



**Nyakagwa t/a Fortunes Auctioneers v KTDA Company Limited (Civil Appeal 140 of 2021) [2022] KEHC 17140 (KLR) (21 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 17140 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CIVIL APPEAL 140 OF 2021  
REA OUGO, J  
DECEMBER 21, 2022**

**BETWEEN**

**JIMMY OMWENGA NYAKAGWA T/A FORTUNES  
AUCTIONEERS ..... APPELLANT**

**AND**

**KTDA COMPANY LIMITED ..... RESPONDENT**

*(Being an appeal against the whole of the ruling of Hon SK Onjoro SPM in Kisii  
CMC MISC Civil Application No 58 of 2021 delivered on 18th October 2021)*

**JUDGMENT**

1. The appellant herein filed an application before the lower court seeking that the taxing officer assess the auctioneer's bill of costs, issue him with a certificate of costs in respect to the auctioneer's bill and enter judgment in favour of the appellant in terms of the certificate of costs.
2. The application was on grounds that the appellant on September 16, 2020 received warrants of attachment and sale in execution against the respondent. He proceeded and proclaimed the properties of the respondent on September 17, 2020. Upon proclamation, the respondent proceeded to settle the claim; however, the auctioneer's charges remain unpaid. The appellant in the supporting affidavit explained that upon proclamation, the respondent sought 7 days to settle the claim and the advocates of the plaintiff did a letter on the September 18, 2020 requesting the appellant to withhold the execution process. Despite the respondent having settled the claim, the appellant's fees remain unpaid.
3. The application was opposed and the respondent through his advocate Alphaxard Mogikoyo filed a replying affidavit before the subordinate court on May 13, 2021. According to the respondent in July, the respondent was served via email with a decree and certificate of costs that contained glaring errors. On July 29, 2020 he wrote to the Executive Officer of the court pointing out the errors and requested that they be rectified. The said decree and certificate of costs were corrected. On September



- 17, 2020, he had a telephone conversation with the plaintiff's advocate, Mr Ayienda, regarding the new decree and certificate of costs. Mr Ayienda informed him that his office had instructed an Auctioneer to execute the decree and certificate of costs. On September 18, 2020 the advocate wrote to the respondent demanding that the decree be settled within 7 days failure of which it would proceed to execute. There was no indication in the letter that they had instituted execution proceedings through the applicant. On 21<sup>st</sup> September, a cheque was issued to M/s CM Ayienda settling party to party costs and the decretal sum. The respondent's advocate on September 23, 2020 wrote to the firm of M/s CM Ayienda confirming the payment and sought that his client be released from any liability in the matter.
4. The respondent submitted that the entire decretal amount was settled within the period demanded by the plaintiff and there was no reason for the appellant to execute. It was averred that the appellant failed to comply with Rule 6 and 7(2) of the *Civil Procedure Rules* and Rule 3 and 5(1) (b) of the *Auctioneer's Rules, 1997*. In any event, there was no evidence that the appellant visited the respondent's office and proclaimed the goods.
  5. The respondent also filed a further, replying affidavit through its Manager and Head Legal and Regulatory Affairs of the Respondent. She averred that their registered office is Nairobi and that they have no office in Kisii. The proclamation of attachment indicate that KCZ 157A Suzuki together with assorted Office Computers and chairs were proclaimed. However, the vehicle in question does not belong to the respondent but is registered in the name of KTDA Management Services, She explained that their offices are secured by security guards at the entrance and the respondent's head of security advised that no auctioneers visited their office on September 17, 2020. The computers and chairs therefore do not belong to the respondent and that in any event, the person who signed the proclamation of attachment does not work for the respondent.
  6. The appellant in the supplementary affidavit averred that Itumbe Tea Factory did not object to the execution proceedings and that settlement of the decretal sum was made after proclamation.
  7. The trial magistrate after considering the evidence before him arrived at the following finding:

“...there is no evidence that the respondent was proclaimed by the applicant. For the applicant to be entitled to his fees he ought to have proven that he indeed proclaimed the respondent and not the respondents who are separate and legal and distinct entities.

The proclamation was done prematurely as the applicant was given a grace period of 7 days by the applicant vide the letter dated 18/9/2020...”
  8. The appellant is dissatisfied with the finding of the trial magistrate and has lodged this instant appeal on the following grounds:
    1. That the learned Senior Principal Magistrate erred in law and in fact in failing to find that Lumba Tea Factory is a subsidiary of the respondent in the proceedings and hence making an order that they are different entities.
    2. That the Learned Magistrate erred in law and in fact in not properly or at all applying the decision/authority in *National Industrial Bank Limited v SK Ndegwa Auctioneer* [2005] eKLR over the application of rule 12 of the *Auctioneers Rules*.
    3. That the learned trial magistrate erred in law and fact by failing to evaluate the averments and the annexures contained in the application and the supplementary affidavit.



4. That the learned trial magistrate erred in law and fact by failing to appreciate the evidence before the court and more particularly the decretal sum was paid by Itumbe Tea Factory whose properties had been proclaimed in the execution proceedings.
  5. That the learned Magistrate erred in law and in fact in relying on extraneous matters in dismissing the appellant's application.
9. The parties were directed to file their respective submissions and they complied. The appellant identified the following issues for this court's consideration:
1. Whether the respondent and Itumbe Tea Company and KTDA Managing Services are one and the same.
  2. Whether the Honourable Court should lift the corporate veil of the respondent
  3. Whether the appellant is entitled to orders sought.
10. The appellant argued that Itumbe Tea Factory and KTDA Management Services did not object to the proceedings because they are part of the respondent. The payment settling the decree was also made by Itumbe Tea Factory. The respondent seeks to defraud the appellant by denying its well known subsidiary/agency and hiding behind the corporate veil. They invited the court to consider the case of *National Industrial Bank Limited v SK Ndegwa Auctioneers* [2005] eKLR where the court held that
- “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 decision that the auctioneer was entitled to fees for attachment prescribed in paragraph 4 of part II of the 4<sup>th</sup> schedule.”
11. The respondent in its submission argued that the fact that the cheques used to pay the decretal sum were from Itumbe Tea Factory did not in law make Itumbe Tea Factory a party to CMCC No 149/2018. It was argued that the respondent is a separate entity from Itumbe Tea Factory and KTDA Management Services Ltd. It was submitted that the appellant also failed to comply with Order 22 Rule 8 of the *Civil Procedure Rules* which provides that “where an application is made for attachment of any movable property belonging to a judgment debtor but not in his possession, the decree holder shall annex to the application the inventory of the property to be attached containing reasonable accurate description of the same.”
12. I have re-evaluated the evidence and the arguments presented before the trial court as well as submissions filed by the parties. The following issues are not in dispute:
- i. That the goods attached did not belong to the respondent
  - ii. That the appellant did not go to the respondent's offices in Nairobi to attach its movable properties but went to Itumbe Tea Factory in Kisii.
  - iii. That the respondent settled the decree before the stipulated date, ie September 23, 2020, as directed by the decree holder.
13. I also note that parties are bound by their pleading and that submissions are not a substitute for pleadings. The appellant in his submissions now seeks the lifting of the corporate veil in regard to the Itumbe Tea Factory. This was not pleaded by the appellant before the trial court. There was also no document presented by the appellant showing the directors of the companies and this line of argument in my view was an afterthought.



14. The real issue before the court is whether the appellants are entitled to their fees. The appellant has invited the court to adopt the Court of Appeal holding 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.....“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”.”

15. The respondent had complied with the instructions of the decree holder who had indicated that execution process would commence if the amount due was not settled within 7 days from September 18, 2020. The goods attached did not belong to the respondent and were neither in possession of the respondent. The purported attachment was therefore unlawful and the appellant is not entitled to fees. The trial magistrate cannot therefore be faulted for its decision in light of the evidence.

16. In the end, the appeal filed on November 15, 2021 is hereby dismissed. The respondent shall have the cost of the appeal. This order in this judgment shall apply to HCCA 140-150, 163-168. Orders accordingly.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS AT BUNGOMA THIS 21<sup>TH</sup> DAY OF DECEMBER 2022.**

**R.E. OUGO**

**JUDGE**

**In the presence of:**

Appellant - Absent

Mr. Mogikoyo for the Respondent - Present

**Ms. Wilkister - C/A**

