Procedure Rules 2010 which require that change of Advocates after judgment has been entered shall not be effected unless by an Order of Court.

3. The Application before the Court is fatally and irredeemably defective and ought to be dismissed forthwith with costs.

Background

The background to this long-standing suit is that the claimants herein filed suit against the respondent claiming Kshs.57,000,000/=. By its judgment dated 28th April 2011 the court awarded the claimants Kshs.50,506,075/=.

The claimants subsequently extracted a decree and instructed the 2nd Interested Party, an Auctioneer to execute the decree by sale of LR NO. 1515/1/M.N. The 2nd Interested Party sold the property at Kshs.120 million to the 1st Interested Party. Kshs.90 million was deposited into the joint account of the claimant's and 1st Interested Party's Advocates. The 2nd Interested Party retained Kshs.30 million allegedly to cover its costs, expenses and charges.

By an order of 10th September 2015, the 2nd Interested Party was directed to deposit Kshs.20 million out of the money he was holding into the joint account of counsels for claimants and 1st Interested Party. The 2nd Interested Party deposited the sum of Kshs.15.5 million only in compliance with the said order leaving a balance of Kshs.4.5 million which is the subject of the pending applications.

On 14th April 2015, the court ordered the arrest of the 2nd Interested Party for disobeying the orders of 10th September 2015 by failing to deposit the said Kshs.4.5 million. The warrants of arrest were extended for six (6) months pursuant to orders made on 13th September 2017.

The application dated 19th October 2017 herein above thus seeks the execution of the warrants of arrest against **Stephen Kimani Karuu T/A Kiriuyu Merchants Auctioneers** for purposes of committing him to civil jail for six (6) months as ordered on 14th April 2016 for disobeying orders of 10th September 2015 to deposit the sum of Kshs.4.5 million as directed and further failing to give a full account and to pay to the claimants the proceeds of sale pursuant to attachment of goods on 23rd August 2011 and an order of 19th September 2017.

On 7th November 2017 when this case came before me for directions on hearing of the pending applications, I directed that the parties proceed by way of written submissions on all the applications. Pursuant to the said orders, only the 2nd Interested Party filed written submissions on all the pending applications while the claimant did not file any. The 1st Interested Party filed submissions in respect of its preliminary objection dated 6th November 2017 only.

I will first dispose of the two notices of preliminary objection, which raise the following issues –

1. That the application dated 23rd October 2017 is fatally defective.
2. That the application is similar to **Nairobi High Court Misc. Civil Application No. 367 of 2015** dated 25th August 2015 and amended on 18th February 2016 thus the instant application ought to be stayed or dismissed.
3. That the applicant is guilty of contempt and ought to be denied audience until he purges the contempt.
4. That the application is incompetent, fatally defective, superfluous, vexatious, frivolous and an abuse of court process.
5. That the Auctioneer's Bill of Costs is grossly exaggerated and offends the provisions of the Auctioneers' Act.

It is the submission of the 1st Interested Party that there is no dispute that there is a judgment in place in this suit and the 2nd Interested Party's advocates can only be allowed to come on record through an order of the court. The 1st Interested Party relies on several authorities of the High Court in **SeeBound Limited vs London Distillers (K) Limited, Civil Suit Number 184 of 2001** (Unreported) where the court addressed itself on a similar situation in which the respondents had not filed a proper notice of change of advocates after judgment had been entered.

The Court held that they were not properly on record as they had failed to strictly comply with the provisions of Order 9 Rule 9 of the Civil Procedure Rules. The Court emphasized that strict compliance was required to enable court process to be done effectively and to the right recipient, and thus prevent confusion and disorder.

The provision aforesaid was made in the interest of good order, procedure and substantive justice in the administration of justice and is instrumental to ensuring there is the quick and just resolution of disputes pursuant to Sections 1A and IB of the Civil Procedure Act, 2010.

The 1st Interested Party also relied on the decision of the High Court in **Simon Barasa Obiero v Jackson Onyango Obiero [2016] eKLR** in which the court stated that the reason this provision was there was to ensure that Advocates got paid for their services and to impose orderliness in civil proceedings.

The 1st Interested Party further relied on **Peter Ludasia Makokha v Theresia Hudson, Busia H.C. Civil Appeal No. 18 of 2015**, as quoted in **Simon Barasa Obiero v Jackson Onyango Obiero [2016] eKLR (supra)** where the Court concluded as follows:

"Similarly in this case the firm of Advocates on record for the Appellant in the lower Court proceedings were Ochweni Ngamate and Company Advocates. This Court deems that firm of Advocates to have been the one with the capacity to file the memorandum of appeal and any other motion or notice and to prosecute the appeal on behalf of the Appellant in terms of Order 9 of the Civil Procedure Rules. Any memorandum of Appeal, Application, Notices, Submissions filed by any other party or firm of Advocates, ostensibly on behalf of the Appellant without complying with Order 9 Rule 9 of the Civil Procedure Rules is null and void ab initio."

The 1st Interested Party also relied on the High Court in **Livingstone Simei Sane v Shadrack F. Ogata & Another [2015] eKLR**, where it

was held that where an application or pleadings are dismissed for failing to comply with Order 9 Rule 9, such application is fatally defective and such application cannot be reinstated or validated by compliance with Order 9 Rule 9.

The court observed that if the Advocates were paid for their services and in turn raised no objection to the coming on record of the Advocates who were to come on record after them, it would automatically reduce the number of Advocate-Client applications made in court. It is also an alternative dispute resolution mechanism as it encourages out of Court negotiations as opposed to claiming costs through the litigation process. Furthermore, it is substantive justice and equitable for the Courts to ensure that Advocates are duly paid for their legal services, otherwise, the party seeking justice from the Courts before paying their outgoing Advocates would be coming to Court with unclean hands, as they have themselves not done justice to their outgoing Advocates. This is in line with the Overriding Objectives of the Civil Procedure Act and cannot be dismissed as a mere technicality.

For the 2nd Interested Party (applicant in application dated 23rd October 2017) it is submitted that it was enjoined to these proceedings after judgment and therefore order 9 Rule 9 of Civil Procedure Rules are not applicable as there has been no judgment or decree that fully determines the issues for which it was enjoined. The 2nd respondent relies on the case of **ABDIRASHID ADAN HASSAN -V- MASTERWAYS PROPERTIES LIMITED (2013) eKLR**.

I have perused the said ruling and in my view, it is not relevant as it does not concern the circumstances similar to those herein, where a party is enjoined to a suit after judgment.

I however do agree with the submissions by both the 1st and 2nd Interested Parties that the mischief that Order 9 Rule 9 was intended to cure was to avoid a client running away with the advocate's fees after representing them before judgment. In the case of the 2nd respondent, it is evident from its application that it changed its counsel because, as insinuated in its application, the consent judgement dated 10th September 2015 entered into by its previous counsel was without its consent.

For the foregoing reasons, I find that Order 9, Rule 9 is not applicable in the case of the 2nd Interested Party herein and that Kinyanjui Kirimi and Company Advocates came on record properly by filing a notice of change of advocates.

The second issue arising from the two (2) notices of preliminary objection is whether the application is similar to **Nairobi HC Misc. Civil Application No. 367 of 2015 dated 25th August 2015**. The 2nd Interested Party/applicant is silent on this issue, which it has not addressed in its submissions. The claimants attached a copy of the application which I have perused.

The said amended notice of motion dated 25th August 2015 and amended on 18th February 2016 seeks the following orders –

1. There be provision for the auctioneer fees, cost, charges and expenses was carried out and effected up to sale of the immovable property.
2. The attached bill of costs be taxed. .
3. Such other order(s) that the court may deem expedient in the circumstances to grant.
4. Cost be provided for.

The grounds in the notice of motion were that;

1. A memorandum was filed in the industrial court regarding sale by auction on the 8th day of April 2014 on all that parcel of land known as L.R. 1514/1 /MN in the Republic of Kenya together with buildings and improvements thereon
2. Mr. Zeyun and Mrs Jing Zhang of Edermann Property Ltd were declared the purchasers at a cost of Kshs.120.000.000/- (One Hundred and Twenty million) and paid Kshs.30.000.000/- (Thirty Million) as the deposit.
3. The amount payable to the auctioneer as fees, cost, charges, commission and expenses are in dispute.
4. The matter is within the jurisdiction of this court.

The 2nd Interested Party has not informed the court whether this application is still pending or has been determined or disposed of in any other manner.

In its application at prayer 3 and 6, the 2nd Interested Party seeks stay of the claimants' application dated 9th October 2017 until its bill of costs is taxed. The applicant is thus seeking to litigate in this court a matter that is either already litigated in the said application in the High Court or is spending determination in the said application. It also therefore means that the applicant filed two separate bills, one in this court and one in **Nairobi H.C. Misc. No. 367 of 2015** over the same subject matter both of which it has either amended or sought to amend at different times.

These grounds are sufficient to warrant do dismissal of the application herein but I will consider the remaining ground that has been raised, that the application is in contempt and has no audience.

The other ground of objection is that the applicant is guilty of contempt and ought to be denied audience until he purges the contempt

It is not in dispute that the applicant is in contempt. This was the finding of the court when it made the orders of 26th May 2016 which were extended on 13th September 2017 and which the applicant seeks to set aside by the instant application. It is further not in dispute that the applicant has not complied fully with the orders.

Court orders are intended to be obeyed unless they have been set aside or orders of stay have been obtained. In the instant case there has been no stay of execution of the court orders of 10th September 2015 or the warrants issued on 26th May 2016 and extended on 13th September 2017.

A party guilty of contempt of court orders cannot be granted audience by the very court whose orders he has disobeyed before he redeems himself by complying with the said orders.

Before I conclude, it is necessary for me to comment on the applicant's application dated 23rd October 2017. The application seeks to set aside consent orders of 10th September 2015. The orders were that the applicant deposits Kshs.20 million into a joint account in the name of counsel for the claimant and 1st Interested Party. The applicant complied by depositing Kshs.15.5 million leaving a balance of Kshs.4.5 million.

This begs the question, why did he comply so substantially with the said consent orders if it was entered into without his consent? And why did he not apply to set aside the said orders from 10th September 2015 to 23rd October 2017 when he filed the instant application?

Further why did he amend the bill of costs in this suit and in **Nairobi HC Misc. Application No. 367 of 2015**, which he amended on 18th February 2018 if he was not satisfied with the consent orders?

The only answer to all these questions is that the application is an afterthought, filed only to delay execution of the warrants of arrest herein.

Conclusion

In conclusion, the preliminary objections filed by the claimants and 1st Interested Party are upheld to the extent that the applicant is in contempt of court orders which contempt it has not purged and the application is therefore an abuse of court process. The warrants of arrest herein are herein again confirmed and extended for as long as the 2nd Interested Party/applicant shall not have obeyed the court orders dated.

I further hold that the 2nd Interested Party has no audience before this court until he purges the contempt.

The application dated 23rd October 2017 is therefore also accordingly dismissed. The 2nd Interested Party shall pay costs of the claimants and 1st Interested Party.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12TH DAY OF OCTOBER 2018

MAUREEN ONYANGO

JUDGE