



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 17 OF 2007

NATIONAL CEREALS AND PRODUCE BOARD.....APPELLANT

VERSUS

PETER GACHUKI T/A PETER BIRDS INVESTMENT AUCTIONEERS...RESPONDENT

(An Appeal arising out of the Ruling and Order of Hon. Innocent Maisiba RM Eldoret delivered on 23rd February, 2007 in Miscellaneous Civil Application No. 76 of 2006)

JUDGMENT

The Respondent filed **Misc. Civil Application No.76 of 2006** in Eldoret Chief Magistrate Court seeking orders that the Respondent's bill of cost arising out of an attachment made in **Eldoret CMCC No.168 of 1997** be taxed and that the Appellant be compelled to pay the taxed bill of costs, as well as costs of the application. The trial magistrate, in a ruling delivered on 23rd February 2007 held that there was no evidence to show that the Respondent's bill of costs had been taxed and therefore allowed the Respondent's application as prayed.

The Appellant, being dissatisfied with the said ruling, filed an appeal against the same and raised several grounds challenging the decision. The Appellant faulted the trial magistrate for allowing the Respondent's bill of costs in a manner that is contrary to the law. The Appellant was aggrieved that the trial magistrate failed to hold that by an order of the court dated 8th July 2002, the Respondent's costs were assessed at Ksh.11,349/- and the Plaintiff's advocate in **Eldoret CMCC No.168 of 1997** was ordered to pay the same to the Respondent. The Appellant also faulted the trial magistrate for disregarding proceedings in **Eldoret CMCC No.168 of 1997** and yet the Respondent's claim was based on those proceedings. The Appellant took issue with the trial magistrate's failure to take into account the fact that the High Court in **Eldoret HCCA NO.46 of 2000** had set aside a substantial part of the decree arising out of **Eldoret CMCC NO.168 of 1997**. Finally, the Appellant was of the view that the trial magistrate ignored the fact that the replying affidavit sworn by the Appellant's advocate in the application was not controverted.

By consent of the parties, the appeal was disposed of by way of written submissions. Both parties filed their written submissions. During hearing of the appeal, the Appellant argued that **Rule 55 of the Auctioneers' Rules (amended) 2009** provided that a court can only tax a bill if there is a dispute as to the amount of fees payable to an auctioneer. The Appellant maintained that in the present case there was no dispute as to the amount of fees payable to the auctioneers, since the court in an order dated 8th July 2002 in **Eldoret CMCC No.168 of 1997** assessed the fees at Ksh.11,349/-. The Appellant asserted that the application for taxation was therefore wrongly placed before the trial court and the same ought not to have been entertained. The Appellant added that in the said order, the Plaintiff's advocates in **Eldoret CMCC No.168 of 1997** had been ordered to pay the Respondent the assessed fees of Ksh.11,349/-. The Appellant was of the view that the said order was still in effect as the same was never appealed against or reviewed. They maintained that allowing the Respondent's application meant that the Respondent stood to be paid twice on the same subject matter which was not justified.

The Appellant averred that having already taxed the Respondent's bill at Kshs.11,349/- in **Eldoret CMCC No.16 of 1997**, the Respondent's application in the trial court was *res judicata*. The Appellant maintained that the decision on the Respondent's bill could only be upset on appeal or review and not by a totally different application as in the present case. They relied on **Section 7 of the Civil Procedure Act** which bars any court from trying any suit in which the matter directly and substantially in issue has been heard and decided by a court of competent jurisdiction. They also relied on the case of **Uhuru Highway Development Limited vs Central Bank of Kenya and 2 others [1996] eKLR** where the court held that for one to rely on the doctrine of *res judicata* they have to prove that there was a previous suit in which the matter was in issue, that the parties were the same, that a competent court heard the matter in issue and that the issue has been raised again in a fresh suit. The Appellant argued that all of the mentioned ingredients had been satisfied in the present case.

The Appellant stated that the trial court failed to address itself to the proceedings in **Eldoret CMCC No.168 of 1997** and urged this court to appraise itself of the same. The Appellant asserted that the replying affidavit sworn by the Appellant's advocate in the application before the trial court was not controverted as the Respondent failed to put in a response to the same. The Appellant averred that the trial court failed to appreciate that the High Court vide **Eldoret HCCA No.46 of 2000** had stayed execution proceedings pending hearing of the Appeal. They argued that the trial court did not appreciate the subsisting order of stay by allowing the Respondent's application.

The Respondent, while opposing the appeal, stated that the Appellant was the debtor in **Eldoret CMCC No.168 of 1997** and was therefore

required to pay the auctioneer charges. The Respondent maintained that he was not a party in **Eldoret CMCC No.168 of 1997** and his role was merely to execute the warrants therein. The Respondent argued that the Appellant being dissatisfied with the trial court's Ruling ought to have filed a reference as opposed to filing this appeal. The Respondent submitted that the Appellant introduced new documents in the record of appeal as well as the supplementary record of appeal which were not part of the record in the trial court's application. He urged this court not to consider the same. The Respondent averred that the trial court's application was not *res judicata* as he had not filed any bill of cost for taxation before. He urged this court to dismiss the appeal with costs.

This court has carefully re-evaluated the evidence adduced before the trial court. It has also considered the submissions made by the parties to this appeal.

This being the first appeal, this Court is obligated to re-evaluate and re-appraise the evidence in order to arrive at its own independent conclusion. (See **Selle V Associated Motor Boat Company Ltd [1968] EA 123.**) In the present appeal, the issue for determination is whether the trial court was merited in allowing the Respondent's application.

The Appellant in their replying affidavit dated 26th October 2006 indicated that an assessment of the auctioneer costs was done in **Eldoret CMCC No.168 of 1997** and that the advocate acting for the plaintiff in that case was ordered by the court to pay the said costs. They asked the court file of the said case be availed at the hearing of the application. The Respondent did not rebut the averments of the Appellant's replying affidavit. The trial court granted him leave to file a further affidavit in response to Appellant's replying affidavit but the Respondent did not file the same.

After perusal of the proceedings in **Eldoret CMCC No.168 of 1997**, it is clear that on 8th July 2002, the Respondent presented to court an assessment of his costs totaling to Ksh.11,349/-. On the same date there was an order of the court whereby by consent of the parties, the auctioneers bill was assessed at Ksh.11,349/-. Consequently, the trial magistrate made a determination on who was to pay the assessed auctioneer costs stating:

“I order that M/S Chebii and Co. Advocates who wrongfully instructed the Auctioneer herein to carry out attachment bear the Auctioneers costs now assessed at Ksh.11,349/-.”

It is this court's view that the trial court in making a determination on the Respondent's application ought to have addressed itself to the proceedings in **Eldoret CMCC No.168 of 1997**. The Respondent's application emanated from the said suit. There is no evidence provided by the Respondent to show that the orders of the court given on 8th July 2002 in **Eldoret CMCC No.168 of 1997** have been vacated or reviewed.

Section 7 of the ***Civil Procedure Act*** provides;

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

It is evident that the Respondent's application seeks to re-argue matters which are otherwise *res judicata*. The Respondent's bill was assessed in **Eldoret CMCC No.168 of 1997** and an order as to who was to pay the same was consequently issued. The Respondent's application should not have been entertained by the trial court.

It is therefore for these reasons that this court finds that this appeal is merited. The same is consequently allowed. This court hereby sets aside the ruling of the trial court and substitutes it with the judgment of this court dismissing the Respondent's application with costs. The Appellant shall have the costs of the appeal. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 5TH DAY OF DECEMBER 2018

L. KIMARU

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 24TH DAY OF JANUARY 2019

HELLEN OMONDI

JUDGE