



**Letshego Kenya Limited v Moiruri t/a Moco Auctioneers (Miscellaneous Application E023 of 2022) [2023] KEHC 18069 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18069 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BOMET  
MISCELLANEOUS APPLICATION E023 OF 2022**

**RL KORIR, J**

**MAY 25, 2023**

**BETWEEN**

**LETSHEGO KENYA LIMITED ..... APPLICANT**

**AND**

**KENNEDY MOKUA MOIRURI T/A MOCO AUCTIONEERS .... RESPONDENT**

**RULING**

1. The Applicant filed a Chamber Summons dated 1<sup>st</sup> July 2022 against the Respondent and sought the following orders that: -
  - I. Pending the inter parties hearing of this Chamber Summons Application, this Honourable Court be and is hereby pleased to grant an order for stay execution of the taxed costs in Bomet Misc. Applications No. 24 & 29 of 2021 and Bomet Misc. Applications No's 8 to 37 of 2021.
  - II. Pending the hearing and determination of this Chamber Summons Application, this Honourable Court be and is hereby pleased to grant an order for stay execution of the taxed costs in Bomet Misc. Applications No. 24 & 29 of 2021 and Bomet Misc. Applications No's 8 to 37 of 2021.
  - III. This Honourable Court be and is hereby pleased to set aside the Ruling dated 27<sup>th</sup> June 2022 in Bomet Misc. Applications No. 24 & 29 of 2021 and Bomet Misc. Applications No's 8 to 37 of 2021
  - IV. This Honourable Court be and is hereby pleased to find that Letshego Kenya Limited is not liable to bear the costs of the auctioneer arising from the bill of costs filed in Bomet Misc. Applications No. 24 & 29 of 2021 and Bomet Misc. Applications No's 8 to 37 of 2021.
  - V. The Honourable Court be pleased to find that the Auctioneer ought to have filed a substantive suit for the recovery of the money owing, if any



## VI. Costs of the Application.

2. The Application was brought under Rule 55(5) of the Auctioneer's Rules, 1997 and Section 3A of the *Civil Procedure Act* and it was premised on the grounds on the face of the Application and on the Supporting Affidavit sworn by Stella Ng'ang'a on 1<sup>st</sup> July, 2022.

### **The Applicant's Case.**

3. The Applicant stated that this was a Reference against the decision of the learned Magistrate who taxed the Respondent's Bill of Costs in Bomet Misc. Applications No. 24 & 29 of 2021 and Bomet Misc. Applications No's 8 to 37 of 2021. That the present Application had been filed within 7 days as required by the law.
4. It was the Applicant's case that the Magistrate erred when she found that when an auction was called off, it was obligated to pay the Auctioneer's fee by dint of Rule 7 of the Auctioneer's Rules. That the Magistrate also erred in law and in fact when she failed to find that the Respondent ought to have filed a substantive suit for the recovery of their money.
5. The Applicant opined that the Magistrate failed to find that there were no attempts by the Respondent to recover their money unlike in the case of *Co-operative Bank of Kenya Ltd vs Joefrick N. Muinde t/ a Kimu Auctioneers (2019)* eKLR.
6. It was the Applicant's case that the Magistrate failed to construe the indemnity clause in the instruction letter within the context of the Auctioneers Rules. That the Magistrate also erred when it allowed taxation against it, despite being the creditor and despite the Respondent having failed to make an effort to recover their money from the debtor in violation of Rule 7 of the Auctioneers Rules. It was the Applicant's further case that the Magistrate failed to tax off items that were not provided for in law and were not supported by any evidence.

### **The Respondent's Case.**

7. The Respondent filed a Replying Affidavit dated 20<sup>th</sup> July 2022 and he stated that it was not in dispute that the Applicant issued instructions to him for debt recovery against debtors in 2016. That he served Proclamation Notices upon the debtors. The Respondent further stated that it was a condition in the letter of instruction that the Applicant was to pay his charges but it did not.
8. It was the Respondent's case that after the Applicant had failed to pay his fee, he served them a demand letter and later on a Bill of Costs as per Rule 55 of the Auctioneers Rules. That the Bill of Costs was taxed on 27<sup>th</sup> June 2022.
9. The Respondent opined that the learned Magistrate rightly referred to the case of Co-operative Bank of Kenya Limited (*supra*) where it was explained that nothing in Rule 7 of the Auctioneers Rules supported the argument that an auctioneer ought to file a suit to recover its fees and commissions from a debtor. That the suit would not be tenable for lack of privity between the debtor and the auctioneer.
10. It was the Respondent's case that the present Application was frivolous, vexatious, unmerited and a waste of the court's time.

### **The Applicant's Further Affidavit.**

11. Through a Further Affidavit dated 26<sup>th</sup> August 2022, the Applicant stated that after giving the Respondent instructions for recovery against the debtors, he did not provide an update of what transpired after proclamation. That the debtor, Beatrice Chepkirui Mitei had not paid her loan as



- alleged. The Applicant further stated that had the debtor paid, it would have informed the Respondent not to proceed with the auction sale.
12. It was the Applicant's case that the demand letter sent to them on 17<sup>th</sup> July 2020 omitted the particulars of the debtors and therefore his demand could not be acted upon. It was the Applicant's further case that the Respondent did not avail himself to the exceptions to Rule 7 of the Auctioneers Rules to cloth him with a claim against them as the instructing creditor and thus the costs should be recovered from the debtor.
  13. On 25<sup>th</sup> July 2022 through the Consent of both parties, prayers 2 and 3 of the Application were allowed. I further directed that the parties submit on prayers 4, 5 and 6.
  14. As per this court's directions on 25<sup>th</sup> July 2022, the present Application was to be canvassed by way of written submissions.

### **Applicant's Submissions.**

15. The Applicant submitted that a proper construction of Rule 7 of the Auctioneers Rules lead to the ineluctable conclusion that the Respondent ought to have pursued the debtor for his fees and costs. That the learned Magistrate had no reason to depart from the literal interpretation of the rule as the provision was clear and unambiguous. The Applicant further submitted that it was trite law and a time-tested rule that the literal meaning of a statute should be adopted where the words of the statute are plain and unambiguous. It relied on the case of *Oduor & 3 others vs Magistrates and Judges Vetting Board & another* (Civil Appeal 457,458,466 & 475 (Consolidated) of 20180) (2021) KECA 92 (KLR) (22 October 2021) (Judgment) (with dissent – HM Okwengu, JA) Neutral citation: (2021) KECA 92 (KLR).
16. It was the Applicant's submission that when courts were faced with similar circumstances as the present case, they held that the judgment debtor ought to pay the auctioneers fees and the auctioneer could only pursue the creditor once the conditions set out in Rule 7 of the Auctioneers Rules were met. It relied on *Co-operative Bank of Kenya Ltd vs Jeofrick N. Muinde t/a Kimu Auctioneers* (2019) eKLR, *E J Austin & 2 others vs Chon Jeum Suk Kim* (2017) eKLR and *Nashon Kerati Muriri vs Chacha Mwita Muchumu* (2014) eKLR.
17. The Applicant submitted that the learned Magistrate based her decision on the allegation that the planned auction was cancelled yet no letter of cancellation was placed before court as evidence. That the Respondent had the burden of proving that the auction was indeed cancelled by the Applicant but failed to do so. It relied on Sections 107 and 109 of the *Evidence Act*. The Applicant further submitted that no evidence was placed before the trial court to indicate that the auction could not proceed because the debtor paid the sums owing to the Applicant.
18. It was the Applicant's submission that the Auctioneers Rules governed the recovery of the Auctioneers fee and that Rule 7 did not have an exception that an auctioneer ought to recover costs from the creditor if an auction was settled. It was the Applicant's submission that even if the trial court exercised discretion to meet the ends of justice, such discretion could not form the basis for disregarding the black letter of the law. It relied on *Scope Telematics International Sales Limited vs Stoic Company Limited & another* (2017) eKLR.
19. The Applicant submitted that there was no material placed before court to show that the Respondent brought himself to the exceptions stated in Rule 7 of the Auctioneers Rules.



20. It was the Applicant's submission that if there was an agreement as to costs, the same ought to have been enforced through a substantive suit for specific performance where evidence would be led and challenged and not a miscellaneous application with a Bill of Costs.

### **The Respondent's Submissions.**

21. The Respondent submitted that he wrote a demand letter to the Applicant dated 17<sup>th</sup> July 2020 but the Applicant ignored it. That neither Rule 7 nor 55 of the Auctioneers Rules exonerated the Applicant from being a proper or necessary party in his claim for assessment and recovery of fees payable to him.
22. It was the Respondent's submission that the Applicant was not on record stating that the fee payable to him was not in dispute at the time the dispute commenced. It was the Respondent's further submission that the sole issue was the amount of fee payable to him. That neither the debtor nor the Applicant have settled his fee or extracted an agreement with him. The Respondent submitted that this amounted to a dispute which warranted the commencement of the suit.
23. In response as to whether he should have filed a substantive suit, the Respondent relied on the case of Co-operative Bank of Kenya (*supra*).
24. This was Reference against the Ruling dated 27<sup>th</sup> June 2022 in Bomet Misc. Applications No's 24 and 29 of 2021 (consolidated with No's 8 to 37 of 2021). In its appellate role, this court also has a duty to review the evidence adduced before the trial court and satisfy itself that the decision reached was well founded. In the case of *Selle & Another vs Associated Motor Boat Co. Ltd and Others* (1968) EA 123, the Court of Appeal pronounced itself as follows: -

“.....this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court . . . is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. . . .”

25. I have gone through and considered the Chamber Summons Application dated 1<sup>st</sup> July 2022, the Replying Affidavit dated 20<sup>th</sup> July 2022, the Further Affidavit dated 26<sup>th</sup> August 2022, the Applicants Written Submissions dated 26<sup>th</sup> August 2022, the Respondent's Written Submissions dated 19<sup>th</sup> August 2022 and the issue for my determination was whether the Applicant was liable to pay the Respondent's Auctioneer fees.
26. It was not in dispute that the Applicant instructed the Respondent to recover monies owed to it from Beatrice Chepkirui Mitei and other borrowers. The Respondent stated that he went ahead and did a Proclamation against Beatrice Chepkirui Mitei as evidenced by the attached Proclamation Notice marked as “KMM-02”. The Respondent stated that it was a condition in the letter of instruction that the Applicant would pay his auctioneer fee. That when the Applicant refused to pay, he filed an Application at the Principal Magistrate's Court in Bomet being Miscellaneous Application Numbers 24 & 29 of 2021 (consolidated with No's 8 to 37 of 2021).
27. The Applicant disputed the finding of the trial court and filed a Reference and I as had noted earlier in this Ruling, I shall limit myself to whether the Applicant was liable to pay the auctioneer fees.
28. The law that governs the auctioneer's fee is found in Rule 55 of the Auctioneer's Rules which provides that: -



- (1) Except as may be 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 instructions 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 subrules (2) and (3) shall be to a judge in chambers.
  - (5) The memorandum of appeal, by way of chamber summons setting out the grounds of the appeal, shall be filed within 7 days of the decision of the registrar or magistrate.
29. The Fourth Schedule of the Auctioneer Rules provides the amounts payable as auctioneer fee and how they are calculated. Rule 55 (3) also provides that when a dispute arises to the amount payable as auctioneer fees, then the disputing party may apply to the Auctioneers Licensing Board or to a Magistrate for assessment of the same. I therefore respectfully disagree with the trial magistrate when she found that there existed a dispute between the Applicant and the Respondent because the Respondent had not been paid. The law is very clear that a dispute arises only when there is a variance of the amounts payable to the auctioneer.
30. Additionally, the Respondent annexed an Instructing Letter from the Applicant marked as “KMM-01”. In relation to the Respondent’s charges, there was an Indemnity Clause in the Instructing Letter where the Applicant agreed to indemnify the Respondent against all costs, damages, losses and expenses that the Respondent may incur in exercise of his lawful duties as an Auctioneer. The Instructing Letter further indicated that the Applicant agreed to pay the Respondent his fee as per the MOU. Neither the Applicant nor the Respondent attached the MOU at the trial court or in this court and it was therefore difficult to ascertain the amounts that were payable to the Respondent as agreed upon by the two parties.
31. The exceptions to an auctioneer’s fee being governed by the Auctioneer Rules is a relevant statute or a Contract. It is salient to note that the MOU and not the Instructing Letter would form the Contract between the two parties. The failure to attach the MOU was fatal in my view as I am unable to determine if there existed a dispute that warranted the Respondent to file an Application for assessment in the lower court.



32. It is standard practice and set law that an auctioneer recovers his fees from a judgment debtor. In the persuasive case of *Nashon Kerati Muriri vs Chacha Mwita Muchuni (2014)* eKLR, Majanja J. held that:-

“The general rule is that the auctioneer recovers his charges from the judgment debtor unless the circumstances fall within rule 7 in which case the judgment creditor is called upon to pay the charges.”

33. Rule 7 of the Auctioneer Rules provided the exceptions and the instances where a judgment creditor or an instructing party would be liable to pay the Auctioneer fees. It stated: -

A debtor shall pay the charges of the auctioneer unless—

- (a) that 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 cases the creditor shall pay the charges or the deficiency thereof.

34. Section 107 of the *Evidence Act* describes the burden of proof as follows: -

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person

35. The burden of proof in any case lay with the claimant. The Applicant herein stated that the only way it was liable to pay the Respondent’s fee was if the Respondent met the exceptions stipulated in Rule 7 of the Auctioneers Rules. This means that even though the legal burden of proof remained with the Applicant, the evidential burden shifted to the Respondent. He had to demonstrate that any of the three exceptions in Rule 7 of the Auctioneer Rules had been met. In the case of *Mbutia Macharia vs Annah Mutua Ndwiga & Another (2017)* eKLR where the Court of Appeal stated that:-

“The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced.”

36. In this case, the Respondent produced the Proclamation Notice (KMM-01) which indicated that he had proclaimed certain household goods and three cows from Beatrice Chepkirui Mitei. This meant that the debtor was found and that the Respondent found goods upon which execution could be levied upon.

37. I have gone through the Magistrate’s Ruling dated 27<sup>th</sup> June 2022 and I quote: -

“..... He proceeded to the Debtor’s premises on the 26<sup>th</sup> October 2016 where he proclaimed the debtor’s assets and has annexed a copy of the proclamation on his affidavit. That the debtor however settled his debt with the respondent and did not settle the auctioneer’s charges and costs”.



38. I have carefully gone through the Respondent’s Replying Affidavit and Written Submissions and I have not found any reference by the Respondent stating that the debtor settled her debt with the Applicant. The Applicant on the other hand stated that the debtor, Beatrice Chepkirui Mitei had not paid off her debt as alleged by the Respondent. It attached a copy of the debtor’s loan statement marked as “SN-1” which indicated that the debtor had a balance of Kshs 14,198/= as at 30<sup>th</sup> August 2022.
39. On the evidence placed before me, it was clear that the Respondent only proclaimed the debtor’s household goods and cows. There was no evidence to show that the debtor paid off her debts with the Applicant and in relation to Rule 7 (3) of the Arbitration Rules, there was no evidence of a sale or an auction to inform the court whether the proceeds from the sale were insufficient or not. Therefore Rule 7 (3) cannot be invoked. I am persuaded by Maina J. in the case of Co-operative Bank of Kenya Ltd vs Jeofrick N. Muinde t/a Kimu Auctioneers (2019) eKLR, where she stated that: -
- “.....Rule 7 of the Auctioneers Rules, 1997 which I have set out in full is written in simple and plain language. It clearly stipulates that “a debtor shall pay the charges of the auctioneer” and continues to set out the only exceptions upon which the client would pay. As was held by Majanja J in Co-operative Bank of Kenya Limited v Joefrick N. Muinde t/a Kimu Auctioneers (supra) whether or not the exceptions set out in Rule 7 have been established is a question of fact and I dare add to be proved by the auctioneer.”
40. The learned Judge in Co-operative Bank of Kenya Ltd (supra) further stated that: -
- “.....The trial Magistrate should have considered whether the respondent had fulfilled the exceptions set out in Rule 7 of the Rules before taxing the bill as against the appellant.”
41. Flowing from the above, the Applicant was only liable to pay for the Respondent’s fee if the Respondent satisfied the exceptions as provided for in Rule 7(3) of the Auctioneer Rules or if the Respondent provided the MOU as evidence so as to inform the court of their agreement as to the payment of the Respondent’s fees. The Respondent had failed on both fronts and he had failed to discharge his evidential burden of proof. The Applicant on the other hand was able to demonstrate through evidence (loan statement) that the debtor, Beatrice Chepkirui was in arrears and was therefore ripe for auctioning as the Applicant had instructed.
42. I note that both parties have failed to attach the Memorandum of Understanding regarding the payment of the Respondent’s fee. The MOU was referenced in the Letter of Instruction attached in the Respondent’s Replying Affidavit as exhibit KMM-01. It is therefore difficult for this court to decipher where the liability lay.
43. In the final analysis, it is my finding that the Applicant was not liable to pay the Respondent’s fees as he had not met the exceptions in Rule 7 (3) of the Auctioneer Rules. It is also noted that parties had consented to set aside the Ruling dated 27<sup>th</sup> June 2022.
44. In the end, the Notice of Motion Application dated 1<sup>st</sup> July 2022 is merited and allowed in terms of prayers 3 and 4.
45. Each Party to bear their costs in this Application.

**RULING DELIVERED, DATED AND SIGNED AT BOMET THIS 25<sup>TH</sup> DAY OF MAY, 2023**

.....

**R. LAGAT-KORIR**



**JUDGE**

**RULING DELIVERED IN THE PRESENCE OF MR. OURU FOR THE APPLICANTS, MS. NDUKUKIRE FOR THE RESPONDENT AND SIELE (COURT ASSISTANT)**

