



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 19 OF 2011

JOHN GACHAU GITONGACLAIMANT

VERSUS

MISS NDUTA MBILE..... RESPONDENT

Mr Allen Gichuhi for Applicant

Mr Mungla for the Auctioneer

RULING

1. Application dated 11th June 2015 is serving before court for determination.
2. Orders 1, 2, 5 and 6 in the Notice of Motion are spent the goods having been sold on 8th June 2015. The auctioneer Mr Muganda Wasilwa T/A Keysian Auctioneers appeared in court on 5th October 2015 for cross-examination.
3. The remaining orders are seeking review of the orders dated 29th May 2015; nullification of the proclamation and attachment dated 4th March 2015; cancellation and/or suspension of the license issued to the Auctioneers; damages for illegal execution process and costs of the applications dated 16th March 2015 and 11th June 2015.
4. Judgement in this matter was delivered by Ongaya J on 28th August, 2012 in favour of the claimant. A decree for Kshs 498,228.85 was extracted on 18th September, 2012. It did not include payment of interest. By consent, the parties agreed that the respondent pay Kshs 16,350 and deposit title for property known as Ngong/Ngong/38852 as security for costs pending appeal. The consent was perfected on 9th November 2012. The claimant tried on two occasions to set aside the consent orders made on 9th November 2015 without success.
5. The applicant submits that Keysian Auctioneers issued a proclamation of attachment on 4th March 2015 to purportedly realize the decretal amount of Kshs 818,288.35 plus their fees of Kshs 92,000 and attached the goods. The proclamation was served when the stay orders dated 9th November 2012 had not been vacated. The proclamation further sought to execute a decree of Kshs 818,288.55 when the decree dated 18th September 2012 is for Kshs 498,228.85.

6. The applicant was not served with a notice to show cause why her property should not be attached in clear violation of order 22 Rule 18 (1) (a) of the Civil Procedure Rules. Keysian Auctioneers attached the respondent's property without serving the applicant with the warrants of attachments or without instructions from the claimants advocate.

7. The applicant submits further that the ruling dated 29th May 2015 has an error on face of record as the court's attention was not drawn to the previous stay order and history of the matter since the stay was granted. There is no evidence that a letter of instructions under Rule 11 of the Auctioneers Rules 1997 was issued. The court has jurisdiction to discipline an errant auctioneer under section 28 of the Auctioneers Act.

8. The applicant has made an application for extension of time in the court of appeal, and has explained the delay in filing the appeal which was because of the mistake of counsel and the application has high probability of success.

Response

9. The Notice of Motion is opposed by the auctioneer sworn on 30th September 2015 and filed on 1st October 2015. The replying affidavit is restricted to the involvement of the auctioneer in the execution process. The claimant himself or his advocate have not filed a replying affidavit regarding other matters set out in the supporting affidavit of Miss Nduta Mbile to the Notice of Motion dated 11th June 2015. These facts are therefore not in dispute. The matter placed in dispute by the Auctioneer are as follows;

10. The Auctioneer states that he was instructed by Messrs Kandie Mutai & Mudezi Advocates to execute the warrant of attachment issued by the court and attached to the replying of affidavit. The auctioneer did not flout any court order as he obeyed and suspended the auction when he was served with a temporary order of stay that had been served on him and only proceeded with the auction sale when the application was dismissed and the orders staying execution discharge and upon advice of the claimant's advocates.

11. That even the order staying execution dated 9th November 2012 had long lapsed by operation of the law. That he had perused the file and seen that on 9th November 2012 Ongaya J granted orders of stay of execution pending the hearing and determination of the intended appeal as the defendant had filed a notice of appeal.

12. That rule 82 (1) of the Court of Appeal rules 2010 provide that;

“Subject to rule 115 an appeal shall be instituted by lodging in the appropriate registry within sixty days of the date when the notice of appeal was lodged:

a. A memorandum of appeal in Quaduplicate

b. The record of appeal in Quaduplicate

c. The prescribed fee and

d. Security for the costs of the appeal”

13. That the notice of appeal was lodged on 12th September, 2012 but todate the appeal has not been instituted. That in terms of Rule 83 of the Court of Appeal rules, if the Appeal is not instituted within the stipulated time, the notice of appeal shall be deemed withdrawn.

14. That the defendant has not reinstated the appeal. There was therefore no intended appeal at the time of execution and even the order of stay dated 9th November 2012 lapsed on the withdrawal of the notice of appeal.

15. That advertisement of the auction sale is regulated by rule 16 of the Auctioneers rules and Rule 16 (2) only provides for advertisement in a newspaper. That the auctioneer was within the law to advertise in the star newspaper. That the auctioneer rendered an account of the sale in compliance with rule 17 and 18 of the rules. The applicant signed the proclamation and repossession forms and did not dispute the value posted by the auctioneer and can't later complain after the auction. Under rule 10 of the auctioneers rules, a debtor could apply for an order of valuation to the court but the applicant did not.

16. The estimated value may differ but the actual or market value are those realized at a properly conducted auction sale. The Auctioneer states that he had conducted the auction sale properly.

Notice Period

17. The Auctioneer states that Rule 12 (c) of the Auctioneers rules provide that the judgement debtor should be given 7 days' notice within which he may redeem the proclaimed goods by payment of the amount set forth in the court warrant or letter of instruction. 14 days' notice is only required under distress for Rent Act. It is admitted that the Auctioneers could have made a mistake in the proclamation form (mw-3) but he collected the goods long after the lapse of 7 days which was the statutory period.

Recovery of damage against Auctioneer

18. Section 26 of the Auctioneers Act leads to the conclusion that recovery of damages against an auctioneer can only be through filing of a civil suit and not by an interlocutory application such as this one.

The section provides;

“Subject to the provision of any other law, a person who suffers any special or general damages by the unlawful or improper exercise of any power by a licenced auctioneer shall be entitled to recover damages directly suffered by him from the auctioneer by action”.

19. The Auctioneer prays that the orders sought should not issue against him especially because;

- i. The execution process is complete and returns duly filed by the auctioneer. The net decretal sum has been utilized by the decree holder.
- ii. Prayer 6 cannot issue as the goods have been sold in execution of a decree of the court. The auctioneer was not a party to the suit. Any irregularity in procuring the warrant of the attachment should be addressed by the parties directly and not the auctioneer.
- iii. The prayer for cancellation of the licence or suspension of the auctioneer's licence is too drastic and draconian for the minor infraction on the proclamation notice.
- iv. Prayer 8 cannot issue against the auctioneer since it is not a party to the suit.

20. The auctioneer prays the application be dismissed as against the auctioneer.

Determination

21. The applicant has submitted that prayers 1,2,5 and 6 have been spent. The remaining prayers 7 & 8 are sought against the auctioneer and not the claimant as such except prayer 3 which seeks the court to review its orders issued on 29th March 2015, as follows;

7. An order be issued cancelling or in the alternative suspending the licence issued to Mr Muganda Wasilwa T/A Keysian Auctioneers

8. The court do order that the damages suffered by the respondent on account of the illegal

execution process be assessed and the same be paid by the Auctioneer on a full indemnity basis within 14 days of assessment.

22. It is apparent that the judgement of the court included an order for interest. The decree extracted on 18th September 2012 was for Kshs 498,228.85. Interest was not included in the order. On 28th September 2012, the respondent through Galaxy Auctioneer issued a warrant of attachment for the decretal amount of Kshs 498,228.85. On 9th November 2012 the respondent filed a case of payment of the security amount ordered by the court and title for parcel of land known as Ngong/Ngong 38852. The consent was in place as of 4th March 2015 when Keysian Auctioneers issued a proclamation of attachment to purportedly realize the decretal amount of Kshs 818,288.35 plus auctioneer fees of Kshs 92,000.

23. The claimant had earlier tried in vain to set aside the consent order twice vide application dated 22nd January 2013 which was dismissed on 8th May 2013. An application to set aside the orders made on 8th May 2013 was filed on 12th June 2013, but was again dismissed. These facts have not been disputed by the respondent.

24. It is clear that the decree for the sum of Kshs 818,288.35 was proper as it included interest that had been awarded by the court. On 16th March 2015 after being served with the proclamation, the respondent instructed new advocates to file an application to stay the execution of the decree. This application was heard and dismissed by Nduma J on 29th May 2015. It is this ruling that the respondent wants reviewed on the basis that court's attention was not drawn to the previous stay order and history of the matter.

25. The firm of Wamae & Allen Advocates was instructed to come on record on 5th May 2015. An application to arrest the judgment was not filed as the ruling was ready.

26. Upon careful consideration of the facts, it is clear that the claimant caused execution of a lawful decree as it was not in excess of the judgement sum. The Judge ordered for payment of interest from 5th November 2009 till payment in full. At the time Keysian Auctioneers attached and sold the goods, it did so in the belief that there was no order of the court staying execution of the decree following the court ruling of 29th May 2015.

27. The court is satisfied by the facts placed before court by Mr Muganda Wasilwa in his affidavit sworn on 30th September 2015 that he had received warrants of attachment dated 2nd March 2015 issued by the court commanding him to execute the said warrants of attachment against the respondent. That the warrants were issued to his firm by the claimant in person but the instructions were later reiterated by the claimant's advocates Messrs Kandie, Muite, Mudeizi & Company Advocates

28. It is therefore not correct that the respondent's property was attached without this court issuing the said auctioneers with warrants of attachment or without instructions from the claimant's Advocate. The auctioneer did not therefore violate rules 6 and 11 (1) (a) of the Auctioneer rules.

29. The application only seeks relief against the auctioneer and no relief is sought against the claimant except the order for review of the ruling of the court delivered on 29th May 2015.

30. It is the courts finding that the applicant has not established a case on a balance of probability against the firm of auctioneers to warrant this court to issue the orders sought in prayers 7 and 8 of the Notice of Motion. In any event the executed decree was in terms of the judgement of the court.

31. As regards the prayer to review the ruling of the court delivered on 29th May 2015 no proper basis for the review has been set out in the application in terms of rule 32 of the Employment and Labour Relations Court (procedure) rules 2010. Furthermore, the judgement and decree of the court have already been executed and this court is not given to issuing orders in vain.

32. The application is dismissed. No order as to costs.

Dated and delivered at Nairobi this 29th day of June, 2016.

MATHEWS N. NDUMA

PRINCIPAL JUDGE