



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL APPEAL NO. 4 OF 2016

KENYA POWER & LIGHTING COMPANY LTD.....PPELLANT

=VRS=

DAVID OBARE OMWOYO

T/A OMWOYO AUCTIONEERS.....RESPONDENT

{Being an Appeal from the Ruling and Decree of Hon. N. Kahara –

RM dated and delivered on the 10th day of February 2016 in the original Keroka Principal Magistrate's Court Misc. Appl. No. 1 of 2015}

JUDGEMENT

The respondent who is a Licenced Auctioneer was issued with a warrant of attachment and sale of the appellant's moveable properties in execution of a decree in Keroka SRMCC No. 34 of 2014 following a judgement delivered on 7th April 2014.

Acting on the said warrant, the respondent proclaimed and attached the appellant's properties and advertised them for sale. However, before the sale the appellant moved the lower court and obtained orders that set aside the judgement and all consequential orders in the suit on the ground that the service was irregular. Among the conditions for setting aside the judgement were an order requiring the appellant to deposit in court a sum of Kshs. 80,000/= as auctioneer's fees. Subsequent to that the respondent filed an application/bill of costs and on 10th February 2016 the bill was taxed at Kshs. 80,000/= and a certificate of costs issued. In a ruling delivered on 10th February 2016 the lower court condemned the appellant to the auctioneer's costs and ordered that the Kshs. 80,000/= deposited in court be released to the auctioneer. That ruling is the subject of this appeal. The memorandum of appeal sets forth the following grounds: -

- “1. THAT the learned Magistrate erred in law and in fact by finding that the Respondent's Application is merited and was not brought prematurely.**
- 2. THAT the learned Magistrate erred in law by finding that the Respondent was entitled to payment of his fees for execution, despite the fact that Judgement in Keroka SRMCC No. 34 of 2013 was set aside.**
- 3. THAT the Learned magistrate erred in law and fact by condemning the Appellant to pay the Respondent Kshs. 80,000 being the Auctioneers fee despite the e app has already deposited the same as security in court in SRMCC 2013 and the court has not determined who is to pay a fee. (Sic).**
- 4. THAT the learned Magistrate erred in law by assessing the auctioneers bill of costs dated 25th March 2015 be assessed at Kshs. 80,000.00.**
- 5. THAT the learned Magistrate erred in law by ordering that a certificate of cost be issued be issued in favour of the Applicant in terms of the Certificate of Costs.**
- 6. THAT the learned Magistrate erred in law by ordering that the deposit made in court by the Appellant for Kshs. 80,000 being the interim auctioneer's fee be paid to the respondent.”**

The appeal was canvassed by way of written submissions. The gravamen of the appeal is that the judgement in the lower court having been set aside all consequential orders including the auctioneer's charges were also set aside. Counsel for the appellant also argued that the judgement having been set aside on account of irregular service it was rendered null and void abinitio and the respondent herein cannot look to the appellant to meet his costs and the appeal should be allowed and the ruling of the trial magistrate be set aside.

Counsel for the respondent however argued that Rule 7 of the Auctioneers Rules, 1997 provides that the auctioneers charges shall be borne by the judgement debtor save in exceptional circumstances none of which have been proved by the appellant. Counsel contended that the trial magistrate was bound to issue a certificate of costs and did not err in so doing. Counsel further argued that as an appellate court this court cannot interfere with the lower court's assessment of costs lightly unless it is shown that the assessment is contrary to law or has taken into account extraneous issues or otherwise failed to take into account relevant factors. Counsel also contended that this appeal is in violation of Rule 55 (4) of the Auctioneers Rules, 1997 and it also lacks merits; it should be dismissed with costs to the respondent.

I have considered the rival submissions carefully. Whereas it is correct that Rule 7 of the Auctioneers Rules, 1997 places the burden of payment of auctioneers charges upon the judgement debtor and does not make provision for exceptions, I am of the view that it would be unjust to expect a defendant to do so in certain circumstances. This case is a classic example of such cases. In this case the judgement giving rise to the auctioneer's charges was set aside on account of irregular service. That judgement was therefore annulled the moment the defendant, now the appellant, met the conditions that were imposed by the court for setting aside the judgement. It would therefore be unjust to, for now, order the appellant to meet the costs of those proceedings given that no blame was placed upon it for the irregular service and it is not yet possible to determine whether the case against the appellant will succeed. Moreover, it is also apparent that those charges were not assessed as provided in Part II of the Fourth Schedule which provides at item 7 that where requisite notices are served and the sale is stayed or postponed the auctioneer is only entitled to **"½ of the fees to which the auctioneer would have been entitled to after the sale, plus expenses."** If this was the manner of assessment, then it is not evident in the ruling. Accordingly, I find merit in this appeal and the same is allowed. The ruling of the Hon. Magistrate dated 10th February 2016 be and is hereby set aside and substituted with an order that the auctioneer's charges in this appeal shall abide the judgement of the trial court in the on-going case.

For avoidance of doubt, should the case against the appellant succeed then the appellant shall bear the charges but should the case be dismissed, those charges shall be borne by the defendant in that case. The costs of this appeal shall also abide the judgement in the lower court.

Signed, dated and delivered in Nyamira this 21st day of February 2019.

E. N. MAINA

JUDGE