



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CIVIL APPEAL NO. E070 OF 2021

BETWEEN

WILTON ASUBA MALIKA & OPPORTUNITY INTERNATIONAL WEDCO LTD...APPELLANTS

AND

JEOFRICK N MUINDE T/A KIMU AUCTIONEERS.....RESPONDENT

(Being an Appeal from Order and Decree in Oyugis Principal Magistrate's PMCC

Miscellaneous Civil Application No. 38 of 2021 by Hon. C.A. Okore –

Senior Resident Magistrate).

JUDGMENT

1. The appellants brought this appeal by way of Chamber Summons under Rule 55 (3) & (4) and the Fourth Schedule Part II of the Auctioneers Rules, 2009. They are seeking the following orders:

a) This application be deemed as an appeal as envisaged by the provisions of Rules 55(3) and (4) of the Auctioneers Rules, 2009.

b) The order and ruling of the subordinate court dated 22nd July 2021, in Oyugis PMCC Miscellaneous Civil Application Number 38 of 2021 – Jeofrick Otieno Ochieng t/a Kimu Auctioneers – vs- Wilton Asuba Malika & another, taxing the Respondent auctioneer's charges in the sum of kshs.387,890/- be set aside

c) The court be pleased to reconsider the said bill of costs, set aside the assessment of the Auctioneers charges by the Learned magistrate dated 22nd July, 2021 and by way of an appeal, render a decision in respect of the disputed items as shown in the bill of costs and taxed as follows:-

Item 1 kshs.1,000/- receipt of instructions

Item 2 kshs.4,000/- fees before attachment

Item 3 kshs.209,000/- commission 10% of kshs.2,098,385/-

Item 4 kshs.20,000/- taking inventory

Item 5 kshs.25,000/- investigation of attachable and service of proclamation

Item 6 kshs.30,000/- traveling for proclamation

Item 7 kshs.20,000/- disbursements

Item 8 kshs.1,000/- court fees

Item 9 kshs.2,450/- court collection fees

Item 10 kshs.10,000/- postage, stationery and telephone

Item 11 kshs.5,000/- preparation of Auctioneers Bill of Costs for assessment

Item 12 kshs.1,000/- filing Auctioneers Bill of Costs

Item 13 kshs.15,000/- service of Auctioneers Bill of Costs

Item 14 kshs.1,000/- preparation, commissioning and filing return of service

Item 15 kshs.10,000/- attending court for assessment

Item 16 kshs.33, 440/- V.A.T. @16%.

A total of Kshs.387, 890/- allowed in the Bill of costs dated 19th July, 2021.

d) The application dated 19th May 2021 and the Bill of Costs dated 19th May, 2021 incorporated herein and filed in court by the respondents, Jeofrick Otieno Ochieng t/a Kimu Auctioneers, for taxation, be struck out as offending the provisions of Section 34(1) of the Civil Procedure Act, Cap. 21 Laws of Kenya.

e) The costs of this appeal, by way of a chamber summons, as prescribed, be provided for.

2. The application was premised on grounds that:

a) The learned trial magistrate erred in law and in fact when she failed to hold that the issue of Auctioneers charges resulting from and in relation to execution of a decree through warrants of attachment and warrants of sale were such issues that fell to be decided pursuant to the provisions of Section 34(1) of the Civil Procedure Act and could not be so decided by a separate proceedings other than the proceedings in the suit whose decree was being executed.

b) The learned trial magistrate erred in law and in fact in exercising a jurisdiction which she did not have when she allowed the notice of motion as had been filed before her as had been prayed when her jurisdiction was limited to assessing auctioneers charges and not more, thereby violating the appellant's rights to a hearing and fair trial.

c) In allowing the motion as presented and the bill of costs as drawn, the trial magistrate was out to punish the appellant as opposed to exercising her judicial duty under the rule.

d) The learned trial magistrate erred when she failed to note the fact that there being no order for execution envisaged by the provisions of Order 22 rule 13(4) of the Civil Procedures Rules, 2010 in the suit whose decree was executed, the warrants of attachment and warrants of sale which were issued and the resultant attachment were inherently unlawful and irregular and, thus, could not form the basis of costs recovery proceedings by an auctioneer by separate proceedings.

e) The learned trial magistrate erred in law then she failed to take into account and to appreciate the fact that the sums which he allowed in the bill of costs as the recovery expenses and/or auctioneers charges for the specified decretal debt was an all-time high and disproportionate.

f) The learned trial magistrate erred in fact and in law when she allowed auctioneers commission at 10% of kshs.2,098,385/- on proclamation, charges on account of travelling for proclamation, taking inventory, investigation, disbursements, court collection fees, postage, stationery and telephone, preparation and service of Bill of Costs and attending court for assessment, which charges are neither provided for nor prescribed under fourth Schedule, part 11 of the Auctioneers Rules, 2009.

g) The learned magistrate erred in law when she failed to appreciate the fact that only such items as prescribed under the fourth schedule part 11 of the Auctioneers Rules 2009, can be claimed in and auctioneers bill of costs if and when incurred by an Auctioneers and awarded on assessment and not otherwise.

h) The learned trial magistrate erred in fact and law in failing to find and hold that:-

a. Court lacked the jurisdiction to hear and determine the respondents said application.

b. That application is incompetent and irregular in view of the provisions of section 34(1) of the Civil Procedure Act. Cap.21 Laws of Kenya, and that the Respondent's prayers in that application could not be granted lawfully. For, under section 34(1) of the Civil procedures act, the issue of the Respondent's charges, and everything else arising from and in respect of the execution for the decree of the trial court in Oyugis PMCC No. 142 of 2019, Kevin Otieno Ochieng –vs- Wilton Asuba & another by warrants of attachment and sale of the applicant's property (as the 1st and 2nd defendants in the primary suit) could only be determined in proceedings within the suit wherein the relevant decree was obtained and was being executed, not by any new, separate proceedings, like that application as filed against the 1st and 2nd defendant/judgment debtors in that cause, now the applicant herein.

c. In so far as that application sought judgment of that court, in that cause, as against the applicant, in terms of a certificate of

taxation was also sought therein, that cause was irredeemably incompetent and illegal, as a judgment of a civil court cannot possibly and lawfully issue in a cause of that nature. For, that the Honourable court lacked the jurisdiction to enter a lawful and regular judgment, from which a lawful and a regular decree capable of being enforced under the Civil procedure Act. Can issue in that cause a substantive suit.

d. The application was premature and, therefore, an abuse of the due process of that court since there was not cogent, credible and admissible evidence, other than the respondents own and bare allegation and deposition that the respondent had tried to negotiate the issue of his fees with the applicant to no avail and , consequently, that court would be acting without jurisdiction, if that court were to proceed and assess the respondents Bill of costs dated 19th May 2021 as under Rules 55(3) of the Auctioneers Rules 1977, the existence of a dispute as to the amount due to an auctioneers, and proof of the existence of such a dispute, if any, is what would trigger the jurisdiction of a court to assess the costs due to any auctioneer.

e. There was no evidence that the Decree of that court in Oyugis PMCC No.142 of 2019 – Kevin Otieno Ochieng –vs- Wilton Asuba & another, which the respondent had executed against the applicant,. Has/had been satisfied and thus, in the absence of such evidence, the law barred the applicant from recovering fees for his work in executing the said decree and thus, by extension, the law barred that court from granting the relief sought and granted in that application before the decree in the said suit was fully satisfied.

f. The learned trial magistrate erred in fact and in law when she failed to strike out the bill of costs as had been filed in an independent and separate proceedings as being an abuse of the court process.

g. The learned magistrate erred in fact and in law when she held that the fact that the respondent was entitled to fees in the sum and in the amounts awarded as itemized in the bill of costs.

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

a) That the application is premature.

b) That the applicant failed to write to the taxing officer within 14 days from the date of assessment.

4. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

5. Rule 55 (3) & (4) of the Auctioneers Rules Provides:

(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.

While section 34(1) of the Civil Procedure Act 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.

6. The auctioneer offended the provisions of section 34(1) of the Civil Procedure Act when he instituted Miscellaneous Civil Application No. 38 of 2021 to pursue his costs in respect of instructions issued to him in Oyugis PMCC No.142 of 2019. He did not have to institute another suit. The proceedings and the subsequent orders in Oyugis Miscellaneous Civil Application No. 38 of 2021 was therefore a nullity.

7. The appeal is allowed with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 16TH DAY OF DECEMBER, 2021

KIARIE WAWERU KIARIE

JUDGE