



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA

(BIMA TOWERS)

CAUSE NO.21 OF 2013

TRANSPORT WORKERS UNION

CLAIMANT

V

AFRICAN SAFARI DIANI ADVENTURE

RESPONDENT

RULING

1. On 28 June 2013 the Court pronounced judgment in which the Claimant was awarded Kshs 158,013/- for unfair termination.
2. The Claimant extracted a decree and started the execution process. In the meantime the Respondent filed an application dated 17 July 2013 seeking the setting aside of the judgment and leave to file a Response out of time. The application was dismissed on 16 September 2013 for non attendance of the Respondent.
3. On 23 September 2013 the Respondent filed a new application seeking the reinstatement of the dismissed application. This application was dismissed on 1 November 2013.
4. On 17 December 2013 the Respondent filed a third application seeking a temporary injunction restraining the Claimant from executing/staying execution. On 19 December 2013 the Court allowed the application on the condition that the decretal sum be deposited into Court and set 27 February 2014 for *inter partes* hearing.
5. When the motion came up for *inter partes* hearing the parties informed the Court that they were negotiating and on 8 April 2014 the Respondent informed the Court that it wished to withdraw the application dated 17 December 2013 and that the monies deposited into Court could be released to the Claimant less the auctioneer's charges. The reason for this was that the auctioneer had acted *ultra vires*.
6. The Claimant however stated that they had paid the auctioneer some money and therefore the Respondent should bear the charges.
7. This ruling is to determine whether the amount deposited in Court as auctioneers charges should also be released back to the Respondent on account of the auctioneer.
8. One of the reasons why the Court had granted a stay was because the auctioneer had proclaimed property worth nearly Kshs 1,000,000/- for a debt of Kshs 200,000/-. I observed in that ruling that the auctioneer had gone overboard.
9. The Auctioneer's Rules are clear on who should be responsible for auctioneer's charges. That person is the judgment debtor, the Respondent herein. The Respondent contends that because of the auctioneers conduct it should be denied charges. The Claimant opposes saying it had already paid some deposit to the auctioneer.
10. The auctioneer is not a party to these proceedings and the Court would be condemning it without giving it a hearing were the Court to concede to the application made by the Respondent. This would not be proper or correct or in accord with natural justice. It would amount to condemning

- the auctioneer without hearing him.
11. The application by the Respondent is therefore declined.
 12. On the basis of the withdrawal of the application by the Respondent, the Court orders that the amount deposited into Court be released to the Claimant Union for and on behalf of the Grievant Ali Kirao and the auctioneer respectively.
 13. The Respondent may pursue any complaints against the auctioneer with the responsible body created to handle such type of complaints.

Delivered, dated and signed in open Court in Mombasa on this 11th day of April 2014.

Radido Stephen

Judge

Appearances

Mr. Otieno, Assistant General Secretary

Transport Workers Union of Kenya

Claimant Union

Mr. Omuya, instructed by

Hezron Gekonde & Co. Advocates

for Respondent