



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO.42 OF 2018

CONSOLIDATED WITH

CIVIL APPEAL NO. 43,44,44,45 AND 46 OF 2018

AFRICAN MERCHANT ASSURANCE CO. LTD.....APPELLANT

-VERSUS-

HEZRON GETUMA ONSONGO T/A HEGEONS AUCTIONEERS.....RESPONDENT

(Being an appeal from the rulings of Hon. C.R.T. Ateya (R.M.) dated and

delivered on 10th July 2018 in PMCC Misc. App No. 5, 6, 7, 8 & 9 of 2018

at Ogembo Law Courts)

JUDGMENT

1. In this consolidated appeal, the appellant contests the trial court's decision to award the respondent costs on the following grounds;
 - a. The learned trial magistrate erred in law and in fact in allowing the Auctioneers costs while the proclamation upon which the assessment was defective and a nullity;
 - b. The learned trial magistrate erred in law and in fact in holding that the proclamation was proper and valid thus ignoring Rule 12, Auctioneers Rules and the binding precedents cited before her;
 - c. The learned trial magistrate erred in law and in fact in allowing item 4 of the Bill without any proof of the said item;
 - d. The learned trial magistrate erred in law and in fact in allowing item 5 of the Bill without any proof of the said item;
 - e. The learned trial magistrate erred in law and in fact allowing item 6 of the Bill without any proof of the said item; and
 - f. The learned trial magistrate erred in law and in fact in allowing item 7 of the Bill without proof of the said item.
2. On the first and second grounds of appeal, counsel for the appellant in his written submissions, argued that the trial court had disregarded Rule 12 of the Auctioneers Rules in allowing the auctioneer's costs. He submitted that contrary to the rules, the condition and the value of each of the specific items proclaimed was not given. That though the condition of the goods was termed as old, the value of the goods was not given and there was no signature by a representative of the appellant on the proclamation.
3. In the event this court found that the proclamation was valid, the appellant submitted that errors had been made in the taxation of items 4, 5, 6 and 7 of the proclamation.
4. In item 4 where the auctioneer charged for, "Traveling to proclamation (100km x 2 x 3 x 60),"the appellant submitted that there was no proof of such travelling. It was argued that the proclamation showed that the auctioneer has an office in Kisii and if indeed he travelled, he must have travelled from his office in Kisii to the Respondent's offices about 1 kilometer away hence the travelling charge sought to have been taxed for Kshs. 360/=.

5. In item 5 dubbed, “Investigation of debtor’s assets,” the appellant submitted that there was no proof of such investigation and moreover there was no provision for charging the item under Schedule 4 of the Auctioneers Rules.

6. In item 6, where the auctioneer charged for, “Taking inventory,” the appellant contended that the item was only available when transporting movable property and for advertising and insuring moveable property. In this case, the appellant argued that there had been no actual seizure or transportation of the goods therefore the trial court erred in allowing the item without giving any reason for doing so.

7. For item 7 which the auctioneer titled, “To disbursements,” the appellant submitted that there was no evidence of any payment comprising of the alleged disbursements or proof of receipts. It was argued that the trial court did not make a finding that such disbursements had been made and failed to give a reason for allowing the item as drawn.

8. For the respondent it was argued that rule 12 of the Auctioneers Rules had been followed and that the proclamation notices captured the condition of the assorted goods proclaimed as old and the auctioneer had indicated that the value of the goods would be ascertained at the time of seizure. It was submitted that the essence of the value of goods attached is to provide a basis upon which the auctioneer’s charges should be assessed which the trial court took into consideration in taxing the bill.

9. On item 4, the counsel submitted that the respondent had travelled from his offices in Kericho a distance of 100 kilometers from Kisii. That the distance covered was twice the distance between Kisii and Kericho and the same was to be computed thrice as per Rule 11 of Part II of the Auctioneer’s charges as well as the Automobile Association published scale.

10. As for item 5, counsel submitted that due diligence required that an auctioneer conduct investigations of a debtor’s assets to prevent wrongful attachment. He submitted that such investigations included motor vehicle searches, inquiry from the general public, sending out investigators therefore the assessment of item 5 was reasonable.

11. Counsel also submitted that item 6 and 7 which covered the inventory taken during the proclamation exercise and disbursements respectively were reasonable and modest. It was submitted that having followed all due process in executing the decree the respondent was entitled to his costs.

12. The respondent herein obtained warrants of attachment and sale against the appellant in satisfaction of decretal sums arising from various suits. He proceeded to proclaim the appellant’s goods upon which the appellant paid the decretal sums but failed to pay the auctioneers fees. Consequently, the respondent filed Miscellaneous Applications Nos. 5, 6, 7, 8 and 9 of 2018 for its costs.

13. The determination of this appeal depends on whether the respondent complied with **Rule 12 (1) (b)** of the **Auctioneers Rules** which stipulates thus;

12 (1) Upon receipt of a court warrant or letter of instruction the auctioneer shall in case of movables other than goods of a perishable nature and livestock—

(b) prepare a proclamation in Sale Form 2 of the Schedule indicating the value of specific items and the condition of each item, such inventory to be signed by the owner of the goods or an adult person residing or working at the premises where the goods are attached or repossessed, and where any person refuses to sign such inventory the auctioneer shall sign a certificate to that effect.

14. In **Lakeland Motors Limited vs Harbhajan Singh Sembi Civil Application No. Nai 24 Of 1998 (11/98UR) [1998]eKLR**, which was cited by the appellant before the trial court, the Court of Appeal held;

There does not appear to be any provision in the Auctioneers Act, 1996 nor in the Auctioneers Rules, 1997 for dispensing with the foregoing rule [Rule 12 (1)(b) of the Auctioneers Rules] . Yet the respondent proceeded to execute the decree and physically attach the applicant's movable goods without complying with the said rule. The flagrant disregard of the provisions of this rule smacks of gross irregularity in the respondent's execution process of the decree of the superior court in Civil Case No. 227 of 1997. It would be an abuse of the process of this Court if we were to countenance such an execution.

15. The appellant also cited the cases of **J.N. Kingoti t/a Max Auctioneers vs Dr. Christopher Luusa HCCC No. 1638 of 2007 [2009]eKLR; Barry Scutt & Another v Hitesh Jethwa & 2 Others Civil Case No 937 of 2000[2009]eKLR; Hughes Limited v Mohammed S Kassam & Another Civil Case 723 of 1996 [2008] eKLR; Savannah International Limited v Zipporah Kwamboka Onchari HC Misc. App No. 8 of 2016 [2016]eKLR** and **Hasmukh Sumaria & 6 Others vs GUT Ventures Limited Civil Suit No. 834 of 2006[2006]eKLR** which emphasis the need to comply with Rule 12 of the Auctioneers Rules in the proclamation of goods by an auctioneer.

16. The respondent herein filled the schedules in the Sale Form 2, titled “PROCLAMATION OF ATTACHMENT/REPOSSESSION/DISTRAINT OF MOVABLE PROPERTY “in his various applications as follows;

a. Miscellaneous Application No. 5 of 2018

i. Description

1. Assorted office chairs

2. Assorted office tables

3. One office computer
4. One photocopier machine
5. And any other movable properties of the j/d

ii. Condition – OLD

iii. Value - To be valued at the actual time of seizure

b. Miscellaneous Application No. 6 of 2018

i. Description

1. Assorted office chairs
2. Assorted office tables
3. One office computer
4. One photocopier machine
5. And any other movable properties of the j/d

ii. Condition – OLD

iii. Value – To be valued at the actual time of seizure

c. Miscellaneous Application No. 7 of 2018

i. Description

1. Assorted office tables & chairs
2. Assorted computers
3. One photocopier
4. One dispenser and
5. or any other movable properties of the j/d

ii. Condition – OLD T.B.A

iii. Value – at 1 million T.B.A

d. Miscellaneous Application No. 8 of 2018

i. Description

1. One photocopier
2. Assorted office tables & chairs
3. One printer
4. One glass table and
5. Or any other movable properties of the j/d

ii. Condition – OLD T.B.A

iii. Value – Over 1 million T.B.A

