



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO. 1262 OF 2015**

**(FORMERLY INDUSTRIAL CAUSE NO. 116 OF 2013, MOMBASA)**

**MAURICE M. MUNYAO & 148 OTHERS** (*suing on their own behalf and on behalf of the other members/beneficiaries of the Kenya Ports Authority Pension Scheme affected by the averaging of the pensionable salary and freezing of the pensionable house allowance (pursuant to the order made by the Honourable Justice Maraga J.) on the 28<sup>th</sup> November, 2007.....***PLAINTIFFS/CLAIMANTS**

**VERSUS**

- 1. ALBERT CHAUREMBO MUMBA**
- 2. ABDALLAH H. MWARUWA**
- 3. M.K. MURE**
- 4. MARY WAIRIMU NG'ANG'A**
- 5. ALEX OLE-TEIPAN**
- 6. MARY OTIENDE**
- 7. MARGARET NYAGA**
- 8. MAJENGO KATANA**(*sued on their own behalf and on behalf of the Predecessors and/or Successors in title in their capacity as the Registered Trustees of the Kenya Ports Authority Pension Scheme.....***DEFENDANTS/RESPONDENTS**

**AND**

**CFC STANBIC BANK LIMITED**

**(FORMERLY STANBIC BANK OF KENYA LIMITED).....GARNISHEE**

Mr. Oriaro for Claimant

M/s Opolo for Respondent

**RULING**

1. The Notice of Motion Application filed on 30<sup>th</sup> September 2015, seeks an order in the following terms;

2 This Honourable Court be pleased to commit to civil jail for six (6) months or for such period as this Honourable Court may deem fit Mutie Muindi T/A Mutibra Auctioneers;

The Application is based on the grounds set out on the face of the Application and supported by an affidavit of Eric Otongolo.

2. The nub of the Application may be summarized as follows:

On 26<sup>th</sup> November 2014 and 5<sup>th</sup> December 2014, Rika J. issued orders which required Mr. Mutia Muindu T/A Mutibra Auctioneers, as agents of the Plaintiffs/Claimants to stop execution of the attachment and/or proclamation levied by Auctioneers on the Garnishee's goods and not to proceed and/or commence any proceedings related to Nairobi **Industrial Cause No. 1262 of 2015 (formerly Mombasa Industrial Cause No. 116 of 2013)** until further order of the Principal Judge of the Court.

That Mr. Mutie Muindi was present in Court when the orders were issued and is aware of the said orders and had an obligation to ensure that the orders were obeyed.

That the ruling was served to all the counsels on record.

That despite the Court orders afore said, Mutia Muindu T/A Mutibra Auctioneers as agents of the Plaintiffs/Claimants proceeded to institute fresh proceedings by filing a Bill of Costs that was based on the proclamation that was stayed pursuant to the aforesaid order. The Bill of Costs is annexed to the Application and marked 'EO5'.

3. The Application is opposed vide a Replying Affidavit of Mr. Randoplh M. Tandika, the advocate on record on behalf of the Plaintiffs/Claimants who deposes inter alia, that on 7<sup>th</sup> November 2014, Justice O. Makau J. made an order of Garnishee absolute by the terms of which the Garnishee was ordered to forthwith pay to the claims the sum of Kshs. 257,819,043.20 plus costs of the suit. That the Garnishee took time to pay the decretal amount and the deponent instructed the Auctioneer to proceed and attach against the Garnishee, which he proceeded to do so.

4. That on 14<sup>th</sup> November 2014, the whole amount was paid into the Advocate's clients account and thus the issue of the Auctioneer proceeding with attachment contrary to the order given on 26<sup>th</sup> November 2014 does not arise since by the said date the whole amount had been paid and no further attachment was carried out.

5. That the orders issued by Rika J. on 5<sup>th</sup> December 2015 have not been disobeyed since the same concerned the parties herein of which the Auctioneer was not a party.

6. That the application is further opposed by a replying affidavit of M/S Mutia Muindu T/A Mutibra Auctioneers who have been cited for contempt by the applicant.

7. The deponent denies having disobeyed the court orders issued on the 27<sup>th</sup> November, 2014 and 28<sup>th</sup>

May, 2015. With regard to the first court order, the Auctioneer states that he did not proceed to remove the goods after proclamation since the applicant paid the total decretal amount less the Auctioneer's fees before the removal of the goods. This order lapsed on 5<sup>th</sup> December 2014, and the same had not stopped the Auctioneer from taxing his costs.

8. With respect to the 2<sup>nd</sup> order issued on 28<sup>th</sup> May, 2015, the same was never served on the Auctioneer to date.

9. The deponent did not file the bill of costs in disregard of any court order in that;

(i) As an Auctioneer, he was never a party to any previous proceedings with the applicant and in particular **Nairobi Industrial case No. 1262 of 2012 (formerly Mombasa Industrial Cause No. 116 of 2013)**;

(ii) That the applicant wrote to claimant's advocate on 26<sup>th</sup> November 2014 requesting for a meeting to discuss the settlement of Auctioneers fees;

(iii) That on 21<sup>st</sup> November 2014, the Auctioneer received a letter from the applicant's advocate advising the Auctioneer to file his bill of costs for taxation.

10. The Auctioneer proceed to file and tax his bill of costs with express authority concurrence and / or awareness of the applicant on 6<sup>th</sup> February 2015.

11. That the Auctioneer was legally right to file the miscellaneous application to tax his bill of costs. The applicant proceeded to file an appeal reference on the bill of costs which was dismissed and also filed an application for leave to file an appeal out of time. The applicant has therefore consciously participated in the proceedings the applicant now alleges were conceived and proceeded on in contempt of court order issued by Rika J. on 28<sup>th</sup> March 2015.

12. The Auctioneer submits that in any event, the bill of costs was filled on the 6<sup>th</sup> February 2015, before the order, alleged to have been disobeyed was issued on 28<sup>th</sup> May, 2015.

13. That the application for contempt is without factual or legal basis and same be dismissed with costs.

### **Determination**

14. The issue for determination is whether the Auctioneer filed the bill of costs on 6<sup>th</sup> January 2015 in wilful defiance and contempt of the orders of the court issued on 5<sup>th</sup> December 2014.

15. It is common cause that the question of alleged stay of the taxation of the bill of costs was raised before the taxing master on the basis that Rika J. had stayed any further proceedings on this matter in his ruling dated 5<sup>th</sup> December 2014. The taxing master considered the objection and declined to stay the taxation / proceedings on the grounds that the Auctioneer was not a party in **Industrial Cause No. 1262 of 2015 (formerly Mombasa Industrial Case No. 116 of 2013) and that Misc. 2 of 2015** was a different matter before the court. The taxing master proceeded to tax the bill on 27<sup>th</sup> March 2015.

16. The Maagistrate made a specific finding that there was no stay of proceedings in Misc. 2 of 2015 before him.

17. The applicant herein made an application for proceedings to appeal the decision of the taxing master.

18. Instead of pursuing that appeal the applicant filed this application on 30<sup>th</sup> September 2015, seeking to have the Auctioneer cited for contempt of court, basing on a matter that had been raised before Hon. Kimanga R.M. on 27<sup>th</sup> March 2015 and a determination made.

19. Furthermore, the applicant's Advocates had on 21<sup>st</sup> November 2014, specifically requested the advocates for the claimant to file the Auctioneer's bill of cost in court for taxation since the Auctioneer's fees sought to be levied was excessive.

20. It does not occur to this court that the fixing of the bill of costs by the Auctioneer on 6<sup>th</sup> January 2015 was prohibited by a competent court order. This position was well stated by Hon. Kimanga R.M. on 27<sup>th</sup> March 2015, and no court of competent jurisdiction has reversed this decision by the learned Magistrate.

21. In this regard, the issue of wilful disregard of a court order by the Auctioneer does not arise at all.

22. It is unnecessary therefore for this court to discuss whether or not there was a proper service of the court order issued by Rika J. on 5<sup>th</sup> December 2015.

23. In any event, even if the bill of costs had been conceived in wilful defiance of the court order, which is not the case, the applicant fully participated in the taxation and had in fact prompted its filing in the letter of 21<sup>st</sup> November 2014. The standard of proof in contempt proceedings as was held in **Gatharia K. Mutitile & 2 others V. Baharini Farm Limited [1985] KLR** is higher than on the balance of probability as contempt is criminal and it must be proved that one has actually disobeyed the court order.

24. The applicant has failed to discharge this onus of proof.

25. From the aforesaid reasons, the court will not delve into the issue whether or not the applicant has met the prerequisite of instituting contempt proceedings, having found that there was in the first place no court order that had prohibited the filing of a miscellaneous application before the taxing master, for taxation of a bill of costs in respect of a 3<sup>rd</sup> party to the suit the subject of the said court order.

26. The application is dismissed with costs.

**Dated and delivered at Nairobi this 13<sup>th</sup> day of May, 2016.**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**