



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CIVIL APPEAL NO. EO26OF 2021

BARCLAYS BANK (K) LTD.....APPELLANT/APPLICANT

VERSUS

HEZRON GETUMA ONSONGO T/A

HECEON AUCTIONEERS.....RESPONDENT

RULING

1. The appellant/applicant moved the court by way of Chamber Summons dated 25th March, 2021. It was brought under Rule 55 (4) & (5) of the Auctioneers Rules, 1997 and Order 51 Rule 1 of the Civil Procedure Rules. The applicant is seeking the following orders:

- a) That this court be pleased to set aside the ruling on taxation of the Auctioneer's Bill of Costs dated 5.11.20, and its consequential orders of judgment delivered thereon on 18.3.2021 by Hon. Obutu in respect of the respondent's application dated 5.11.2020.
- b) That the costs of this appeal be awarded to the appellant.

2. The application was premised on the following grounds:

- a) The learned trial magistrate erred in law and in fact in finding that the respondent is entitled to costs for auctioneer's costs for work done yet the execution by the respondent was based on a certificate of costs in Homa Bay Miscellaneous Application No.14 of 2020 between Oscar Odongo T/A Odongo Investment Auctioneers, in the absence of any decree extracted or otherwise, in the said matter, which could have been capable of execution to justify his claim for such auctioneer's fees.
- b) The learned magistrate disregarded the appellant's preliminary objection to the taxation of the auctioneer's fees and submissions that there was no decree extracted or otherwise procured as a basis of such entitlement to the auctioneer's fees, and failed to reach any finding or determination on that objection.
- c) The learned magistrate erred in law and in fact in failing to give reasons for disregarding the appellant's preliminary objection on the failure to extract a decree which would entitle the respondent to proceed with execution as it did.
- d) The learned magistrate erred in law and in fact in failing to appreciate fundamental nature of the preliminary objection, in that in the absence of such a Decree having been extracted as contemplated by the law under Order 21 Rules 7 and 8 of the Civil Procedure Rules, the execution purported to have been undertaken by the said respondent as an auctioneer was rendered void and a nullity in law, and would not justify any claim for payment of auctioneer's fees, sought to be taxed against the appellant.
- e) The learned magistrate's decision to take the auctioneer's bill was purely wrong and not supported by any provisions of law or decision.
- f) That in any event, the Taxing Officer wrongly exercised his discretion in taxing the respondent's bill at kshs.118, 407 which is unjustified.

3. The respondent opposed the application on the following grounds:

- a) That the applicant is guilty of concealment of material facts.
- b) That the application is frivolous and an abuse of the due process.

4. Rule 55 of the Auctioneers Rules, 1997 provides as follows:

(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.

4. The jurisdiction of the trial court is contested on ground that the respondent ought to have filed his bill of costs in Homa Bay CMCC 111 of 2018. This argument was premised on section 34 of the Civil Procedure Act. The section Provides:

(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined 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 proceeding, and may, if necessary, order payment of 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 purposes of this section, be determined by the court.

***Explanation.*—For the purposes of this section, a plaintiff whose suit has been dismissed, and a defendant against whom a suit has been dismissed, are parties to the suit.**

5. In my view, this was not a jurisdictional issue but one of form. It has been conceded that it was not raised before the learned magistrate. However, this is a point of law which need no evidence to be called.

6. The question we may ask ourselves is whether the failure to comply on section 34 (1) of the Civil Procedure Act is fatal. The test in my view would be whether such a failure occasioned miscarriage of justice. In **D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another [1980] eKLR** [Madan JA] stated that:

A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it. No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.

In the instant case, I find that no prejudice or miscarriage of justice was occasioned in spite of failure to comply with form. This, in my view, is the reason why it was not raised in the magistrate's court. I will therefore invoke the spirit by Madan JA in the above cited case coupled with the provisions of Article 159 (2) (d) of the Constitution of Kenya. The section provides that justice shall be administered without undue regard to procedural technicalities.

7. From the foregoing, I find that the appeal has no merit. The same is dismissed with costs.

DELIVERED and SIGNED at HOMA BAY this 28th Day of July, 2021

KIARIE WAWERU KIARIE

JUDGE.