



Letshego Kenya Limited v Moiruri T/A Moco Auctioneers (Miscellaneous Application E027 of 2022) [2023] KEHC 18072 (KLR) (25 May 2023) (Ruling)

Neutral citation: [2023] KEHC 18072 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
MISCELLANEOUS APPLICATION E027 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 6th 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. 38 to 67 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. 38 to 67 of 2021.
 - III. This Honourable Court be and is hereby pleased to set aside the Rulings dated 29th June 2022 in Bomet Misc. Applications No. 38 to 67 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. 38 to 67 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. The decision of the court in this appeal to apply in Bomet Misc. Applications No. 38 to 67 of 2021.



VII. 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 6th 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 Bomet Misc. Applications No. 38 to 67 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 unless the stay orders were granted, execution would ensue thereby rendering the present Application moot. 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 erred by basing his decision to tax the Bill of Costs on the fact that there was a proclamation. That the issue before the court was not whether there was a proclamation or not but who was to bear the Respondent's costs.
6. The Applicant stated that the Magistrate erred in law by construing the plain wording of Rule 7 of the Auctioneers Rules that the obligation to pay the Respondent's fees fell on the instructing client when on auction was called off.
7. It was the Applicant's case that the Magistrate erred when he found that the Applicant ought to settle the Respondent's costs because the debtors promised to pay, a finding which was not supported by evidence.
8. The Applicant opined that the Magistrate erred when he 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.

The Respondent's Case.

9. The Respondent filed a Replying Affidavit dated 20th 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.
10. 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 29th June 2022.
11. 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.

12. Through a Further Affidavit dated 26th 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 debtors, Chepkemoi Koskei and Sarah Chepkemoi Kirui had not paid their loans as alleged. The Applicant further stated that had the debtors paid, it would have informed the Respondent not to proceed with the auction sale.



13. It was the Applicant's case that the demand letter sent to them on 17th 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 debtors.
14. On 25th 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.
15. As per this court's directions on 25th July 2022, the present Application was to be canvassed by way of written submissions.

Applicant's Submissions.

16. 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 the Respondent could not claim charges from the creditor unless they showed that either the debtor could not be found, that the debtor had no goods upon which execution could be levied or if the proceeds from the sale were insufficient to cover the charges.
17. 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).
18. 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 that an 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.
19. It was the Applicant's submission that the Respondent did not bring himself to the exceptions envisaged under Rule 7 of the Auctioneers Rules. That the learned Magistrate completely ignored Rule 7 in his determination.
20. The Applicant submitted that the learned Magistrate based his 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 the Respondent bore the burden of proving that the auction was cancelled by the Applicant.
21. It was the Applicant's submission that the Auctioneer 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. That the learned Magistrate relied on a fourth exception to Rule 7 of the Auctioneer Rules which did not exist. It was the Applicant's further 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.



22. 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.
23. 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.

24. The Respondent submitted that he wrote a demand letter to the Applicant dated 17th July 2020 but the Applicant neglected 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.
25. 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 as to the amount due with him. The Respondent submitted that this amounted to a dispute which warranted the commencement of the suit.
26. 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*).
27. This is a Reference against the Rulings dated 29th June 2022 in Bomet Misc. Applications no. 38 to 67 of 2021. As an appellate court, I am tasked to evaluate the evidence afresh and draw my own conclusions. In *Kiilu & Another vs. Republic* (2005)1 KLR 174, the Court of Appeal stated thus:-

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses”.
28. I have gone through and considered the Chamber Summons Application dated 6st July 2022, the Replying Affidavit dated 20th July 2022, the Further Affidavit dated 26th August 2022, the Applicants Written Submissions dated 26th August 2022, the Respondent's Written Submissions dated 19th August 2022 and the issue for my determination was whether the Applicant was liable to pay the Respondent's Auctioneer fees.
29. It was not in dispute that the Applicant instructed the Respondent to recover monies owed to it from David Kiprono Cheruiyot and 10 other borrowers which was evidenced by the Instruction Letter produced by the Respondent and marked as “KMM-01”.
30. The Respondent stated that he went ahead and did a Proclamation against David Kiprono Cheruiyot 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 Applications at the Principal Magistrate's Court in Bomet being Miscellaneous Application Numbers 38 to 67.



31. The Applicant disputed the findings of the trial court and filed this Reference and as I had noted earlier in this Ruling, I shall limit myself to whether the Applicant was liable to pay the auctioneer fees.
32. 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.
33. The Fourth Schedule of the Auctioneer Rules provides the amounts payable as auctioneer fee and how they are calculated.
34. The Respondent annexed an Instructing Letter from the Applicant (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 fees 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.
35. It is standard practice and set law that an auctioneer recovers his fees from a judgment debtor. In the persuasive case of Joseph Gikonyo t/a Garam Investments vs National Social Security Fund (2016) eKLR, Amin J. held that: -
- “.....The Law is clear. The liability for the Auctioneer's fees lies with the Judgment Debtor.”
36. 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.
37. The burden of proof in any case lay with the claimant. The Applicant herein stated that the only way he could be 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 *Co-operative Bank of Kenya Limited v Joefrick N. Muinde t/a Kimu Auctioneers (2019) eKLR*, Majanja J. stated that: -
- “The grounds in Rule 7 of the Rules are disjunctive.....”
38. The fact that evidential burden of proof can shift depending on the circumstances of the case, was stated by the Supreme Court in *Raila Amolo Odinga & Another vs Independent Electoral and Boundaries Commission & 2 Others (2017) eKLR*, thus: -
- “Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and “remains constant through a trial with the plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.”
39. In this case, the Respondent produced the Proclamation Notice (KMM-02) which indicated that he had proclaimed certain household goods and one native cow from David Kiprono Cheruiyot. This meant that the debtor was found and that the Respondent found goods upon which execution could be levied upon.
40. I have noted that this Reference sought a Ruling for 30 files and the Respondent herein only attached one Proclamation Notice. I have read all the Magistrate's Rulings in Bomet Misc. Applications No's 38 to 67 where he indicated in his Rulings that the Respondent herein proclaimed all the debtors assets. The same Proclamation Notices that were used in the trial court were not placed before me in the present Application.
41. I have also noted from the trial court's Rulings that the debtors' properties were not sold and that the debt was paid to the Applicant. 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 debtors settled their debts with the Applicant. The Applicant on the other hand stated that Chepkemioi Koskei and Sarah Chepkemioi Kirui had not paid off their debts as alleged by the Respondent. It attached a copy of the debtors' loan statements marked as “SN-1a and 1b” which indicated that the debtors had a balance of Kshs 12,927.42 and Kshs 2,901.95/= respectively as at 7th September 2022. They however did not attach any other loan statements from the other debtors.
42. On the evidence placed before me, it was clear that the Respondent only proclaimed one of the debtor's household goods and cow. There was no evidence to show that the debtors paid off their debts with the Applicant and in relation to Rule 7 (3) of the Auctioneers 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.”

43. 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.”

44. Flowing from the above, the Applicant is 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 has failed on both fronts and he has failed to discharge his evidential burden of proof. The Applicant on the other hand was able to demonstrate through evidence (loan statements) that some of the debtors, Chepkemoi Koskei and Sarah Chepkemoi Kirui were in arrears and were therefore ripe for auctioning as the Applicant had instructed.

45. Apart from David Kiprono Cheruiyot, there was no evidence to suggest that the other 29 debtors were proclaimed upon. As earlier indicated, there was no evidence to indicate that the debtors had paid off their debts with the Applicant and most importantly, there was no evidence of an auction sale.

46. 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.

47. In the final analysis, it is my finding that the Applicant was not liable to pay the Respondent’s fees as the Respondent 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 Rulings dated 29th June 2022 in Bomet Misc. Applications No’s. 38 to 67 of 2021.

48. In the end, the Notice of Motion Application dated 6th July 2022 is merited and it is allowed in terms of prayers 3 and 4.

49. Each party to bear their costs in this Application.

RULING DELIVERED, DATED AND SIGNED AT BOMET THIS 25TH DAY OF MAY, 2023

.....

R. LAGAT-KORIR

JUDGE

Ruling delivered in the presence of Mr. Ouru for the Applicants, Ms. Ndukukire for the Respondents and Siele (Court Assistant)

