



REPUBLIC OF KENYA



KENYA LAW

THE NATIONAL COUNCIL FOR LAW REPORTING

Where Legal Information is Public Knowledge

**Fantasy Auctioneers v Limuru Hills Limited (Civil Appeal E537 of 2021)
[2024] KEHC 14971 (KLR) (Civ) (28 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14971 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL APPEAL E537 OF 2021**

TW OUYA, J

NOVEMBER 28, 2024

BETWEEN

FANTASY AUCTIONEERS APPELLANT

AND

LIMURU HILLS LIMITED RESPONDENT

*(Being an appeal against the Ruling of the Hon. A.M. Obura. (CM) delivered
on 30th July, 2021 in Nairobi Milimani CMCC No. 1387 OF 2018)*

RULING

Background

1. This appeal emanates from the ruling delivered on 30.07.2021 by the lower Court in Nairobi Milimani CMCC No. 1387 OF 2018 (hereinafter the lower Court suit). Binico Enterprise Ltd, the Plaintiff before the lower Court, initiated a claim by way of plaint dated 12.02.2018 as against Limuru Hills Ltd, (hereinafter the Respondent), the Defendant before the lower Court seeking; - settlement of Kshs. 941,000/- being the amount owing by the Respondent; Kshs. 556,890/- being the accrued interest; and costs of the suit & interest in respect of cause of action premised unpaid invoices appertaining a sale of goods contract for cement.
2. Despite being served with summons the Respondent failed and or opted not to enter appearance where after upon Binico Enterprise Ltd lodging a request for judgement the same was entered and or endorsed on 10.08.2018. The latter thereafter applied for warrants of attachment in favour Appellant for purpose of execution.
3. The Respondent thereafter moved the lower Court vide a motion dated 23.11.2018 expressed to be brought among others pursuant to Order 10 Rule 11 of the Civil Procedure Rules (CPA) seeking



inter alia that the Court be pleased to set aside and or vary the judgment in default therein and any other orders issued subsequently as against the Respondent in the matter pending hearing and determination of the suit; that the Court do grant leave to the Respondent to file its defence and accompanying documents or in the alternative deem the draft defence filed therein as duly filed; that there be a temporary stay of execution of the decree issued against the Respondent pending hearing and determination of the suit; and that the warrants of attachment and sale issued against the Respondent on 19.11.2018 be lifted, set aside and or vacated pending hearing and determination of the main suit.

4. Binico Enterprise Ltd, opposed the Respondent's motion by way of a replying affidavit filed on 24.01.2019.
5. Fantasy Auctioneers, (hereinafter the Appellant) lodged a bill of costs dated 08.02.2019 seeking a total sum of Kshs. 181,401.90/- which was later taxed as drawn by the lower Court on 29.03.2019.
6. The Respondent thereafter moved the Court vide another motion dated 15.05.2019 expressed to be brought pursuant to Section 3A, 63(e) and 80 of the CPA seeking inter alia that the honorable Court be pleased to review, vary and or set aside order allowing the Appellant's bill of costs pending hearing and determination of the main suit; and that the honorable Court be pleased to issue a stay of execution of the Appellant's bill of costs pending hearing and determination of the suit.
7. The Appellant opposed the Respondent's motion by way of replying affidavit dated 24.05.2019. Vide a ruling delivered on 11.09.2019, the trial Court allowed by the Respondent's motion dated 15.05.2019 by way of reviewing its order and or decision rendered on 29.03.2019 taxing the Appellant's bill of costs. Thereafter, the lower Court issued another ruling dated 30.07.2019 wherein the trial Court proceeded dismiss that the Appellant's bill of costs for being premature meanwhile proceeded to allow the Respondent's motion dated 23.11.2018.

The Appeal

8. Aggrieved with the outcome, the Appellant preferred the instant appeal challenging the finding by the lower Court premised on the following grounds in its memorandum of appeal as itemized hereunder: -
 - “ 1. That the learned honorable Magistrate erred in law and in fact in failing to appreciate that what was for determination was the Appellant's bill of costs dated 8th February, 2019.
 2. That the learned honorable Magistrate erred in law and in fact in purporting to deliver a ruling on the Respondent's application dated 23rd November 2018 while delivering a ruling on the Appellant's bill of costs dated 8th February 2019 which application was not before her and whose directions on the hearing had not been sought and issued.
 3. That the learned honorable Magistrate erred in law and in fact in failing to appreciate that the only issue pending before her between the Appellant and the Respondent was the Appellant's bill of costs dated 8th February, 2019.
 4. That the learned honorable Magistrate erred in law and in fact in failing to appreciate that the Appellant had lawfully been appointed to execute the decree of the Court, discharged its obligation in accordance with the law and deserved to be remunerated for its services hence its bill of costs dated 8th February, 2019.



5. That the learned honorable Magistrate erred in law and in fact in failing to appreciate that the appellant had continued to incur storage charges of the proclaimed and attached moveable property of the Respondent during the pendency of the taxation of its bill of costs dated 8th February, 2019.
 6. That the learned honorable Magistrate erred in law and in fact in finding that the Appellant’s bill of costs was premature yet there was judgment and decree on record which decree the Appellant was executing hence the costs sought to be taxed in the bill of costs.
 7. That the learned honorable Magistrate erred in law and in fact in holding that the Appellant’s bill of costs was premature yet there were no Court orders restraining her from proceeding with its taxation.
 8. That the learned honorable Magistrate erred in law and in fact holding that the taxation of the Appellant’s bill of costs was premature on account of the pending application by the Respondent dated 23rd November, 2018 which application was not coming up for consideration before her and she had not been called upon by the Respondent to consider the same.
 9. That the learned honorable Magistrate erred in law and in fact in failing to consider the Appellant’s bill of costs dated 8th February, 2019 and the submissions thereof thereby arriving at a conclusion contrary to what was sought in the said bill of costs.
 10. That the learned Magistrate erred in law and in fact in dismissing the Appellant’s bill of costs dated 8th February 2019 with costs without considering its merits and having held that the same was premature.
 11. That as a result of the above, the learned honorable Magistrate displayed bias in the manner in which she heard and determined the taxation of bill of costs dated 8th February, 2018.” (sic)
9. In light of the aforecaptioned itemized grounds, the Appellant seeks before this Court orders to the effect: -
- “(a) The appeal be allowed.
 - (b) The entire decision of the learned honorable Magistrate be set aside and in its place the Appellant’s bill of costs dated 8th February 2018 be allowed as drawn and in the alternative be taxed before a different Court.
 - (c) The costs of the appeal and the taxation proceedings before the trial Court be awarded to the Appellant.” (sic)
10. Directions were taken on disposal of the appeal by way of written submissions of which only the Appellant complied with.

Submissions

11. Counsel for the Appellant began his submissions by highlighting the history of the matter leading to the instant appeal. Addressing the first ground of appeal, it was submitted that when parties appeared



before the trial Court on 23.06.2021 it was made clear to the Court that what was before the Court for consideration was the Appellant's bill of costs. That despite the above, the trial Court in its ruling referred to a Respondent's notice of motion dated 23.11.2018 and went ahead to decide on the same and disregarded the bill of costs which was before it. It is therefore clear that the trial Court determined what was not before it. Submitting on the second ground, it was argued that when the matter came up for directions what was scheduled for determination was the Appellant's bill of costs whereas the Respondent has only mentioned that there was a pending application on 10.03.2021 however no directions were taken or issued on the said application. Concerning the third ground of appeal, it was argued that Appellant was not a party to the Respondent's motion dated 23.11.2018 which was primarily between the Respondent and Binico Enterprise Ltd. That the latter was not made aware nor represented in the proceedings on 23.11.2021 that culminated in the impugned ruling therefore the said party was condemned unheard whereas the trial Court erred in deciding an application where one party was not represented and one party was not privy to the same.

12. On the fourth ground of appeal, it was summarily argued that the Appellant having lawfully carried out execution on instructions, it was entitled to costs whereas the impugned ruling dismissed the Appellant's bill of costs by stating that the taxation was premature without giving any reasonable explanation or justification. Addressing the fifth ground of appeal, it was submitted that the trial Court in purporting to allow the Respondent's motion dated 23.11.2018 failed to consider that the Appellant had incurred storage charges of the proclaimed and attached movable property thus occasioning it irreparable loss and damage by dismissing the bill of costs. On the sixth ground on appeal, it was submitted that the bill of costs was not premature as it resulted out of a judgment that entitled the decree holder to instruct an auctioneer to execute the same upon issuance of warrants of attachment. Submitting on the seventh ground of appeal, it was argued the bill of costs was filed after the Appellant has carried out execution instructions of the decree whereas there were no orders against the Appellant restraining it from proceeding with taxation of its bill of costs and or that the bill of costs was prematurely filed. That the Respondent's motion seeking to set aside the decree of this Court was not itself a bar to taxation of the Appellant's bill of costs.
13. With respect to the eighth ground of appeal, counsel reiterated that the trial Court went against the proceedings of 23.06.2021 to determine the Respondent's motion and the Appellant's bill of cost was agreed by respective parties appearing before the trial Court, was for determination. Concerning the ninth ground in the appeal, it was summarily submitted that the trial Court did not take note of what was sought in the Appellant's bill of costs, submissions in support and opposition thereof despite the parties having confirmed to the Court on 23.06.2021 that they had filed their respective submissions. Addressing the tenth ground of appeal, it was posited that the trial Court ought to have carefully considered the merits of the bill of costs before concluding that the same was premature. With respect to the eleventh and final ground of appeal, it was argued that given the honorable Magistrate's determination, this Court ought to arrive at the inescapable conclusion that the learned Magistrate was biased in her ruling. In summation, it was argued that the appeal ought to be allowed with costs of the appeal and trial Court being awarded to the Appellant.

Disposition and Determination

14. At this juncture, it would be apt to observe that the instant appeal was disposed of as part of the Judiciary Rapid Result Initiative (RRI) matters. That said, the original lower Court record did not form part of the record before this Court. Nevertheless, the Court has duly considered the Record of Appeal as well as the Appellant's submissions.



15. Having stated the above, it is trite that the duty of this Court as a first appellate Court is to re-evaluate the evidence adduced before the trial Court and to draw its own conclusions, but always bearing in mind that it did not have an opportunity to see or hear the witnesses testify. *Selle and Anor. v Associated Motor Boat Co. Ltd and Others* (1968) EA 123.

16. The Court of Appeal in *Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR stated that: -

“This being a first appeal, we are reminded of our primary role as a first appellate Court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.

17. Here, the Appellant vide his appeal has raised a raft of grounds of appeal challenging the impugned ruling nevertheless resting on two (2) salient issues. The first concerning what was actually scheduled for determination; and the second being the actual determination itself, premised on what the trial Court had localized for determination before it. Succinctly put, the appeal appears to postulate on the events leading up to the impugned ruling and the ruling itself. To foregoing end, I find it useful to quote the relevant facets of the impugned decision ad verbum, in order to contextualize the Appellant’s remonstrations. The learned Magistrate in her ruling stated as follows: -

“This matter is coming up for ruling on the auctioneers bill of costs dated 8th February 2019 and the defendants notice of motion dated 23/11/2018.

Upon perusal of the Court record and considering submissions by the auctioneer/applicant and the judgment debtor/respondent, I find that the taxation of the said bill as against the defendant is premature and ought not to be granted.

It is noted that the defendant denies service of the summons to enter appearance in this suit and that their application dated 23/11/18 to set aside or vary the judgment entered on 10/08/18 has never been determined. From the Court record, directions on filing submissions were taken on 25/09/19 before Hon. Orange SRM.

On the said application, I considered the replying affidavit of Gilbert Loka Kianga sworn on 24/01/19 and its annexures.

I observed that the process server Lawrence Kisungu Muthoka sworn on 13/04/18 does not specify who exactly was served with summons to enter appearance. He merely states that a security guard ushered him to the Managing director’s office and he served the Managing director. It is scanty and doubtful. I also find that there are triable issues raised in the draft defence marked “KK-2” as the Defendant denies ordering for the goods allegedly delivered and also denies owing the Plaintiff the sum of Kshs. 941,000/- claimed plus costs and interest.

I am thus inclined to allow the notice of motion application dated 23/11/18 and do hereby direct that:

1. The defendant shall file and serve its Defence in terms of the annexed draft within 14 days hereof.
2. The Plaintiff shall have corresponding leave to reply thereto,
3. The Auctioneer’s bill of costs dated 8th February 2019 is dismissed with costs.



4. That parties shall take steps to have the main suit heard on merits without delay.
 5. The plaintiff respondent shall bear the costs herein.” (sic)
18. As earlier noted, the Appellant’s grouse with the lower Court’s decision is two (2) fold. This Court proposes to contemporaneously address the Appellant’s agitations. By the Appellant’s grounds of appeal and submissions, he has made heavy weather of the fact that what was for determination before the trial Court was his bill of costs dated 08.02.2019 and not the application dated 23.11.2018. This Court had prior in this judgment set out the history of the matter and gist of the latter motion as filed by the Respondent. However, having keenly scrutinized the certified record of proceedings before the lower Court, as presented in the Record of Appeal, it can be noted therefrom that the parties attended to the lower Court matter between 27.11.2018 until 30.07.2021, when the impugned ruling was eventually delivered.
19. It would be apt to note that the matter was handled at varied times by different Magistrates. Though, relevant to the Appellant’s contestation are the ensuing proceedings post filing of the Respondent’s motion dated 23.11.2018. From the record, the said motion was filed under urgency and certified urgent for interpartes hearing on 27.11.2018. On the latter date the Court granted interim orders in respect of the motion pending its determination whereafter the Court scheduled the motion for hearing on 07.12.2018. Upon hearing representations by parties on the latter date, Hon. Orange (SRM) stood over the matter to 25.01.2019, extended interim orders in respect of the motion dated 23.11.2018 and directed the submissions be filed. It would appear that in the intervening period, in an attempt to avert the sale of one of its motor vehicles, the Respondent filed another application dated 18.12.2018 that subsequently led to proceedings on 19.12.2018 and 28.12.2018 nevertheless no substantive activity occurred on the said dates.
20. When parties eventually appeared on 25.01.2019 before Hon. Orange (SRM), he issued direction to the following effect: -
- “The matter be mentioned on the 01.03.2019 for submissions for the application dated 23.11.18 and 18.12.18. The respondent to file reply. Prayer (b) of the application dated 18.12.2018 is allowed by consent. Interim orders extended” (sic)
1. It would seem, as consequence of the latter proceedings, the Appellant proceeded to file its bill of costs dated 08.02.2019 which was fixed for hearing on 01.03.2019 whereupon on the latter date Hon. Orange (SRM), directed that the Appellant’s bill of costs be heard on 21.03.2019. There were subsequent appearances on the matter on 21.03.2019, 28.03.2019 and lastly on 29.03.2019 when the bill of costs was taxed as drawn for being unopposed. The forestated taxation, led to the Respondent’s motion dated 15.05.2019, as earlier noted, that was determined vide a ruling delivered on 11.09.2019, in which Hon. Orange (SRM) reviewed his orders and or decision rendered on 29.03.2019 taxing the Appellant’s bill of costs.
 2. On 28.11.2019, parties again appeared before Hon. Orange (SRM), in respect of the Appellant’s bill of costs, to wit the Court slated the same for ruling on 06.09.2020 however as at 22.05.2020, he seems not have had the benefit of the respective parties’ submissions in respect of the Appellant’s bill of costs and as a consequence returned the file back to the registry. Parties eventually appeared before Hon. Obura (CM) on 10.03.2021 wherein counsel



appearing to the Respondent indicated to the Court that pending before it was the Respondent's applications dated 23.11.2018 and 18.12.2018 alongside the Appellant's bill of costs. The Court directed that "mention to issue for 31.03.2021 for taking directions on a ruling date" There were subsequent appearances on 31.03.2021, 19.05.2021 and on 23.06.2021 wherein counsel appearing for the Appellant indicated that the matter was for Appellant's bill of costs meanwhile counsel for Respondent merely indicating that he had filed submissions without more. The said exhortation was equally confirmed by counsel appearing by the Appellant. The forestated thus led to the impugned ruling that was delivered on 30.07.2021.

3. With the foregoing elaborate set of events in reserve, what this Court gathers is that as at when the matter was being handed by Hon. Orege (SRM), two (2) of the Respondent's motions alongside the Appellant's bill of costs were pending before the Court. However, as earlier as 25.01.2019 it would be, what was pending determination were the Respondent's motion to which to Court directed that submissions be filed in respect of the same. Later, as at 28.11.2019, there seemed to have been an impression created that what was for determination was the Appellant's bill of costs notwithstanding this Court earlier proceedings on the matter. However, at the time, the Court did not render a ruling on the Appellant's bill of costs for reasons earlier noted and or appearing on the record.
4. Upon Hon. Obura (CM) taking up the matter, there were no explicit directions on what was for determination on 23.06.2021 save for the representation made by counsel for the Respondent while appearing on 10.03.2021. Hence, it can purposefully be stated that the proceedings lacked certainty on what was designated for disposal as at when the impugned ruling was eventually delivered. Whether the same was an oversight and or an inadvertent omission by Hon. Orege (SRM) and later Hon. Obura (CM), this Court is at a disadvantage of deducing the same from the record before it.
5. It would seem that Hon. Obura (CM) who eventually took over the matter, collated what was for determination from the gist of representation made before her and equally upon reviewing the entirety of the record of proceedings. Yet, while it is true that the Appellant's bill of costs was pending determination prior to the impugned decision, it must be recalled that the Respondent's motion dated 23.11.2018 and 18.12.2018 were equally still pending as well. More importantly, the applicable motion that was pending was the one dated 23.11.2018 which sought substantive orders in respect of the decree to wit execution and reasonably the Appellant's bill of costs were resultant proceedings of. Palpably, the language employed by the trial Court, that the Appellant's bill of costs being "premature", was unwarranted and the Court must be faulted for not addressing itself in detail for its reasoning. However, it cannot be faulted for rendering a determination on both the Appellant's bill of costs and Respondent's application dated 23.11.2018 that were both live issues for determination for reasons to be further in this judgment.



6. While it may be true that the only dispute that was between the Appellant and the Respondent was the formers bill of costs, it must be remembered that the bill of costs originated from execution proceedings whereas the latter originated as a result of a decree obtained in favour of Binico Enterprise Ltd, to wit the Respondent sought to have the said decree set aside vide its motion 23.11.2018. Indubitably, logic would dictate that determining the Respondent motion would take precedence over the bill of costs on accord of the fact that a finding of the latter in favour of the Respondent would evidently have a bearing on the Appellant's bill of costs. The forestated reasoning is fortified by Platt JA (as he then was) in *Bouchard International (Services) Ltd v M'Mwereria* [1987] KLR 193 as cited with approval in *Miarage Co Ltd v Mwichuri Co Ltd* [2016] eKLR, wherein while addressing himself to the exercise of the discretion employed in the nature of the Respondent's motion. He stated that: -

“The basis of approach in Kenya to the exercise of the discretion to be employed or rejected ... is that if service of summons to enter appearance has not been effected, the lack of an initiating process will cause the steps taken to be set aside *ex debito justitiae*.”

27. The rationale of the above would be that on accord of the trial Court's ruling on 30.07.2021 in favour of the Respondent's motion lifting, setting aside and or vacating the warrants of attachment and sale issued against the Respondent on 19.11.2018 be pending hearing and determination of the main suit, the Appellant's bill of costs that was manifestly premised on warrants of attachment (on its face thereof) could not be taxed on account of the decree of the lower Court dated 01.08.2018 being set aside *ex debito justitiae* for want of proper service of summons to enter appearance upon the Respondent. Here, it would equally be remiss not to mention that, in castigating the impugned decision, the Appellant cannot equally purport to hold brief for Binico Enterprise Ltd, to assert that latter was condemned unheard on the Respondent's motion. Further, while it may be true that he was not a party to proceedings in respect of the Respondent's motion, the Appellant was a 'beneficiary' of work availed by the decree holder, Binico Enterprise Ltd, in order to release its fruits of litigation.
28. Having addressed the above, this Court has separately held elsewhere, that judicial officers are enjoined to be keen-eyed, exercise a higher degree of particularity, accuracy and precision while rendering their decision. Nevertheless, judicial officers are not infallible to mistakes in the course of discharging their duties. The latter of which exemplifies the rationale, predication and existence of review and appellate jurisdiction. Therefore, on occasion mundane mistakes such as inadvertently failing to set out the exact application for determination where there are a number on record or typographical errors are likely to occasion when judicial officers discharge their duty. Just like judicial officers, counsel or litigants alike are equally not immune to mistakes in the course of agitating their respective cases hence the codification of Article 159(2)(d) in our Constitution and Section 1A of the CPA. Plainly, Courts are enjoined to do substantive justice by examining the substance and not to strictly adhere to technicalities.
29. The essence of the foregoing being, the record failed to specifically capture what was for determination, and the learned Magistrate appears to have by inadvertent omission failed to do the same, nevertheless proceeded to address the substance of what was before her save for her unwarranted use of the word "premature" in respect of the Appellant's bill of costs. Good order would have required of the trial Court to set out a brief history of the matter in order to localize what it considered for determination.



It would have been egregious, if the trial Court had proceeded to render itself sole on the bill of costs knowing all too well that the Respondent's motion was pending meanwhile its merits or otherwise would have a logical effect on the Appellant's bill of costs given that the latter was not a standalone cause of action as it was premised on a decree and warrants of attachment that were set aside.

30. Consequently, the Appellant's exhortation that what was solely for determination was its bill of costs is manifestly an affront to the provisions Section 1A, 1B & 3A of the CPA. Accordingly, in determining the forestated the totality of the grounds in the Appellant's memorandum of appeal cannot sustain and or issue in the circumstances.

Determination

31. For all the preceding reasons, the Court finds no merit to this appeal and will dismiss it with no order as to costs.
- i. This Appeal is dismissed.
 - ii. No order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 28th DAY OF November, 2024

ROA 14 days.

HON. T. W. OUYA

JUDGE

For Appellant.....Kariuki

For Respondent.....N/A

Court Assistant.....Martin

