



**Kenya Commercial Bank Ltd v Samore & 3 others; Pamela Joy Ouko t/  
a Sadique Enterprises Auctioneers (Respondent) (Civil Appeal E119, E120,  
E121 & E122 of 2021 (Consolidated)) [2024] KEHC 9370 (KLR) (30 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9370 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL E119, E120, E121 & E122 OF 2021 (CONSOLIDATED)**

**FROO OLEL, J  
JULY 30, 2024**

**BETWEEN**

**KENYA COMMERCIAL BANK LTD ..... APPELLANT**

**AND**

**SARAH SEMPENO SAMORE ..... 1<sup>ST</sup> DEBTOR**

**MICHAEL MWALYO KIMEU ..... 2<sup>ND</sup> DEBTOR**

**BENJAMIN WAMBUA NDILU ..... 3<sup>RD</sup> DEBTOR**

**JOHN NDUNGU WAWERU ..... 4<sup>TH</sup> DEBTOR**

**AND**

**PAMELA JOY OUKO T/A SADIQUE ENTERPRISES  
AUCTIONEERS ..... RESPONDENT**

*((Being an Appeal from the ruling/order of Hon. H. Onkwany (PM)  
delivered on the 11th day of February 2021 at Mavoko Law Courts))*

**JUDGMENT**

**A. Introduction**

1. This appeal arises from the Ruling of Hon. H Onkwany (PM) delivered on the February 11, 2021 in Mavoko CMCC Misc Appl No. 12,14,15 and 16 of 2020 where she ordered the Appellant to pay the Auctioneers costs and proceeded to tax the said costs as presented in the said Application. Being wholly aggrieved by the said Ruling the Appellant did file their reference/memorandum of Appeal by way of chamber summons pursuant to provisions of Rule 50, 51 and 55(5) of the Auctioneers Rules and sought for orders that;



- a. That the Ruling by the learned Magistrate Honourable H. Onkwany on taxation of the bill of costs filed in Miscellaneous Application no.12, 14, 15 and 16 of 2020 by the Respondent against the Appellant herein and dated 11/2/2021 be hereby set aside in its entirety.
  - b. That in the alternative, that bills be reviewed and taxed off or remitted with appropriate directions to a taxing officer as the court shall deem fit for reconsideration.
  - c. That the costs of this appeal be provided for.
2. The said appeals were supported by the grounds on the face of the said application and supporting affidavit of one Joshua Maingi, the branch manager (KCB Kikima) of the Appellant bank. The Respondents Advocate indicated that they would rely on the contents of Affidavits dated June 24, 2020 and 08.10.2020 earlier filed in the primary suit, which formed part of the record of Appeal, and their submissions to oppose this chamber summons/reference. Parties hereto thereafter agreed that the Appeal be canvassed by way of written submissions.
  3. The matters herein all arise from the same cause of action and a similar determination was made in the aforesaid files. For purposes of convenience and to save precious judicial time as provided for under the “oxygen rules” I have consolidated these files for expediency purposes.

## **B. The Appeal**

4. The Appellant averred that the Respondent had filed his auctioneers’ bill of costs and sought for the same to be taxed. The said bills were seeking the following sums;
  - i. Mavoko CMCC Misc Appl No. 15/2020 Ksh.88,642.20/=
  - ii. Mavoko CMCC Misc Appl. No.12/2020 ksh.154,175.10/=
  - iii. Mavoko CMCC Misc Appl. No.14/2020 ksh.102,407.80/=
  - iv. Mavoko CMCC Misc Appl. No.16/2020 ksh.150,401.54/=
5. The Appellant opposed taxation of the said auctioneers’ bill of costs and eventually after considering the submissions made, the trial magistrate allowed the bills as presented. The appellant faulted this finding on grounds that;
  - a. The taxing master erred in law and fact in proceeding to assess the bills of costs yet no dispute had arisen as required under Rule 55 of the Auctioneers Rules 1997. Instead of directing the Applicant to file a suit for the recovery of the money arising if any.
  - b. The taxing master failed to appreciate that the Respondent had only proclaimed the applicant’s goods and had not attached and sold the said goods and was therefore not entitled to the sums claimed in the bill of costs.
  - c. The taxing master erred in fact and law in assessing the following items that are not provided for in law and were not supported by any evidence or legal backing.
    - i. Preparation of auctioneer’s bill of costs
    - ii. Filing of auctioneer’s bill of costs, notice of appointment and submissions.
    - iii. Service of auctioneer’s bill of costs.
    - iv. Advocates instructions fee.



- v. VAT
- d. The taxing master erred in law and fact by over assessing the commission payable and/or arriving to the Respondent given the circumstances giving rise to the bill of costs.
  - e. The taxing master erred in law and fact proceeding to tax the bill of costs without giving reasons for arriving at his decisions and conclusions.
  - f. The taxing officer erred in adopting wrong principles in the exercise of her discretion in taxing the bill of costs.
6. The Appellant reiterated that the trial magistrate ought not to have taxed the auctioneer's bill of costs as no dispute had arisen as required under Rule 55 of the Auctioneers Rules 1997 and should have directed the Respondent/Auctioneer to file a suit to recover his fees from the debtors. The taxing master therefore erred in taxing the bills as presented, over assessed the same and adopted the wrong principles in exercise of her discretion and this court would therefore be justified in setting aside the same.
  7. The Appellant further submitted that the Respondent only proclaimed the various debtors' goods but did not attach. Therefore, no actual work was done equivalent in value to the sums sought. The Appellant also urged the court to note that, the parties herein had a service level agreement, regulating their contracted work and it did provide that the Respondent would only be paid if she sold goods attached and made recovery. In this instance this did not happen as the auctioneers only proclaimed and therefore were not liable under the service level agreement to payment of incomplete service rendered. The Appellant thus prayed that this Appeal be allowed.
  8. The Respondent did file her Replying Affidavit denied that the service level agreement was applicable as the work done was carried out before they signed the service level agreement, and annexed correspondences exchanged clarifying its applicability. It was good law that once an auctioneer executed on instructions given, it was the instructing party who foots the bills of such execution. The bill of costs had been drawn to scale and travelling rate applicable were AA-Kenya rates, which was provided for in the Auctioneers rules. They had attempted to amicably settle the costs incurred but no agreement had been arrived at. They were therefore justified to have their bill of costs taxed. The Respondent therefore prayed that these Appeals be dismissed.

### **C. Parties Submissions**

#### **i. The Appellant's Submissions**

9. The Appellant submitted that the trial magistrate erred in law in failing to apply provisions of Rule 55 of the Auctioneers Rules which provides that the debtor shall always pay auctioneers fees except in instances set out under other provisions within the said Rule. It was the Appellants contention that the auctioneer never made any effort to recover her fees from the debtor by serving them with an invoice and/or demand letter before seeking to have bank settle the said auctioneers' fees.
10. The Appellant urged the court to find that there was no dispute between them and the Auctioneers which would warrant taxation. Further it was their contention that, the bill of costs too, were submitted prematurely before execution was complete as the Respondent had only proclaimed and not attached and sold the attached properties. Reliance was placed on Civil Appeal no. 42 of 2018 African Merchant Assurance Co. Ltd vrs Hazron Getuma Onsongo (2019)eKLR.



11. The Appellant further faulted the trial magistrate for ignoring the service level agreement entered into between the parties on 17.02.2017. The said agreement specifically provided at schedule I that a commission of 10% would be paid on amount collected. The respondent did not manage to recover/collect any amount of money and it went without saying that she could not claim any commission. The parties were bound by terms of their contract and the same could not be rewritten. Reliance was placed on Civil Appeal no. 45 of 2015 Pius Kimaiyo Langat vrs Cooperative Bank of Kenya Ltd (2017) eKLR.
12. The Appellant also faulted the trial magistrate for not giving reasons for arriving at her decisions and also made an error by failed to tax off items not provided for in law and/or those not supported by any evidence or legal backing. Reliance was placed on Civil Appeal no. 9 of 2019 Cooperative Bank of Kenya Ltd vrs Jeoffrick N Muinde T/A Kimu Auctioneers (2019) eKLR and Cooperative Bank of Kenya Ltd vrs Jacinta Nkiorat & another (2022) eKLR.
13. In view of the foregoing, the appellant submitted that the appeal was merited and prayed that the same be allowed and the bill of costs be reviewed and remitted back for fresh taxation before a different taxing master.

#### **(ii). The Respondent Submissions**

14. The Respondent urged this court to find that there was no error or misapprehension of the evidence the basis upon which the appellate court could interfere with the finding of the trial magistrate. Corresponds filed especially, based on email exchanged clearly showed that a dispute had arisen and the Respondent therefore had a right under Rule 55 (3) of the Auctioneers Rules to seek taxation of the bill of costs. The high court in Bungoma HCCC no.312 of 1999 had also held that one auctioneers instructions are suspended or halted. It is the instructing party who foots the bills of such execution.
15. There could not be any doubt that the auctioneer had executed her work and proclaimed. This was not a distinct and/or separate legal process from attachment and this was backed by Rule 12 of the Auctioneer Rules which provided that once goods had been proclaimed, the law presumes that the said goods had been seized and were under the control of the auctioneer. It therefore did not matter at what stage execution had stopped and it would be presumed that service had been rendered and the auctioneers had to be paid. Reliance was placed in Nairobi HCC Milimani Commercial Court Civil suit no. 18181 of 2000 National industrial Credit Bank Ltd vs. Majani Mingi Sisal Estates Ltd & 2 others and Mombasa High Court Civil Misc Appl no. 172 of 2009 Trophy Enterprises vrs San Giorgio Limited.
16. Finally, the Respondent submitted that at the time of executing the instructions to recover the debt owed, the parties had not signed a service level agreement and it was inapplicable under the circumstances herein. They urged the court to find that the auctioneers bill of costs had been drawn to scale, correctly itemized/particularized without any exaggeration and thus was properly allowed is drawn.
17. The Respondent therefore urged this court to find that this appeal lacks merit & proceed to dismiss the same.

#### **D. Analysis & Determination**

18. A first appeal is a valuable right of the parties and unless restricted by law, the whole case therein is open for rehearing both on the question of fact and law. The judgment of the appellate court must therefore reflect its conscious application of mind and record the findings supported by reasons, on all issues arising along with the contentions put forth and pressed by the parties for decision of the appellate



court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the appellate court had discharged the duty expected of it. See *Santosh Hazari Vs Purushottam Tiwari (Deceased)* by L.Rs (2001) 3 SCC 179.

19. A first appellate court is also the final court of fact and litigants are entitled to full fair independent consideration of the evidence. The parties have a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of section 78 of the *civil procedure Act* a court of first appeal can appreciate the entire evidence and come to a different conclusion. See *Kurian Chacko Vs Varkey Joseph* AIR 1969 Keral 316.
20. This court has read through the proceeding before the trial court, the chamber summons Application, the grounds of Appeal raised therein, the response by the Auctioneer/respondent, and submissions filed by both parties and deduce that the issues for determination which arise in this Appeal are;
  - a. Whether the Appellant is liable to pay the Auctioneer/Respondent her dues/fee for work done.
  - b. Whether the taxing master exercised her discretion in the proper manner while taxing the Auctioneers bill of costs.
  - c. Who should bear the costs of this Appeal.

**i. Whether the Appellant are liable to pay the Auctioneer/Respondent her dues/fee for work done.**

21. The Appellant averred that the trial Magistrate erred in law by proceeding to assess the Auctioneers bill of costs, yet no dispute had arisen between the parties herein as required under Rule 55 of the Auctioneers rules, 1997 and instead should have directed the auctioneer to file a suit to recover the sums demanded from the debtor. Further it was the Appellants contention that the Auctioneer/Respondent had only proclaimed the debtor's goods and not attached and therefore was not entitled to sums claimed in the bill of costs. Finally, it was their contention that they had a service level agreement, dated 17.02.2017, which expressly provided that the Auctioneer/Respondent would only be entitled to a commission of 10% paid on the amount collected.
22. Rule 12 of the Auctioneers Rules, 1997 referred to in the judgment of the superior court provides:

“Upon receipt of a court warrant or letter of instruction the auctioneer shall in case of movables other than goods of a perishable nature and livestock:

  - (a) record the court warrant or letter of instruction in the register.
  - (b) Prepare a proclamation in Sale Form 2 of the schedule indicating the value of specific items and condition of each item, such inventory to be signed by the owner of the goods or an adult person residing or working at the premises where the goods are attached or repossessed, and where any person refuses to sign such inventory auctioneer shall sign a certificate to that effect.
  - (c) In writing give to the owner of the goods seven days notice on Sale Form 3 of the schedule within which the owner may redeem the goods by payment of the amount set forth in the court warrant or letter of instruction.
  - (d) On expiry of notice without payment and if goods are not to be sold in situ remove the goods to safe premises for auction.



- (e) Ensure safe storage of the goods pending their auction.
  - (f) Arrange advertisement within seven days from date of removal of the goods and arrange sale not earlier than seven days after first newspaper advertisement and not later than fourteen days thereafter.
  - (g) Not remove any goods under the proclamation until the expiry of the grace period.
23. Rule 14 of the Auctioneers Rules, 1997 further prohibits the removal, interference or alienation of any goods comprised in the proclamation.
24. The question of whether or not proclamation amounts to attachment has been dealt with by court on several instances and it is now settled and good law, that indeed proclamation is part and parcel of the attachment process and where an auctioneer has started the execution process, whether he/she completes that same, he/she will be entitled to be paid their fee for work done.
25. In National Industrial Credit Bank Limited Vrs S.K. Ndegwa Auctioneers (2005) Eklr, the Appellate court held that;
- “It is clear from the plain reading Rule 12 as read with Rule 14 of the Auctioneers Rules and the contents of the prescribed form, that is, Sale Form 2 that the proclamation of the movable goods is legally and effectively an attachment. From the moment the goods are proclaimed, the judgment-debtor is deprived of the legal possession and physical control of the goods and instead the goods are placed in the custody of the law and the court through the auctioneer. The judgment-debtor can only redeem them by the payment of the debt. If the judgment-debtor fails to pay the auctioneer moves to the second stage of conducting the sale of the attached goods.”
26. The second issue raised by the Appellant was that no dispute had arisen as required under Rule 55 of the Auctioneers rules, 1997, and the Auctioneer/respondent ought to have filed a suit as against the debtor to recover her costs. Rule 55 of the Auctioneers Rules, 1997 states that fees and disbursements are payable to an auctioneer
- 1. Except as maybe provided by any other written law or by contract the fees set out in the fourth schedule payable to the auctioneer for the attachment, repossession and sale of movable and immovable property under court warrants or letters of instruction shall be charged in accordance with these rules.
  - 2. Where a dispute arises as to the amount of fees payable to an auctioneer; -
    - a. In proceedings before the High court; or
    - b. Where the value of the property attached or repossessed would bring any proceedings in connection with it within the monetary jurisdiction of the High court, a registrar, as defined in the civil procedure Rules ( Cap 21, Sub leg) may on the application of any party to the dispute assess the fee payable.
  - 3. In any other case where a dispute arises as to the amount of fees payable to an auctioneer a magistrate or the board may, on the application of any party to the dispute, assess the fees payable.



4. An Appeal from a decision of a registrar or a magistrate or the board under sub rules (2) and (3) shall be to a judge in chambers.
  5. The memorandum of the appeal, shall by way of chamber summons set out the grounds of appeal, shall be filed within 7 days of the decision of the registrar or magistrate.”
27. From the pleadings filed and documentary evidence provided, the undisputed fact is that the loans, subject of the proclamation were eventually written off, by the Appellant and no subsequent attachment and sale of the proclaimed goods was under taken. This fact was confirmed by the averment of the Auctioneer/respondent in her further replying Affidavit dated 8<sup>th</sup> October 2020, at paragraph 6, where she stated that ,
- “ I also know very well that we had two meetings in the company of the respondents Authorized representative through Oljoro’s chiefs office and the District officer Oloitoktok, where it was established that the said loans were fraudulently issued and the farmers/ debtors rights infringed and hence no execution could succeed but however the debtors were advoked to liaise with respondent.”
28. The Appellant in their replying Affidavit file by one Arphaxad Chege Kamau dated 12.08.2024 at paragraph 8 also confirmed that the debts were written off. While Rule 7 of the Auctioneers rules, 1997 expressly provides that it is the debtor who should pay the auctioneers charges, the said rule also provides for exceptions which include,
- “ a debtor cannot be found; or
- (b) he has no goods upon which execution can be levied; or
  - (c) the sale proceeds are insufficient to cover the charges, in which case the creditor shall pay the charges or the deficiency thereof.”
29. The auctioneer can therefore not be faulted for demanding for her fee’s to be paid by the Appellants as the facts herein bring her within the exception provided for under Rule 7 of the Auctioneer Rules, 1997. Further before filling her bills of costs for taxation she did reach out to the Appellant bank and they tried to amicable resolve the matter but failed to do so. The Auctioneer/Respondent was therefore justified in filing her bill of costs for taxation.
30. The Appellant also objected to the Auctioneer/ respondent taxation on the basis that they have a service level agreement, which provides at schedule 1, that, “KCB shall outsource debt recovery to you and shall pay 10% commission on any amount recovered”, by this clause, the Auctioneer was estopped from demanding for fee as no recovery was made. In response the Auctioneer did depone that they did discuss this issue with the bank and they noted that ;
- a. They executed the banks instructions as provided for by the relevant rules of recovery;
  - b. The issue of payment of commission on recovery cannot Apply in these cases as there was nothing to recover as witnessed by the bank staff, and it was noted that the loaning process was fraudulent;
  - c. There were expenses incurred in the course of the exercise that needed to be recovered and according to the Auctioneers rules there were provisions for payment of such fee;
  - d. At the time of executing he contract, they did not have a drawn contract by the bank.



31. Even though the service level agreement provides for payment of 10% commission on recovery, the same does not imply that if no recovery is made and work is undertaken the auctioneer cannot get reimbursement of the costs incurred. Secondly the interpretation of the “SLA” also cannot oust the express provisions the Auctioneer rules, which allows for recovery of expenses incurred. Finally on this issue the correspondences exchanged especially the emails confirm, that the Auctioneers costs were under active consideration by the Appellant credit monitoring & control division, where one Ntoyian .s. Polong requested for the said a breakdown of the Auctioneer’s costs/reimbursement for their consideration. They are therefore estopped in equity for turning their back to reject the claim for reimbursement of expense’s incurred.

**ii. Whether the taxing master exercised her discretion in the proper manner while taxing the Auctioneers bill of costs.**

32. In the case of Kipkorir, Titoo & Kiara v Deposit Protection Fund Board (2005) e KLR, ,the Court of Appeal held that the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer erred in principle in assessing the costs. Similar finding were made in the case of Peter Muthoka & Another v Ochieng & 3 Others (2019) e KLR.
33. The general principles governing interference with the exercise of the taxing master’s discretion was also discussed in the South African Case of Visser vs Gubb 1981 (3) SA 753 (C) 754H – 755C. The court stated as follows;

“The court will not interfere with the exercise of such discretion unless it appears that the taxing master has not exercised his discretion judicially and has exercised it improperly, for example, by disregarding factors which he should properly have considered, or considering matters which it was improper for him to have considered; or he had failed to bring his mind to bear on the question in issue; or he has acted on a wrong principle. The court will also interfere where it is of the opinion that the taxing master was clearly wrong but will only do so if it is in the same position as, or a better position than, the taxing master to determine the point in issue . . . The court must be of the view that the taxing master was clearly wrong, i.e. its conviction on a review that he was wrong must be considerably more pronounced than would have sufficed had there been an ordinary right of appeal.”

34. The manner in which an auctioneer’s charges are assessed was also settled by the Court of Appeal in the case of National Industrial Credit Bank Limited v S. K. Ndegwa Auctioneer [2005] eKLR where the court held: -

“The respondent based his fees on the decretal sum and the Deputy Registrar assessed the fees on the basis of the decretal sum. The wording of paragraph 4 of Part II of the Fourth Schedule does not say that the percentages stated apply to the decretal amount. It would be unjust to base the fee on attachment on the decretal amount because in some case, the value of the attached goods may be many times less than the decretal amount shown in the warrant of attachment and sale.

The values indicated in paragraph 4 of Part II of the Fourth Schedule on the basis of which the fees for attachment are assessed are no doubt obscure. Nevertheless, it is a canon of construction of statutes, that if possible a statute should be construed in a manner which makes it operative and that where a statutory has several meanings even though there is little to choose between them, the courts must decide what meaning the statute is to bear, rather



than reject the provision as a nullity. (See Paragraph 582 Halsbury's Laws of England Vol. 36, 3<sup>rd</sup> Edition).

The main object of paragraph 4 is clear. It is intended to provide values on the basis of which the auctioneers should be assessed. We think that it is reasonable that the auctioneer's charges for attachment should be based on the value of the goods attached and not on the decretal sum. It is to be remembered that the auctioneer is to be remunerated for the actual work done and not on the basis of what he could have done had he attached goods equivalent in value to the decretal sum. This is the meaning we give to paragraph 4 of Part II of the Fourth Schedule in order to make it operative.....”

35. The Appellant faulted the trial Magistrate for taxing the itemized bill as drawn, yet it contained various items not provided for in the schedule like, preparation of auctioneer's bill of costs, filing of auctioneer's bill of costs, notice of appointment and submissions, service of auctioneer's bill of cost, Advocates instruction fee etc. The Auctioneers fee was therefore over assessed and no reason was given for arriving at the said decision to have the bill taxed as presented. They prayed for taxed bills be review and taxed off and/or be sent back to the Taxing master for re taxation.
36. The taxing master did not exercise her discretion judicially and in the wrong manner taxed the Auctioneer bill of cost as presented. She also failed to give reasons for the same. Prudence demanded that she looks at each item on merit and explained why the same was justified and/or where not justified to reduce and/or tax down the same. Therefore, the Appellant objection to the mode of taxation has merit and the same has to be set aside.
37. Though this court has the option to tax the said Auctioneers costs, it is beret of facts relating to mileage costs; office of Auctioneer, where exactly were the proclamation done and distance covered. These are issues parties will have to resubmit on for the taxing master consideration.

#### **E. Disposition**

38. The upshot is that this Appeals partially succeed, I do set aside the Ruling/Order of Hon H. Onkwani (PM) delivered in Mavoko Chief Magistrate court Misc Application No 12, 14, 15 and 16 of 2020, dated 11th February 2021, with respect to the assessed Auctioneer costs and direct that the same be referred back to a new Taxing master at Mavoko law court for fresh taxation.
39. The matter be mentioned before the Chief Magistrate, Mavoko Law Court for reallocation to a new taxing master.
40. Each Party to bear their own costs of this Appeal.
41. It is so ordered.

**JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 30<sup>TH</sup> DAY OF JULY, 2024.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

**DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 30<sup>TH</sup> DAY OF JULY, 2024**

In the presence of: -

Mr Wataka for Appellant

Mr Muchoma for Respondent



Susan/Sam Court Assistant

