



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CIVIL APPEAL NO E025 OF 2021**

**GEORGE ARUNGA SINO T/A MAYWOOD AUCTIONEERS...APPELLANT**

**VERSUS**

**JANE ADHIAMBO JALANGO.....DECREE HOLDER**

**AND**

**MOSES OCHIENG ONYANGO.....RESPONDENT**

**RULING**

1. In his Notice of Motion dated 23<sup>rd</sup> March 2021 and filed on 24<sup>th</sup> March 2021, the Appellant sought orders that he be granted leave to file this appeal and that the Ruling on taxation of Auctioneers Bill of Costs dated 19<sup>th</sup> February 2021 and on the 17<sup>th</sup> March 2021 be set aside and the court be pleased to uphold the Consent judgment entered on 2<sup>nd</sup> March 2021 at 11.00am by both parties.

2. He swore an affidavit on 23<sup>rd</sup> March 2021 in support of his said application. He averred that he was an Auctioneer class “B” and allowed to trade in the name and style Maywood Auctioneers. He prayed for the court to grant him leave to file his appeal in this court as he would be time barred if he sought the same from the Lower court.

3. He stated that the application which has brought about this appeal was set for Ruling on 16<sup>th</sup> March 2021 but the same did not see the light of day. He added that this delay prompted him to write to court a protest letter dated 18<sup>th</sup> March 2021. He contended that on 19<sup>th</sup> March 2021 at 5.30 pm, he received a copy of the Ruling dated 17<sup>th</sup> March 2021 via email and was thus unable to seek leave from the trial court to file this appeal on time.

4. He asserted that on 23<sup>rd</sup> March 2021, he appeared before the lower court and applied for leave to file this appeal but the same was denied and he was given a hearing date of 27<sup>th</sup> April 2021. He was apprehensive that he would be time barred to appeal by virtue of Rule 55(4) and (5) of the Auctioneers Practice (**sic**) Rules, 1997.

5. He contended that the proceedings of 2<sup>nd</sup> March 2021 at 11.30am to set aside the consent judgment *ex parte* was conducted in bad faith contrary to procedure and the law as both parties had freely entered the consent and the same adopted as order of court on 2<sup>nd</sup> March 2021. He was emphatic that the Respondent’s oral application did not meet the threshold of setting aside a consent judgment.

6. He stated that it was in the interests of justice that he be granted leave to file an appeal in the first instance.

7. In opposition to his application, on 20<sup>th</sup> April 2021, Stephen Okoth Aoko, the Respondent’s advocate filed a Replying Affidavit. The same was filed on 22<sup>nd</sup> April 2021.

8. He averred that when the Appellant’s Bill of Cost came up for assessment on the 2<sup>nd</sup> March 2021, he objected to the same on the ground the Appellant had not provided documents that discharge the evidentiary burden as to the claims he was making.

9. He stated that the court then placed the matter aside so that parties could record a consent after agreeing and upon production and provision of the relevant official supporting documents. He asserted that upon the court resuming after a break and in his absence, the Appellant fraudulently indicated to the court that the total bill was to be assessed at Kshs 734,080.90/= and thereafter sneaked out of the court premises. He was emphatic that the said consent had been mistakenly recorded without signifying his approval for the supporting documents and final figures as he was not in court when the purported consent was recorded.

10. He contended further that the court after listening to his plea set aside the alleged consent order and a mention date of 27<sup>th</sup> April 2021 was fixed for fresh assessment of the Bill. He stated that the Appellant would suffer no prejudice by having his Bill procedurally assessed as per the law and as a result, the present application was misconceived, bad in law and malfeasance as a consent ought to be recorded in the presence of both parties.

11. In his Further Affidavit that he swore on 4<sup>th</sup> June 2021 and filed on even date, the Appellant termed the averments in the Respondent's Replying Affidavit as a mere denial and an afterthought aimed at defeating the ends of justice. He was emphatic that both parties engaged in negotiations outside the court and agreed that they agreed at a figure of Kshs 734,080.90/= which was evidenced in the record showing "Coram as before". It was his contention that if the Respondent had wished to set aside the said consent, then he ought to have filed a formal application for the setting aside of the said consent.

12. The Appellant's Written Submissions were dated and filed on 14<sup>th</sup> June 2021 while those of the Respondent were dated 18<sup>th</sup> June 2021 and filed on 28<sup>th</sup> June 2021. This Ruling is based on the said parties' Written Submissions which both parties relied upon in their entirety.

### **LEGAL ANALYSIS**

13. The Appellant relied on Section 80 (b) of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules 2010 where it is provided that a person who is aggrieved by decree or order from which no appeal is allowed, may apply for the review of the said order or decree.

14. He further placed reliance on the cases of **Flora N. Wasike vs Destimo Wamboko (1988) eKLR, SMN vs ZMS & 3 Others [2017]eKLR** where the court cited the case of **M & E Consulting Engineers Limited vs Lake Basin Development Authority and Another [2015]eKLR** where the common thread was that a consent may be varied or set aside where it was obtained fraudulently, in collusion, where agreement was contrary to the policy of the court, where it was based on insufficient material facts, where it was based on misapprehension or ignorance of material facts and/ or on any other sufficient reason.

15. On his part, the Respondent concurred with the said holding but relied on the several cases which he did not attach copies thereof in arguing that he had demonstrated the grounds for setting aside of the consent order as he did not participate in the alleged consent.

16. Notably, the Respondent did not oppose the Appellant's prayer in this regard. Rule 55(4) of the Auctioneers Rules provides as follows:-

**“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.”**

17. Further, Rule 55(5) of the Auctioneers Rules states that:-

**“The memorandum of appeal, by way of chamber summons setting out the grounds of appeal, shall be filed within 7 days of the decision of the registrar or magistrate.”**

18. This court noted that the Appellant filed his Memorandum of Appeal against a ruling that was delivered on 17<sup>th</sup> March 2021 on 24<sup>th</sup> March 2021. This was not a procedure that was envisioned under the Auctioneers Rules. The grounds of appeal were required to be set out in a chamber summons.

19. Notably, the grounds of appeal in the Memorandum of Appeal were not set out in the Appellant's present application. However, he did set out the following ground of appeal, which captured the essence of his appeal, in the said application:-

**“THAT the Learned Trial Magistrate misapprehended the nature of jurisdiction to review a consent judgment ex parte and in applying the procedure to set aside consent judgment.”**

20. As the said ground of appeal was sufficient for purposes of determining the Appeal herein, this court came to the firm conclusion that his grounds of appeal were set out in a chamber summons application within the seven (7) days stipulated in the Auctioneers Rules, 1997. This court therefore found his prayer for leave to file an appeal unnecessary for purposes of hearing and determining his appeal.

21. Turning to the merits, this court wholly concurred with both parties' submissions that a consent could be set aside and/or reviewed if the requisite conditions set out in the aforesaid case law were satisfied. The question that this court was left with was to establish what transpired in court on 2<sup>nd</sup> March 2021 with a view to determining whether or not the Learned Magistrate proceeded on the wrong principles in having set aside the consent.

22. A reading of the record shows that the Bill of Costs dated 19<sup>th</sup> February 2021 came up for assessment on 2<sup>nd</sup> of March 2021. The Respondent first indicated to court that he was opposed to the said bill. The matter was placed aside to proceed at 11.00am. When the court resumed, the Appellant addressed the court claiming that they had reached a consent where the same was recorded and adopted as order of court. When the Respondent's Advocate came to court at 11.30 am, he informed the court that the Appellant was to produce certain documents. The Learned Magistrate then set aside the consent.

23. In his Ruling of 17<sup>th</sup> March 2021, the Learned Magistrate set aside the consent and directed that parties re-submit themselves to the taxation of the Appellant's Bill of Costs afresh. It appears that the same may have been provoked by the Respondent's submissions on 9<sup>th</sup> March 2021 that the consent that had been arrived at had been withdrawn. On this day, the Appellant also made his submissions whereupon

the court retired to make its Ruling. It is this Ruling of 17<sup>th</sup> March 2021 that aggrieved the Appellant herein.

24. This court noted that although, the consent may have freely been entered into as the Appellant contended, it did appear to this court that there was no meeting of minds between him and the Respondent herein. The Respondent's advocate did not appear to have been present at 11.00 am and only came to court at 11.30 am by which time the Appellant had already left court. If the Respondent's advocate was present in court at 11.00 am, then the Learned Magistrate erred in not having placed him on record.

25. In the understanding of this court, "**Coram as before**" would ordinarily constitute the judge or judicial officer presiding in the matter together with the court assistants. The reason for this is that it is not always the same advocates who appear at any given time before the same bench after a matter has been placed aside. Good practise calls on courts to re-write the names of the advocates who appeared before them afresh after re-calling the file to avoid ambiguity in the proceedings.

26. The procedure that was adopted by the Learned Magistrate in setting aside the consent order was irregular as he ought to have directed the Respondent's counsel to make a formal application and then make a determination on the merits or otherwise of setting aside the consent. He would have had an opportunity to interrogate whether or not the Respondent had satisfied the conditions of setting aside a consent. Indeed, the contestations by the Appellant's advocates seemed to have been off the cuff whereupon the Learned Magistrate reserved a Ruling. There does not appear to have been proper submissions on the question of whether the consent ought to have been set aside.

27. However, as the Learned Magistrate's decision dated 17<sup>th</sup> March 2021 merely asked parties to re-submit themselves to a fresh assessment of the Appellant's Bill of Costs, this court came to the firm conclusion that there would be more delay if it directed that the Respondent file a formal application to set aside the consent for determination by lower court for the reason that it would have arrived at the same conclusion that the Learned Magistrate arrived at in his said Ruling. It found and held that the Respondent had demonstrated that he had met the threshold for setting aside of a consent order.

28. Further, save for a delay in realising the fruits of his costs, if at all, this court was not persuaded that the Appellant had suffered and/or would suffer prejudice. Indeed, re-assessment of his Bill of Costs meant that the ends of justice would still be met at the end of the day.

29. Notably, this court proceeded to determine the merits or otherwise of the setting aside of the consent despite the parties not having ventilated it in detail before the Learned Magistrate for the reason that on appeal, the High Court has power to re-evaluate the submissions that had been made to a subordinate court and determine a matter as opposed to remitting the same for determination by a subordinate court that had proceeded irregularly.

30. Indeed, Section 78 of the Civil Procedure Rules stipulates as follows:-

**1. Subject to such conditions and limitations as may be prescribed, an appellate court shall have power:-**

- a. To determine a case finally;**
- b. To remand a case;**
- c. To frame issues and refer them for trial;**
- d. To take additional evidence or require the evidence to be taken;**
- e. To order a new trial.**

**2. Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties and imposed by this Act on courts of original jurisdiction of suit instituted therein.**

**DISPOSITION**

31. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Chamber Summons application dated 23<sup>rd</sup> March 2021 and filed on 24<sup>th</sup> March 2021 was not merited and the same be and is hereby dismissed with costs to the Respondent herein.

32. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 25<sup>TH</sup> DAY OF NOVEMBER, 2021**

**J. KAMAU**

**JUDGE**