



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL APPEAL NO. 40'A' OF 2009**

**ELDORET STEEL MILLS ..... APPELLANT**

**VERSUS**

**ERNEST NJEKA OMBANGO ..... RESPONDENT**

**RULING**

Before court is the application by way of Notice of Motion which is dated 16th December, 2010. It is brought pursuant to the Provisions of Section 1A, 1B, 3, 3A and 63(e) of the Civil Procedure Act and Order 51 Rule 15 of the Civil Procedure Rules and all enabling Provisions of the Law. It was brought under a certificate of urgency. It prays for orders:

1. THAT .....
2. THAT the orders of the Court made on the 24th day of May, 2010 dismissing the Appellant's/Applicant's application dated 25/09/2009 be set aside.
3. THAT the application dated 25/9/2009 and the orders obtained on the 29th September, 2009 be reinstated and so remain in force pending the hearing and determination of the said application dated 25/9/2009.
4. THAT pending the hearing and determination of the application herein there be stay of execution and/or further execution and/or sale of the Applicant's Motor Vehicle registration number KAS 009Q.

It was quickly agreed by both counsel appearing herein for their respective parties that prayers nos. 2 and 3 be granted by consent. That was done. There were various affidavits of service of an order issued in CMCC. No. 1100 of 1999 and counsel for the respondent was desirous of cross-examining the deponents thereof being A.L. Khayo advocate and P.A. Omulama, court clerk/process server. The court was of the same view and hence it was agreed that evidence be taken, not of the two named persons above, but also of the auctioneer and his employee and the supposed purchase at the auction of 14/12/2010.

It turned out that whereas A.L. Khayo advocate said she served the order of 10/12/2010 on M/s Miyienda & Co. Advocates' clerk one Hillary Maritim on 2nd floor of Muya House, their offices are actually situated on 4th floor. What was not disputed was that the offices of M/S Miyienda & Co. Advocates are next door to a Christian Organisation's Offices. Whereas the advocate may have mistaken the floor on which she

served, she did not mistake that those offices were next to the Christian Organisation's Offices. It is therefore immaterial in my consideration whether the lady the advocate met was called Gladys as she claimed or she is called Christine as claimed by Hillary Maritim. The advocate described how she went into the building through Barclays Bank into an open area before ascending the stairs to serve the order at M/S Miyienda & Co.

Hillary Maritim on his part said he was not in the office at the time it is alleged that he was served, having been sent to Iten Court to do some work, the nature of which work he could not remember. He said that he got back to his office at 5.30 p.m. He denied ever having met Khayo advocate. How Khayo advocate got to know that Hillary Maritim was Miyienda & Co. Advocates Clerk was not disputed or even how she got to know his full name. I believe her when she says that it was Hillary Maritim himself who told her his full names. I believe that this was on 10/12/2010 at 4.35 p.m. or thereabouts when Khayo advocate walked up with Gladys or Christine to the Advocate's offices next to the Church organisation's offices.

It is this same court that heard the respondent's application dated 14/12/2010 sometime between 10.30 a.m. and 11.00 a.m. I take judicial notice of the fact that when counsel started to argue the application he said it was urgent as a sale was scheduled for that morning and feared that even as he addressed the court, the said auction could have been in process. That must mean one or several things. The advocate who was before court with his application must have been aware of the order before 10.30 a.m. for him to be in court with an application to which was attached a copy of the order of 10/12/2010. It means further that having seen that order the said Mr. Miyienda advocate did not conduct the auctioneer to tell them of its existence and hence the sale at 10.45 a.m. or thereabouts on 14/12/2010.

How about service to the auctioneers" Mr. Omulama's evidence as to service on the auctioneers was firm. Mr. Jeremia Abina Ongaro on whom Mr. Omulama said he had effected service said he had known Omulama for a long time, had worked cordially with him for that time and regarded him as a person of integrity and had no reason to doubt him. If Mr. Jeremiah and the auctioneer were in Webuye and Kitale sometime on 10/12/2010, I find that they were in their offices at about 4.00 p.m. onwards and that the order was indeed served on Jeremiah by Omulama as he said he did. And that is the reason it becomes easily believable the version by Narinder Lochab that indeed he spoke to Jeremiah over their office number (the office number was confirmed by the court during the hearing when the same was dialed through respondent's counsel number – judicial notice taken) and Jeremiah promised to do nothing as he was in receipt of the order.

In the end on a balance of probability I find that the order of 10/12/2010 was served on both the respondent's advocates' firm and on the auctioneers on 10/2/2010. That disposes of the issue of whether or not the order of 10/12/2010 was served.

As to the second issue, that of whether or not there was an auction and therefore a sale, I note as follows. It was not denied at all by the auctioneer himself, or his employee Jeremiah or the buyer Momanyi Sure that it was Jeremiah who rang the bell, called for bids, and declared Momanyi Sure the highest bidder. It was accepted by all and more particularly Mr. Jeremiah himself that he was not a licenced auctioneer and hence he was not an agent of the court as envisaged by order XXI Rule 60(1) in the following words;-

"Save as otherwise prescribed, every sale in execution of a decree shall be conducted by an officer of the court or by such other persons as the court may appoint in this behalf, and shall be made by public auction in the manner prescribed."

Jeremiah is not a licenced auctioneers and hence he is not an officer of the court and quite correctly he did not claim to have been appointed by court in that behalf. His actions at the auction of 10/12/2010 were a nullity without any saving grace. Respondent's submissions with regard to Rule 14 of the

auctioneers Rules is totally misplaced and is a misunderstanding of the rules. An auction shall be conducted by an officer of the court or a person appointed by the court in that regard. Jeremiah was none of the above.

What about the decree that gave rise to the auction" Mr. Bernard Onkoba the licenced auctioneer easily admitted that the decree was dated as issued on 19/07/2009. That is clearly a period in excess of one year and as per order XXI rule 18, which provides thus;-

"18(1) where an application for execution is made;-

(a) more than one year after the date of the decree;

(b) .....

(c) .....

The court executing the decree shall issue a notice to the person against whom execution is applied requiring him to show cause, or a date to be fixed, why the decree should not be executed against him." There is only one method provided, and it is by first Notice To Show Cause and it was not disputed that no such notice issued before 14/12/2010.

For the above reasons the entire execution process was extremely irregular and the purported auction and sale a nullity. Consequently I hereby lift and set aside that execution by the inherent jurisdiction of the court – see MULLA's Code of Civil Procedure 13th Edition Vol.II at pg. 1184.

The Civil Procedure Rules have no provision for setting aside sale in the circumstances such as the one presenting themselves here, but where that sale was irregular, as I find this one was, then the order of sale will be set aside ex debito justitiae the same way an irregularly obtained judgment against the law and not in accordance with the law, would – see MANSO ENTERPRISES LTD. V. KENYA COMMERCIAL BANK LTD. & ANOTHER (1989)KLR pg. 584.

Consequently I set aside the sale of 14/12/2010 and order that motor vehicle KAS 009Q be released forthwith. The costs of this application shall abide the appeal.

It is accordingly ordered.

DATED SIGNED AND DELIVERED AT ELDORET THIS 30TH DAY OF DECEMBER, 2010.

**P.M. MWILU**  
**JUDGE**

In the presence of;

Absent - Advocate for Applicant

Mr. Miyienda – Advocate for Respondent

Tabitha - Court Clerk

**P.M. MWILU**  
**JUDGE**



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