



Oscar Otieno Odongo t/a Odongo Investment Auctioneers v Diamond Trust Bank Kenya Limited (Civil Appeal 127 of 2021) [2022] KEHC 15050 (KLR) (31 October 2022) (Judgment)

Neutral citation: [2022] KEHC 15050 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL 127 OF 2021
REA OUGO, J
OCTOBER 31, 2022**

BETWEEN

**OSCAR OTIENO ODONGO T/A ODONGO INVESTMENT
AUCTIONEERS APPELLANT**

AND

DIAMOND TRUST BANK KENYA LIMITED RESPONDENT

(Being an appeal from the ruling and order issued on 15/10/2021 by Hon, Dorcas Mac'Andere (DR) in Kisii High Court Miscellaneous Civil Application No 35 of 2021 Rule 55(5) of the Auctioneers Rules of 1997)

JUDGMENT

1. The appeal before the court was filed by way of Chamber Summons dated October 12, 2021 seeking the following orders:
 1. The Honourable Judge be pleased to set aside the order of the Deputy Registrar taxing 3 items of the Auctioneers bill dated June 24, 2021 at Kenya Shillings Five Thousand Four Hundred and Eighty Four, Eighty Cents [Kshs. 5,484.80] only.
 2. The Honourable Judge be pleased to allow item 3 of the Auctioneers bill dated June 24, 2021 as drawn in the bill.
 3. In the alternative and without prejudice to prayer 2 herein above, the Honourable Judge be pleased to tax/assess the item 3 of the Auctioneers bill dated June 24, 2021 as per the 4th schedule of the [Auctioneers Amendment rules of 2009](#).
 4. The Hon. Judge be pleased to determine and award costs of taxation and interest on the taxed amount from the date of assessment as prayed for under prayer 3 of the Notice of



Motion Application dated June 24, 2021, which prayer was not addressed by the Hon. Deputy Registrar hence technically disallowed/dismissed.

5. Such further and/or other orders be made as the court may deem fit and expedient.
2. The appeal is based on grounds that the Deputy Registrar incorrectly interpreted the law by applying the sale commission fees while assessing attachment commission fee. The Deputy Registrar therefore applied a wrong amount in working out the commission.
3. The appellant in his submission filed on the April 5, 2022 submitted that an auctioneer is entitled to two types of commissions if they complete their assignment to the sale stage. Further, that where the auctioneer serves a proclamation, the rules call it an attachment and the auctioneer is entitled to a commission on attachment. The appellant cited the Court of Appeal decision in National Industrial Credit Bank Limited v SK Ndegwa Auctioneer, CA No 195 of 2004, where the court observed that the word proclamation as used in the Civil Procedure Act and Rules and the Auctioneers Rules means Attachment. Item 3 in the appellant's bill dated June 24, 2021 refer to commission for attachment and not the commission for sale. The trial magistrate in her ruling applied paragraph 7 of the Auctioneers Amendment Rules of 2009 which applies to a sale that has been stayed, or postponed. The provision does not apply to attachment.
4. He also faulted the Deputy Registrar for using the amount as per the consent judgment and not the figure in the warrant of attachment which showed the value of the property attached. It was pointed out that the respondent did not dispute the value of the property as indicated in the applicant's proclamation notice served upon the respondent. The appellant contends that that the total value of the goods proclaimed was Kshs 896,000/- and the commission on attachment attracts 5% of the value of the goods thus they were entitled to Kshs. 44,800/- as their commission on attachment. They also submitted that the trial magistrate failed to address prayer 3 & 4 of his application dated July 24, 2021.
5. The appeal was opposed by the respondent. The respondent filed written submissions on September 14, 2022. According to the respondent on April 14, 2021, the decree holder in KisiiHC MiscAppl. No. 140 of 2019 obtained an *ex-parte* Garnishee Order Absolute of Kshs 219,392/- against the bank. Aggrieved, the respondent filed an application dated April 27, 2021 seeking to set aside the foregoing garnishee absolute to forestall attachment and sale of its immovable assets and by consent recorded on May 31, 2021, parties agreed as follows:
 - a. The Garnishee shall settle the Garnishee Order Absolute of Kshs. 219,392/- within 14 days.
 - b. Parties to agree on the Auctioneers costs failure to which the Auctioneer shall tax his costs.
6. The applicant filed his bill of costs seeking a sum of Kshs 91,300/- and the bill of costs was taxed at Kshs 44,984/-. They relied on the case of Kenya Tea Packers Company Limited v Hezron Getuma t/a Hegeon Auctioneers [2021] eKLR where the court observed:

“The fees and disbursements payable to an auctioneer are provided for at Rule 55 (1) of the Auctioneers Rules which states: -

“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 moveable and immoveable property under court warrants or letters of instructions shall be charged in accordance with these Rules.”



Therefore, in drawing a bill of costs the auctioneer is confined to only what is provided for in the Auctioneers Rules. The actual fees due to an auctioneer are provided for in PART II of the Fourth Schedule.”

7. The respondent submitted that the appellant have not adduced any valuation report on the proclaimed goods amounting to Kshs 896,000/-. The value of the goods as proposed by the appellant remains speculative. Under part II of the Fourth Schedule of the *Auctioneers Rules*, commission charged for attachment and repossession is 5% of the amount actually recovered. The appellant has not annexed a valuation of the goods proclaimed but for proposes of expediency; the same can be calculated using the decretal sum. They support the finding of the trial magistrate. Under paragraph 7 of Part II of the Fourth Schedule of the *Auctioneers Rules*, if the sale is stayed or postponed, the auctioneer is only entitled to half the commission.

Analysis And Determination

8. I have considered the pleadings on the record, and the arguments made by the respective parties in their submissions and the subject of the appeal concerns the taxation of item no. 3 in the appellant’s bill of costs filed before the Deputy Registrar. The Deputy Registrar in her ruling trial observed as follows: check the Renumeration order on auctioneers bill of costs is there commission on service of proclamation attachment as indicated in the BOC.

“Item 3 is taxed at Kshs. 5,484.9/= (a consent was recorded between the Judgment Debtor and the Decree Holder that the garnishee pays a sum of Kshs. 219,392/- to settle the decretal sum). If the applicant could have completed the sale, he could have been entitled to Kshs 5% of that amount as per paragraph 4 of part II of the schedule which is Kshs. 10,969.60/ = but since the sale was stayed, he is entitled to half of the fees chargeable as per paragraph 7 of part II of the schedule which is Kshs. 5,484.8/-.”

9. The trial magistrate failed to consider whether the appellant was entitled to his fees on attachment but instead assessed the bill for sale for immovable property where the sale has been postponed or stayed. The respondent in their submissions explained that it filed an application dated April 27, 2021 seeking to set aside the garnishee absolute to forestall sale of its immovable assets. It is common ground that the appellant did not sell the goods attached. We must however remember that goods can only be sold once they have been attached. The distinction between an attachment and sale was well explained by the Court of Appeal in *National Industrial Credit Bank Limited v S K Ndegwa Auctioneer* [2005] eKLR where the court stated;

“...The purpose of the attachment is the execution of the decree. The essence of the attachment is to remove the goods from the possession of the judgment-debtor and place them in the custody of the law so that they can be sold to satisfy the judgment debt if the judgment-debtor does not pay the debt. To place the goods in the custody of the law it is not necessary, as Mr. Gatonye correctly submitted, that the goods must be carried away from the premises of the judgment-debtor. In the commentary to Order 21 Rule 43 of the Indian rule which is in *pari materia* to Order 21 Rule 38, the authors of Mulla, *The Code of Civil Procedure* 16th Edition state in part at page 2667:

“where a warrant of attachment is executed by affixing it to the out door of the warehouse in which goods belonging to the judgment debtor are stored, it amounts to “actual seizure” within the meaning of the present rule”.



It is clear from 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.

We are satisfied that the learned Judge correctly construed the word “proclamation” in the context in which it is used in the *Auctioneers Rules* and reached the correct decision that the auctioneer was entitled to fees for attachment prescribed in paragraph 4 of Part II of the Fourth Schedule.

.....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.”

10. From the principles established in the above case, it is clear that the Deputy Registrar did not consider item 3 of the appellant’s bill of costs. Indeed, the appellant did attach the goods and it was therefore paramount to consider item no. 3 in the bill of costs. Paragraph 4 of Part II of the Auctioneers Rules provides guidance on the auctioneer’s fees on attachment. The value of the goods according to the proclamation notice is Kshs 896,000/-. The value of the goods are less than a Kshs 1,000,000/- and therefore the fees on attachment will be Kshs 44,800/- (5% x 896,000/-). The Deputy Registrar’s ruling together with all the attendant consequences are hereby set aside. From the foregoing reasons the bill is hereby taxed as follows;

- a. Receipt of Instructions 1,000
- b. Fee before attachment 4,000
- c. Commission on service on proclamation attachment 44,800
- d. Hire of pick up and labor for attachment 6,000
- e. To postage, stationery and telephone 5,000
- f. Storage for 47 days at 500/- per day 23,500 see the submissions before the DR

Total 84,300

11. The appellant is thus entitled to Kshs 84,300/- with interest from the date of the ruling of the deputy registrar on the appellant’s bill of costs. The appellant having been successful in the appeal shall have the costs of the appeal.

DATED, SIGNED, AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT BUNGOMA THIS 31ST DAY OF OCTOBER, 2022

R.E. OUGO

JUDGE

In the presence of:

Mr. Odongo in person



Respondent – absent

Aphline: Court Assistant

