



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

MISC. CIVIL APPEAL NO. 18 OF 2020

KENNEDY OOKO JACOB

t/a SSEBO INTEL. CO. AUCTIONEER..... APPELLANT

versus

JOHN ABICH OCHANDA.....RESPONDENT

JUDGMENT

The appellant, **Kennedy Ooko Jacob t/a Ssebo Intel Co Auctioneer**, was dissatisfied with the Ruling and Orders of **Hon. D. Onyango, Chief Magistrate** in Migori CMCC MISC Civil Application No. 77/2019 dated 29/6/2020 in which his application by way of Notice of Motion dated 17/12/2019 was dismissed.

By that Notice of Motion, the appellant urged the court to assess the auctioneer's bill of costs that was issued in CMCC 82/2018 of Kshs. 62,760; that the defendant/ judgment debtor be compelled to settle the assessed costs and that the court be pleased to enter judgment in terms of the certificate of Auctioneers costs in favour of the appellant against the defendant /judgment debtor.

The parties filed submissions in the said application and the court struck out the motion in view of the provisions of Section 34(1) of the Civil Procedures Act.

The appellants appeal is in the form of a Chamber summons supported by grounds and an affidavit sworn by him. Though not brought in the normal format in which appeals are brought, the court directed the parties to file submissions on the said appeal. The appellant filed his submissions in court on 22/7/2020. Mr. Odero counsel for the respondent, though aware of the courts' directions on filing of submissions, did not file any nor did he appear on the date set for mention to confirm compliance.

The grounds listed in the Chambers summons can be summarized as follows:-

- 1. That the taxing master erred in law and fact by failing to assess the auctioneer's costs;**
- 2. That the taxing master failed to consider the fact that the applicant was not a party in the suit between the plaintiff / decree holder and defendant / judgment debtor;**
- 3. That the decision of the taxing master was erroneous and disregarded tenets of fair trial;**
- 4. That the court erred by not calling for the mother file or perusing the mother file instead of striking out the application;**
- 5. That the taxing master misconstrued Section 34 of the Civil Procedure Act which deals with all question arising between the parties to the suit in which the decree was passed and failed to appreciate that an auctioneer is not a party to the suit;**
- 6. That the taxing master erred by disregarding the stare decisis doctrine and the Court of Appeal decision on how the Auctioneer's bill can be filed.**

Having considered these grounds, I think that the only issue for determination here is procedural; that is, whether, the appellant, an auctioneer who was claiming his costs, could do so in a separate suit from that in which the costs were awarded. The trial court invoked Section 34 (1) of the Civil Procedure Act which provides as follows:-

“34 (1) All questions arising between the parties to the suit in which the decree was passed, or their representative, and relating to the execution, discharge or satisfaction of the decree, shall be determine by the court executing the decree and not

by a separate suit.

2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceedings, and may, if necessary, order payment or any additional court fees.

3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purpose of this section, be determined by the court.”

In CA 21/2018 Agriculture Food and Fisheries Authority vs Joseck Ibrahim Okwemwa, J. Majanja in considering whether a magistrate could determine the ownership of a vehicle in a matter that was commenced by an auctioneer seeking orders relating to repossession, held:-

“ Since the vehicle was sold as a result of the execution of the orders in Kisii Misc. Civil Application No. 185 of 2016, any application seeking to set aside, vary or in any way implicate those orders should be filed in that case. The decision by the trial magistrate is underlined by the provision of Section 34 (1) of the Civil Procedure Act which deem such proceedings to be a suit for that purpose...”

In South Nyanza Sugar Co Ltd =vs= Alfred Sagwa Mdeizi t/a Pave Auctioneers (2010) EKLRL, J. Makhandia as he then was stated

“Section 34 of the Civil Procedure Act strictly bars the filing of separate proceedings to determine issues that emanate or arise from execution of decrees in a suit. Without obvious regard to these mandatory provisions of the law, the learned magistrate held that the appellant, if he sought to recover any monies from any of the parties to the application had to bring or initiate independent proceedings. In the face of the clear provisions of Section 34 of the Civil Procedure Act, this conclusion was clearly erroneous.”

The above decisions have clarified the meaning and purport of Section 34 (1) of the Civil Procedure Act. The appellant’s proceedings seek to determine issues arising from execution and Section 34 Civil Procedure Act clearly provides the procedure by which the appellant should move the court. He should have brought the application the mother file in CMCC 82/2018.

For the above reasons the trial court was correct in striking out the Notice of Motion. By striking out the appellant’s motion, the appellant has been accorded an opportunity to file the application in the proper forum.

Consequently, I find that this appeal lacks merit. It is hereby dismissed with costs to the respondent.

Dated and Signed at Migori this 25th day of February, 2021

R. WENDOH

JUDGE