



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CIVIL APPEAL NO 15 OF 2016

PACIS INSURANCE COMPANY LIMITED.....APPELLANT

VERSUS

MARTIN ODIEKS ODHIAMBO.....RESPONDENT

ESHIKHONI AUCTIONEERS.....RESPONDENT

JUDGMENT

1. This Appeal is related to **HCCA No. 15 of 2016**. The two (2) Appeals are predicated on the rulings of the Principal Magistrate's Court in Ukwala Civil Suit No. 21 and 22 of 2013 delivered on 19th November, 2014 in both files.

2. In determining the two appeals, though not consolidated, I have taken cognizance of the fact that the pleadings i.e. complaints, defenses, applications, replies, submissions, arguments and the subsequent orders in both files in the lower court and the ensuing appeals too are the same except for the names of the parties and sum claimed and as such, I shall proceed in discussion and determination thereof as though they are one and the final determination to apply concurrently to each of the files. It follows that I shall deal with one appeal and the judgment in one shall apply mutatis mutandis the other file.

3. The Plaintiff in Civil Suit No. 21 of 2013 in the Lower Court who is the Respondent in Civil Appeal No.16 of 2016 is **MARTINE ODIEK ODHIAMBO** while the Plaintiff in Civil Suit No. 22 of 2013 in Lower Court and the Respondent in Civil Appeal No.15 of 2016 is **ERICK OTIENO OOKO**. The Defendant in the Lower Court cases and who appears as the Appellant in the two Appeals is **PACIS INSURANCE COMPANY LIMITED**.

4. The Appellant (**Pacis Insurance Company Limited**) being aggrieved and dissatisfied with the ruling of the Principal Magistrates Court in Ukwala Civil Suit No. 21 and 22 of 2013 delivered on 19th November, 2014 through its advocates filed Petitions of Appeal Nos. 16 and 15 of 2016, respectively citing the following grounds:-

(a) The learned trial magistrate grossly misdirected himself in holding that the Appellant should bear the Auctioneers charges when the evidence clearly demonstrated that the execution process had been irregularly initiated by the Respondent.

(b) The learned trial Magistrate erred in fact and in law in failing to acknowledge that that the appellant had filed its defence in time and within the 7 days period given by the Respondent and as such no execution should have ensued.

(c) The learned trial Magistrate misdirected himself in ignoring the fact that the application dated 18/12/2013 filed by the Appellant seeking to set aside the ex parte judgment was allowed by consent and that prayer 5 of the said application sought that the costs of the application be met by the respondent which application was allowed by consent with costs in the cause hence the Respondent should have been held liable for payment of the Auctioneer's charges.

(d) The learned trial Magistrate failed to apply himself judicially and to adequately evaluate the Appellant's evidence as contained in the application and supporting affidavit and the annexures thereto and submissions thereto and the applicable law and thereby arrived at an erroneous decision.

5. This being a first appeal, the law, under section 78 of the Civil Procedure Act requires that I reassess and reanalyze the evidence and material in the Lower Court and arrive at my own independent conclusion as though I were a trial court

6. The respective Plaintiffs (now Respondents) in the trial Court through their Advocates filed **Requests for Judgement** on 25/11/2013 against the Defendant (now Appellant in both cases) therein who having been served with summons to enter appearance together with the

plaints, only filed memos of appearance and did not file defence within the timelines stipulated in the Law thereby prompting the court to enter **Interlocutory Judgment** as was prayed for Kshs. 413,802/= and Kshs. 251, 920 /= respectively together with costs and interest as against the Defendant.

7. Three and a half months later after the filing of Civil Suits No.21 and 22 of 2013 which had been done on 29/7/2013 that is on 26/11/2013 is when the Defendant filed defenses through its Advocate.

8. Then on 18/12/2013 the Defendant's Advocate filed Notice of Motion Applications dated 18/12/2013 brought under Certificate of Urgency and on 19.12.2013 prosecuted the same seeking that the orders of execution sought be stayed, the exparte judgment entered be set aside and the respective defenses be deemed as validly filed.

9. On 15/1/2014, the above application was compromised by a consent that was entered into by the parties. The court records reads that **"the application dated 18/12/2013 is hereby allowed with costs in the cause as per the letter dated 20/12/2013"** duly signed by Counsels for both parties effectively setting aside the default judgment and staying execution with the orders to apply to both files.

10. The Plaintiff's Advocates then fixed the matter for hearing on 5/3/2014. However, the hearing were adjourned to 7/5/2014 on the Defendant's Counsel's contention that an application filed by the Plaintiff needed to be heard first and seeing that the Defendant had yet to see the said application, it needed time have a look at it and put in the necessary response.

11. However, on 13/3/2014 in the registry, a Bill of Costs dated 11/3/2014 drawn by Eshikhoni Auctioneers was filed in respect the request for judgment of 25/11/2013 and the same fixed for taxation on 16/4/2014 which Bill was consequently resolved by consent between the Defendant's Advocate and the Auctioneer's Advocate at the assessed cost of KSh.79,879.92/= for both files.

12. Subsequently, the Defendant filed yet another application dated 6/6/2014 seeking a declaration that the execution by Eshikhoni Auctioneers was irregular and that the Plaintiff be ordered to pay the Auctioneers' costs assessed above or in the alternative both the Plaintiff and Defendant to bear the costs equally.

13. From a reading of the Ruling of 19/ 11/2014 on the application dated 6/6/2014 by the Magistrate, I observe that prior to the consent of 15/1/2014 while parties were still negotiating, the Plaintiffs and Respondents in the Application through their Advocate vide a letter dated 5th August, 2013 undertook not to take any steps of execution during the period of negotiations.

14. However as the negotiations were taking too long to materialize, the Plaintiffs/Respondents grew weary and by a letter dated 19/11/2013 gave the Defendant/Applicant seven (7) days to file their defence, upon which, six (6) days later the Plaintiff /Respondent requested for judgment in default yet again and on the basis of that, judgement was entered on 25/11/2013, and on the basis of the latter instructions were given to the Auctioneers who moved in to execute decree.

15. The Defendant/ Applicant (**Pacis Insurance Company**) through its Advocate in retrospect, contended that the judgement was entered on 25/11/2013 yet according to the seven (7) days within which it was to file the defence, the seventh day was on 26/11/2013 to which it acknowledges having filed it on the very day that is 26/11/2013. Further contention by the Appellant was that the judgment obtained in favour of the Plaintiff/ Respondent was irregularly obtained, thus unlawful and that the Plaintiffs/Respondents herein should bear the Auctioneers' costs assessed at Kshs. 79,879.92/=.

16. The Auctioneer's Counsel on the other hand contended that there was a **consent** entered into between the Defendant/Applicant Appellant herein and the Auctioneers dated 7/5/2014 and that the Applicant in their application of 6/6/2014 offered to meet a half of the Auctioneer's costs which accordingly means admission of liability on the part of the Applicant. The Auctioneer's Counsel in further argument paused a question that **"the question that begs for answer is if they want the respondent to pay the Auctioneers cost, what was the basis of the consent on 7/5/2014"**.

17. Further, the Replying Affidavit by Kennedy Shikuku T/A Eshikhoni Auctioneers in response to the application of 6/6/2014, deposes that he received Warrants of Attachment and Sale dated 11/12/2013 and 10/12/2013 for the suits respectively to levy execution against **Pacis Insurance Company Ltd** to which he proceeded to the Judgment Debtor's offices in Kisumu to proclaim on 18/12/2013 but on the 19/12/2013 he was served with orders of stay.

18. He further deposes that on 11/3/2014 he filed his Bill of Costs. He states at paragraph 9 of the Replying Affidavit that the application was improperly drawn since the Applicant voluntarily of his own volition entered consent on payment of the Auctioneers' costs and could now not turn round and say he could not pay or does not know who is to pay further deposition was that it was a ploy by the J.D to deny or delay the Auctioneers earning from the fruits of their sweat.

19. Though the Applicant/Appellant herein in counter argument insisted that the **consent was as to costs only and not for payment**, to quote verbatim **"I want the court to note that there is a difference for the assessment of auctioneers' costs and consent to pay the auctioneer's costs"**.

20. Thus the main bone of contention as observed by the Magistrate was as to who is to pay the Auctioneers' costs that were taxed by consent between the Defendant's counsel and that of the Auctioneer and the Court posed a question **'why tax costs for a Third Party, who is not party to the consent'** and held that by taxing the Auctioneers' costs, the Defendant/Applicant/Appellant herein implied that they were ready to pay the same and were thus estopped from transferring or denying responsibility, effectively dismissing the application dated 6/6/2014 hence this appeal against the orders of the Trial Magistrate that the Defendant/Appellant herein should bear the Auctioneer's charges.

21. The Defendant/Applicant **Pacis Insurance Company** secured stay orders of execution of the Auctioneer's costs vide the application

dated 26/11/2014, then moved this court through a Memorandum of Appeal dated 28/11/2014.

22. The grounds of the appeal have already been stated above, and reliance is placed on the Supporting Affidavits of Counsel for the Defendant/Appellant and one Joseph Mwai, Legal Officer of the Defendant Company in the Lower Court files in respect to the application of 6/6/2014 which contentions reiterate the above stated averments as elucidated by the Defense/Appellant's Counsel in prosecuting the application alongside what was captured in the lower court's ruling.

23. This Appeal was canvassed by way of written submissions filed by each of the Parties Advocates on record.

24. The Appellant- Pacis Insurance Company Limited- in its twin submissions filed on 24/8/2017 reiterated the arguments or submissions fronted during their Prosecution of the application on 6/6/2014 in the Lower Court as stated above and added that the learned Trial Magistrate grossly misdirected himself in holding that the Appellant should bear the Auctioneers' charges yet evidence showed that the execution was irregular in that vide the consent dated 15/1/2014, parties to UKWALA PMCC NO.21 and 22 OF 2013 agreed to have the Interlocutory-Judgment set aside and both parties were subsequently having negotiations to have the matters settled out of court.

25. It was argued in the submissions that the irregularity is based on the fact that by the time the Appellant was filing its defence, it was doing so rightfully as it was still within the time limit and that the Respondents - **MARTINE ODIEK ODHIAMBO** and **ERICK OTIENO OOKO** through their Advocates requested the judgment in circumvention of the existing consent.

26. The Appellant in addition to its submissions further, questioned the conduct of the Respondents and stated that such conduct isn't one to be expected of a party to an agreement; that agreements are usually in good faith and ought to be abided by, adding that had the judgment been legal and regular, the story would be different and in this regard, relied on the case of **KERICHO HCCC NO.27 OF 2012 ROSE CHEPKORIR VS MWINYI MOHAMMED RIVA & ANOTHER [2015]eKLR** where the Court ordered the Plaintiff/ Respondent to bear the Auctioneer's fees on the basis that the judgment was irregularly obtained.

27. In further submission, the Appellant did not dispute that the Auctioneer is entitled to fruits of his labour but their point of departure is on who ought to pay the Auctioneers' charges and still reiterated that ***the consent entered into on the bill of costs of the Auctioneers was based on the amount payable and not on who should have paid it.*** Further submission was that it being a party in the suit, it was aware that the Auctioneers' Bill of Costs as was presented wasn't supposed to be prejudicial to its interests.

28. In addition to the foregoing it was submitted that **Pacis Insurance Limited** through its Advocate chose not to oppose the Bill of costs as the same was not supposed to be paid by it, the Appellant but rather by the Plaintiff, and contended further that that is the reason why they remained silent on who was to pay the Auctioneer's costs.

29. The Appellant's Counsel maintained that assessing a Bill of Costs is different from consenting to pay the said costs.

30. It was submitted that the Learned Magistrate erred both in Law and in fact by ignoring the fact that the Application dated 18/12/2013 was allowed by consent and that prayer 5 of the Application stated that the costs of the application be paid out by the Plaintiffs/Respondents then and that to that extent the Plaintiffs then ought to have been the ones to pay the Auctioneers' costs.

31. Further the Trial Magistrate was faulted for not deeming it fit and just to consider the legality of the judgment that provoked the instructions given to the Auctioneer and a submission made that in any event, the said judgment was delivered prematurely.

32. The Auctioneer filed written submissions dated 31/1/2018 stating in summary that the Plaintiffs filed Civil Suits No. 21 and 22 of 2013 dated 25th day of July, 2013 on 29/7/2013 against Pacis Insurance Limited to enforce settlement of the judgment they had earlier obtained against the Appellant's insured in UKWALA PMCC no 11 of 2013. The Appellant then filed a Memorandum of Appearance dated 31st of July 2013 but failed to file defense within 14 days as stipulated in law, the Plaintiff now Respondent through its Advocate filed for request of judgment in default of defense on 25/11/2013 which the court endorsed and Notices of Entry of Judgment filed on 29/11/2013 and served. Followed by the Warrants of Sale of Property in execution of decree for money duly signed by the Principal Magistrate Ukwala on 11/12/2013 and 10/12/2013 for the suits respectively.

33. That on 26/11/2013 the Appellant filed a statement of defence out of time after judgment in default of decree had been entered. It was submitted in contention that the defence remained an irregular document on the Court file with no force of law, and that the court then proceeded to issue Warrants of Execution against movable property of the Appellant.

34. That the Auctioneer proceeded to proclaim the Appellant's property on 11/ 12/ 2013 and it is those warrants that prompted the notice of motion application dated 18/12/2013. They further contended that amongst the prayers sought in the application dated 18/12/2013 they never mentioned any prayer in relation to the Auctioneers' costs although the appellant complained that its properties had been proclaimed.

35. It was further submitted that the consent compromised the application of 18/12/2013 and that as per prayer 5 of the said application, it was costs of the application that were to remain in the cause. Further, that their bill taxed on 7/5/2014 was by consent with Counsel for the Appellant who prayed for stay of execution for 30days.

36. The Auctioneer's submissions further opposed the grounds of appeal by stating that the Auctioneer cannot be denied his costs on the basis that the judgment was irregular, stating that the execution process was not irregular as it is the appellant who failed to file defence within the stipulated time as provided for by **Order 7 Rule 1 of the Civil Procedure Rules** and that the appellant only filed its defence 86 days after the date of entering appearance; the reasons for delay allegedly caused by negotiations which according to the auctioneers, does not offer a satisfactory explanation for the reasons of delay because the Appellant had failed to demonstrate how the existence of negotiations impeded it from filing its defence.

37. The Auctioneers submitted further that the Appellant had not shown how the Court and the Auctioneer would have been aware of the alleged negotiations and correspondences between Counsel for the Appellant and the 1st Respondent and additionally, that there was no pronouncement by the Court that the judgment in default and the execution process were irregular.

38. **On ground 2**, it was submitted that the Appellant having entered appearance on 2/8/2013 and filed his defence on 26/11/2013 after judgment in default had been entered, “it was not justified to state that the Appellant had filed its defence “in time” and that its prayer 4 of the application dated 18/12/2013 to have its filed defence to be deemed as properly filed was a clear admission that the Appellant’s defence was never filed in time as required by law hence the appellant is estopped by **Section 120 of the Evidence Act** from raising **ground 2**.

39. **On ground 3**, in reference to the consent of 15/1/2014, the Auctioneers submitted in reiteration that the costs related to the application and that never at any one point were Auctioneer’s Costs related therein and that its (**Pacis Insurance Limited**) pleading in the Lower Court never sought directions on who was required to pay the Auctioneer’s Costs. They further contended that, “*in any event a consent is a contract that binds the concerned parties*” being in this case the Appellant (**Pacis Insurance Limited**) and the Respondent (Respondents - **Martine Odiek Odhiambo and Erick Ooko**) hence the consent cannot be used to bind the Auctioneer nor deny him his costs. It was further submitted that “*a consent should be construed for what it actually is and between the parties ascribing to it.*”

40. **On ground 4** it was submitted that the appellant had failed to distinctively argue the ground for it to elucidate a response.

41. On the other grounds not contained on the face of the appeal but as can be deduced from the statement, the Auctioneer and 2nd Respondent submitted that **ground 5 to 9** concedes that **the Auctioneer is entitled to fruits of his Labour; however that the point of departure is on who ought to have paid the Auctioneer’s charge**” . On this it was submitted that the Appellant is completely misdirected as to the proper Law that Governs the recovery of **Auctioneer’s Costs. Rule 7 of the Auctioneers Rules** which provides that the Auctioneer shall recover his costs from the Judgment-Debtor who in this case was **Pacis Insurance Limited** and only when the J.D cannot be found shall he fall back on the Judgment-Creditor, was relied on.

42. **Responding to Ground 6 which alleges that “for the Plaintiff in Ukwala PMCC No. 22 of 2013 to file his request for judgment before the expiry of the 7 day period is circumvention of the agreement between the parties for reasons...” the Respondents submitted** that the Appellant’s defence was filed in contravention of **Order 7 Rule 1 of the Civil Procedure Rules** and that even if a consent was entered into which excused the Appellant from filing its defence, then such consent or contract was entered into in contravention of **Order 7 Rule 1** and it amounts to an illegal contract whose terms cannot be used to injure the rights of the Auctioneer. Further, that the consent in regard to the 7 day grace period was never filed in Court and therefore privity of contract would prevent the Appellant from relying on the unfiled letter that gave an ultimatum for the defence to be filed within 7 days.

43. **On Ground 7 where it is alleged that “ it is due to the mischief of the plaintiff deciding to instruct an Auctioneer even when they know that the judgment was irregular and illegal that forms the basis for us to state categorically that they ought to pay the Auctioneer’s fees,” it was submitted that** when an Auctioneer wants to Execute Court Warrants he would receive instructions from the court and not from the Plaintiff and once proclaimed, the property ceases to be the property of the J.D and becomes the property of the court and that an Auctioneer is an officer of the Court thus receives instructions from the Court not the Plaintiff as was argued. Reliance was placed on the case of **NAIROBI HCCC NO 1818 OF 2000 NIC BANK LTD VS MAJANI MINGI & 2 OTHERS**.

44. **On Ground 8 that...the consent order recorded on 5th may 2014 is silent on who is to pay the Auctioneer’s costs. Therefore, it cannot be interpreted to be a case where we have admitted liability to pay the Auctioneer’s charges,” it was submitted that** parties recorded a consent for Auctioneers costs between the Appellant and the Auctioneer with a stay of 30 days at the request of the Appellant meaning the period of stay was to enable the Appellant through its Advocate to get time within which to pay the costs and even if the consent was silent on who was to pay the costs, **Rule 7 of the Auctioneers Rules** provided the answer to the gap.

45. The Respondents attacked the conduct of the Appellant stating that the Appellant failed to seek directions beforehand on who was to pay the Auctioneer’s costs, proceeded to tax and enter into consent on quantum and it even sought stay of 30 days within which it anticipated that the Auctioneer would proceed to attach the property of the Appellant if the Consent Order was not adhered to.

46. **On Ground 9**, the 2nd Respondent (Auctioneer) submitted that the application filed in court to direct on who was to pay costs was entirely incompetent for having been filed after the assessment of Auctioneers Costs and that once the court made the order on quantum, the court became *functus officio* and further added that **Rule 55 of the Auctioneers Rules** provides that any party aggrieved by the decision of the Magistrate upon conclusion of taxation must appeal to the High Court through a Chamber Summons hence the process of taxing the bill ended with the Consent Order.

DETERMINATION

47. I have carefully considered the appeal herein, the submissions by both Parties Counsels and the authorities relied on.in my view, the issues that flow for determination from the arguments above are:

i. Who ought to bear the costs of the auctioneer if court finds that they are entitled?

48. There are other ancillary questions that the court will endeavor to answer such as: The essentials/ contents of a consent, what is captured in there remains as that and one cannot insinuate facts not within the consent as part of the consent: Gentleman’s understanding or law, equity: Rules of procedure vs agreement:

Costs in the cause: Is the Auctioneer entitled to costs, was the execution irregular.

49. The Court notes that on 16/4/2014 Counsel for Defendant/Appellant herein intimated to court that there was a Preliminary Objection filed on 14/4/2014 whose main issue was on who was to bear the Auctioneers Bill of Cost. Some of the issues raised in that Preliminary Objection were: When is a party allowed to file request for judgment: Who can enter into a consent and on what basis: Do all grounds of an application allowed by consent and was the Interlocutory-Judgment irregular and what was the effect of such judgment irregularly entered.

50. The letter dated 19/11/2012 and received by the Advocates of the Defendant on 21/11/2012 is the one that talks of the 7 day's notice and it says "***we refer to the above matter and apparently you appear clearly disinterested in negotiating this matter. In view of that, we hereby give you a seven (7) day's notice that if we fail to hear from you substantively on settlement, we shall file requests for judgment and proceed with execution proceedings without any further reference to you whatsoever***". Vide a letter dated 5/8/2013 by the Plaintiff's Advocate, it refers to a letter dated 1/8/2013 from the Defendant, to which the Plaintiff responds by stating "***we are amenable to an out of court settlement and await proposal on settlement.***" they also confirmed that the Plaintiff will not take precipitate steps in the matters during the period of negotiations.

51. In the Replying Affidavit sworn by Kennedy Shikuku T/A Eshikhoni Auctioneers Paragraph 9 of the Replying Affidavit is the matter of concern here where he deposes clearly that the application is improperly drawn since the Applicant voluntarily of his own volition **entered consent on payment** of the Auctioneers cost and cannot now turn round and say he cannot pay or does not know who is to pay, further adding that it is a ploy by the J.D to deny or delay the Auctioneers earning from the fruits of his sweat.

52. Therefore the issue in question is '***why tax costs for a Third Party, who is not party to the consent?***' It should be noted that, by the time the Defendant /Appellant herein was moving the Court on 18/12/2013, Warrants of Execution had already been issued on 10/12/2013 and were already being acted upon by the Auctioneers.

53. In my humble view, the application dated 6/6/2014 by the Appellant was an afterthought as the Appellant had fully participated in the taxation of the Auctioneers costs and entered a consent and even sought for stay of 30 days only to turn around and purport to seek directions on who should pay the same costs. If the Appellant felt that it was not bound to pay the taxed costs it should first have sought orders as to who should pay the same before consenting to the taxation and arriving at a figure by consent and seeking for stay of execution only after knowing who would settle the said costs.

54. The consent of 15/1/2014 reads: "**by consent the defendant's application dated 18/12/ 2013 is hereby allowed with costs in the cause**" the caveat with costs in the cause is distinguishable from costs to the Defendant or Plaintiff whichever be the case . Generally, "**costs follow the event**" for most civil actions. This means that the costs of an action are usually awarded to the successful litigant. However, any award of costs is at the discretion of the Court and the costs awarded may include fees, charges, disbursements, expenses and remuneration.

55. For the above reasons, I find and hold that the trial Magistrate did not err in holding that the Auctioneer's costs were payable by the Appellant herein. Accordingly, I uphold her finding and holding and dismiss this appeal with costs to the Respondent/Auctioneer. This Judgment and Orders shall apply to HCCA No. 15 of 2016 Mutatis Mutandis.

Dated, Signed and Delivered at Siaya this 27th day of August, 2018.

R.E.ABURILI

JUDGE