



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CIVIL APPEAL NO. 36 OF 2018**

**OGEMBO TEA FACTORY LTD.....APPELLANT**

**VERSUS**

**HEZRON GETUMA T/A**

**HEGEONS AUCTIONEERS.....RESPONDENT**

*(Being an appeal from the ruling/order of Hon. J.K. Mutai (SRM) delivered on 12<sup>th</sup> June, 2018 in Ogembo SRMCC Misc. App. No. 14 of 2018)*

**JUDGMENT**

1. The appellant's appeal is based on the following grounds as set out in the Memorandum of Appeal dated 13<sup>th</sup> June 2018; hollow

*a. That the learned trial magistrate erred in law and in fact in making a determination that the court had jurisdiction to determine the said matter when the matter had gone on appeal and had already been determined by the High Court;*

*b. That the learned trial magistrate erred in fact and in law in failing to declare himself functus officio in the matter when he was fully aware that the matter had proceeded on appeal to the High Court in HCCA No. 82 of 2011;*

*c. That the learned trial magistrate erred in law and in fact in taxing the auctioneer's bill when the court lacked the requisite jurisdiction ;*

*d. That the learned trial magistrate erred in law and in fact in ordering the respondent to pay the auctioneers fees despite the fact that the decretal amount plus costs had been deposited in a joint interest account and therefore the auctioneers had no basis proclaiming against the appellant;*

*e. That the learned trial magistrate erred in law and in fact, in assessing the auctioneers' fess at Kshs. 166,409/- despite the fact that costs plus the decretal amount had already been deposited in a joint interest earning account and the matter had proceeded on appeal to the High Court;*

*f. That the learned trial magistrate erred in law and in fact, in failing to declare the warrants had been issued and signed as null and void when it was clear that the matter had proceeded to the High Court and therefore rendering the lower court functus officio;*

*g. That the learned trial magistrate erred in law and in fact, in blatantly ignoring evidence on record proving that the matter had proceeded to the High Court and it therefore lacked jurisdiction to assess costs or make any decision in the lower court file.*

The appellant seeks to have the ruling/order of the Court dated the 5<sup>th</sup> June 2018, be reviewed and / or set aside.

2. The facts leading up to this appeal are as follows;the respondent herein moved the trial court by an application dated 17<sup>th</sup> April, 2018 for assessment of its bill of costs. In his supporting affidavit, the respondent averred that he had been issued with warrants of attachment and sale against the appellant on 12<sup>th</sup> April, 2017 arising out of Ogembo Civil Suit No. 13 of 2010. On the same day, he proceeded to proclaim the appellant's movable goods. He deponed that he made the application for assessment of his costs before the expiry of the mandatory notice, as he was informed that there was a stay in force.

3. The appellant filed a replying affidavit in the subordinate court opposing the application for assessment of the respondent's costs. It averred that the decision of the court in Ogembo Civil Suit No. 13 of 2010 had been appealed against vide Kisii HCCA No. 82 of 2011thus the trial court lacked jurisdiction to hear the application. It also deposed that they deposited the decretal amount plus costs in a joint interest earning

account as part of security for the appeal, therefore the warrants were null and void and the respondent should have followed up on payment with its instructing client. The appellant further stated that they had made an application for nullification of the warrants of attachment but no decision had been made on it.

4. The application dated 17<sup>th</sup> April, 2018 proceeded before the subordinate court. In its decision which is challenged in this appeal, the court found that it had jurisdiction to hear the application and assessed the respondent's costs at Kshs 166,409/=.

5. In this appeal, the appellant maintains that the lower court was *functus officio* and thus lacked jurisdiction to tax the bill of costs. The appellant's counsel argued that the trial court lacked jurisdiction due to the filing of Kisii HCCA No. 82 of 2011. Counsel also contended that there was a stay of execution, therefore the respondent's actions were unlawful and its fees were not payable.

6. The respondent's counsel replied that as at the date of instructions, issuance of warrants of attachment and subsequently the letters of proclamation, the court in Kisii HCCA No. 82 of 2011 had already entered judgment dismissing the appeal. Thus the contention that there was a pending appeal in the superior court and that the subordinate court was not seized with jurisdiction was an erroneous argument.

7. On the issue joint account, counsel argued that **order 42 rule 6** of the **Civil Procedure Rules** stipulates that the filing of an appeal does not operate as a stay. That in as much as there was a pending matter in the High Court it did not bar the subordinate court from assessing the respondent's bill of costs as there was no order for stay stopping the assessment. Counsel further argued that there was no nexus between the matter the appellant contends proceeded on appeal and the matter before the trial court for assessment.

8. Having considered the parties' submissions and the record of appeal, I find that the main issue arising for determination is whether the subordinate court was *functus officio* and thus lacked jurisdiction to assess the respondent's fees.

9. The term *functus officio* is interpreted in the **Black's Law Dictionary, 8<sup>th</sup> Edition** at **page 696** thus;

*[Latin "having performed his or her office"] (Of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.*

10. In the decision relied upon by the appellant, the Supreme Court in **Raila Odinga & 2 Others V Independent Electoral & Boundaries Commission & 3 Others Petition No. 5 of 2013 [2013] eKLR** quoted Daniel Malan Pretorius in his article, "*The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law*" (2005) 122 SALJ 832 in defining the doctrine as follows:

*"The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker."*

11. In this case, the warrants of attachment and sale were issued to the respondent on 12<sup>th</sup> April, 2017 in furtherance of the execution process against the appellant upon the court's dismissal of HCCA No. 82 of 2011 on 9<sup>th</sup> February, 2017.

12. I reject the respondent's submissions that there was no stay in force at the time the warrants were issued. There is uncontroverted proof that prior to the commencement of Kisii HCCA No. 82 of 2011, the parties consented to a stay of execution and the decretal sum was deposited in a joint interest earning account. That being said, the appellant has not shown that the respondent was aware that there was a stay of execution in place. It has also not proved that there was any *mala fides* on the part of respondent in applying for the warrants. In any case, such allegations would be a matter to be determined by the Auctioneers Licensing Board in accordance with **Section 24** of the **Auctioneers Act**.

13. The respondent was entitled to apply for warrants of attachment and sale of property to satisfy the judgment debt upon receiving instructions by virtue of the Auctioneer's Act. This duty was carried out by the respondent as an agent of the court. (See **Davis & Shirliff Ltd v Attorney-General Civil Appeal 21 of 1978 [1978]eKLR**)

14. The appellant does not dispute that its goods were proclaimed by the respondent. At the time of the proclamation, the warrants were still in force. There were no orders stopping the respondent from carrying out its duty as an agent of the court. The appellant admits that it made an application to have the warrants declared void but the same was not determined. Having carried out its duty, the respondent was entitled to apply for assessment of its costs against the debtor as provided by the **Auctioneer's Rule 7**.

15. On its part, the trial court derived jurisdiction to assess the respondent's charges from the **Auctioneers Rule 55** which provides;

**55(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. [Emphasis added]*

16. The trial court's decision to assess the respondent's cost was well grounded. For these reasons, I find this appeal unmerited and dismiss it with costs to the respondent.

**Dated, signed and delivered** at Kisii this 28<sup>th</sup> day of **June 2019**.

**R.E.OUGO**

**JUDGE**

**In the presence of;**

**Mr. Magara h/b Mr. Nasimuyu For the Appellant**

**Mr. Gichana For the Respondent**

**Rael Court clerk**