REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC NO. 80 OF 2017

WANYONYI CHEKERIE..…....1ST RESPONDENT/PLAINTIFF

VERSUS

JOHN MASAI……...…..DEFENDANT/APPLICANT

ARCHIBALD WEKESA NYUKURI…...…….2ND RESPONDENT

KENNEDY SHIKUKU T/A

ESHIKONI AUCTIONEERS……...……3RD RESPONDENT

RULING

(On setting aside an order of dismissal of Application to set aside judgment)

THE APPLICATION

1. The Applicant brought a Notice of Motion dated **1/07/2021**. It was filed on **05/07/2021**. It was brought under **Sections 1A**, **1B**, **3**, **3A** and **63(e)** of the **Civil Procedure Act**, Chapter 21 of the Laws of Kenya and **Order 22 Rules 25**, **Order 45 Rules 1** and **2**, and **Order 51 Rule 1** of the **Civil Procedure Rules**, **Article 159** of the **Constitution** of Kenya, **2010** and "all other enabling provisions of the law." The Applicant sought the following specific orders:

1. **...spent**
2. **…spent**
3. **…spent**
4. **That the order made on 3/3/2020 dismissing the Defendant's Application dated 14/08/2019 be vacated and set aside and the said Application dated 18/08/2019 be reinstated for hearing on merit.**
5. **That the Respondents be allowed to file a further Affidavit in support of the Application and the directions on hearing be issued (**sic**).**
6. **That the Respondents give account for the payment in terms of livestock and money received from the Applicant**
7. **That the Respondents be ordered to deposit in Court the payment received from the applicant in execution of the decree of this Court until further orders of the Court.**
8. **That the costs of the application be paid by the Respondent.**

2. The Application was based on numerous grounds and supported by an Affidavit sworn by the Applicant and a Further Affidavit sworn by him later. It was opposed through two sets of Affidavits, one sworn by learned counsel on behalf of the **1st** Respondent and another by the **3rd** Respondent. I summarize the contents of them all under the following heads.

SUPPORTING AFFIDAVIT AND GROUNDS

3. The Application was supported by the Affidavit of one John Masai Kinuthia sworn on **01/07/2021** and a number of grounds which were given on its face. Since the depositions in the Supporting Affidavit repeated most of the points in the grounds in support of the Application, I will first summarize the grounds.

4. The grounds were that the Applicant had brought an application dated **14/08/2019** whose import was to set aside the judgment of the Court. The Application was dismissed on **03/03/2020**. The earlier Application sought also a prayer for the Applicant/Defendant to file his defence and defend the suit. The Applicant stated that he was not informed of the dismissal of the said application until **24/06/2021** when he was arrested in execution of the decree of the court and costs. The other ground was that on **26/01/2021** he had been served by the **2nd** Respondent with a Proclamation of the same date, a certificate of costs for **Kshs. 190,505/=**, warrants of attachment for **Kshs. 256,955/=** and an auctioneers' fee note amounting to **Kshs. 140,286/=**.

5. He stated that after that the **2nd** Respondent attached five heads of cattle each valued at **Kshs. 50,000/=** and he demanded a further sum of Kshs. **80,000/=** which the Applicant obliged and paid. That upon that payment, he was informed by the **3rd** Respondent that he had fully paid the decretal sum and would not be followed on the decretal sum and consequential orders. However, he was arrested on **24/06/2021** in purported further execution of the decree.

6. He termed the arrest illegal and unconstitutional since all the decretal amount and costs were paid by him. His other ground was that since he had not agreed with the auctioneer on his costs the auctioneer had to tax his bill in Court for his sum to be due. He then stated that he had a good defence with triable issues and that justice demanded that the Respondents give account of the sums they received from him and also that the application be allowed and the matter be determined on merit. The supporting Affidavit contained nothing more than a repetition of the content of the grounds.

THE RESPONSE

7. The Respondents filed two Replying Affidavits both sworn on **12/07/2021**. In the one sworn by learned counsel, Karani Aggrey, the deponent swore that the Applicant had been served with summons to enter appearance but failed to file defence hence the matter proceeded *ex parte* against him. He also deponed that when the Applicant filed the Application dated **14/08/2019** he was directed to file submissions but did not do so hence the Application was struck out one and half years before the instant application and the Applicant was in no hurry to apply for a review of the orders of the Court. He then stated that the Applicant had exhibited indolence which was not explained and the Application he sought to reinstate was hopeless and unmeritorious. He swore that the Applicant was still indebted to both the Respondent and Auctioneer as per the decree less the sum of **Kshs. 179,000/=** he had paid and the unpaid fees of **Kshs. 140,286/=** respectively.

8. The **3rd** Respondent swore his Replying Affidavit the same date. In it he stated that he had been instructed by the **1st** Respondent to recover **Kshs. 256,955/=** and on **26/1/2021** he proclaimed property of the Applicant. Of that were seven (**7**) indigenous cows and five (**5**) calves. He swore that the Applicant did not pay the decretal sum hence execution was levied and that at the time of attachment he only found **two (2)** mature cows and **two (2)** calves which were sold after **72** hours of attachment when the Applicant failed to redeem the cows upon being served with notice to do so. He swore that the animals which were of good quality had been moved by the judgment debtor from the compound by the time of attachment hence he could not attach them.

9. He stated further that the attached animals having been of poor quality fetched only **Kshs. 49,000/=**. He deponed further that by that time the Applicant had paid only **Kshs. 130,000/=** via M-pesa totaling to **Kshs. 179,000/=,** which M-pesa payment he amended to **Kshs. 140,000/=** in the submissions made by learned counsel. He stated that what the animals fetched was the most reasonable price they could and not **Kshs. 50,000/=** for each as the Applicant alleged. He then deponed that his fees of **Kshs. 140,286/=** was still outstanding and there was no justification for paying into Court the sum already of **Kshs. 179,000/=** paid by the Applicant leaving a balance of **Kshs. 77,955/=**. He then stated that the Applicant was still indebted to him and the **1st** Respondent to the extent shown and prayed for dismissal of his suit.

FURTHER AFFIDAVIT

10. On **29/07/2021** the Applicant filed a Further Affidavit sworn on **28/07/2021** in response to the two Replying Affidavits. In respect to the Replying Affidavit by learned counsel, he stated that Mr. Karani Aggrey Advocate who swore one of the Replying Affidavits, was not competent to do so and that the Affidavit was full of falsehoods. He denied being indebted to the Plaintiff or the auctioneer, having made full payment of the decreatal sum and costs. He then deponed that he instructed his Advocates previously on record believing they would update him but they did not. He stated that it was admitted by the said Mr. Karani Advocate that his previous Advocates failed to act, and that counsel's mistake should not be visited on him. He denied being indolent and stated that he had sufficiently explained his delay in bringing the instant Application. He insisted he had a good defence which raised triable issues.

11. In response to the Replying Affidavit by the **3rd** Respondent, the Applicant deponed that auctioneers neither presented to court their bill of costs nor did they serve him with and agree on their costs. He the attacked the bill the auctioneers relied on as being exaggerated and having double charges. He stated that the auctioneers never followed due procedure in attaching his cattle and they never conducted a public auction. He then deponed that he paid **Kshs. 140,000/=** to the **2nd** Respondent as evidenced by M-pesa statements and not **Kshs**. **130,000/=**.

12. He reiterated that his head of cattle which he now stated were four and not five as sworn in the earlier Affidavit were each valued **Kshs. 50,000/=** hence amounting to **Kshs. 200,000/=** which sum would total **Kshs. 340,000/=** when added to the **Kshs. 140,000/=** paid via M-pesa. He deponed that his cows were of good health and would have fetched the sums he claimed hence he needed an account of their sale to be rendered and in the meantime all sums be deposited in Court. He repeated the point of his Application being meritorious.

SUBMISSIONS

13. When the Application came up before me for *inter partes* hearing, this Court gave directions on its service and its disposal of it by way of written submissions. It was mentioned on **14/10/2021** to confirm compliance and when that was found not to have been done, further on **30/11/2021**. By that date, the Applicant had filed his submissions dated **15/10/2021** and filed on even date while the **1st** Respondent filed his dated **15/11/2021** on **23/11/2021**.

14. In the Applicant's submissions, learned counsel reiterated the contents of both the grounds in support of the Application and the affidavits in support. He also submitted that failure to move the Court in time was due to his Advocate's mistake. He submitted that counsel should not swear an Affidavit in contentious matters. He relied on the case of ***Isaac Ngugi v Overseas Courier Services (K) Ltd 1998 eKLR as cited in Regina Waithira Mwangi Gitau v Bonface Nthege [2015] eKLR.*** He then repeated that **Order 45 Rule 1** of the **Civil Procedure Rules** provided for review of a Court's judgment for any other sufficient reason on an application made without unreasonable delay. He then submitted that the Application sought to be revived was not hopeless and it provided for filing of a good defence. He repeated the other contents of his two affidavits.

15. The **1st** Respondent submitted by repeating the contents of the Replying Affidavit. He only stated further that the cows were sold at **Kshs. 49,000/=** as per the Return filed in Court by the auctioneer and that it was true that the Applicant had paid a sum of **Kshs. 140,000/=**, all giving a sum of **Kshs. 189,000/=**. He stated that the **four (4)** cows were indigenous and unhealthy and that is why they fetched that small sum. He then summed it by stating that Mr. Karani Advocate had only deponed to matters he had become acquainted with while handling the matter on behalf of his client.

DETERMINATION

16. I have carefully considered the Application, the affidavits in support of the Application and the grounds in support thereof. I have also read and analyzed the Replying Affidavits and the submissions by both counsel as well as the law. Four issues commend to me for consideration. They are:-

(a) Whether the Applicant satisfied the requirements for vacating and setting aside the order made on 3/3/2020.

(b) Whether the Applicant should be allowed to file a further Affidavit in support of the Application dated 14/08/2019

(c) Whether the Respondents should be ordered to give account of the payment received from the Applicant and deposit it in Court.

(d) Who should bear the costs of the instant Application?

17. I begin by analyzing the first issue and the law thereon. However, as I do so, I point out that the decision on the second issue is dependent on the success or otherwise of the first. Thus, its determination will be in summary depending on the outcome of the first.

(a) Whether the Applicant satisfied the requirements for vacating and setting aside the order made on 3/3/2020

18. To start an analysis of the first issue, it is worth of note that the Applicant brought the instant Application after allegedly making payments towards the satisfaction of the decree of this Court. This Court gathered the facts of that action from both the Applicant's own Supporting Affidavit and Further Affidavit, and the Replying Affidavits thereto. I would summarize the evidence of that immediately herein.

19. At paragraphs **8** and **9** of his Affidavit sworn on **01/07/2021** the Applicant deponed that after the proclamation of **26th January, 2021** and attachment of his head of cattle he paid the sum of **Kshs. 140,000/=** and in total, in comparison with the sum he expected from the sale of his animals, he paid a total of **Kshs. 340,000/=**. At paragraph **10** he swore that after the payments he was informed by the auctioneers that he had paid the entire sum ordered by the Court and would not be followed later. He was only cajoled from his quiet peaceful life by the warrant of arrest executed against him in **June 2021**. As stated above, although the fact of full payment was disputed by the Respondents, they too agreed that he had paid the sum of **Kshs. 189,000/=**.

20. In the circumstances, what do the actions of the Applicant summarized in the paragraph above imply? They mean that the Applicant was in agreement with the decision of the Court, that is to say both the judgment and dismissal of the Application dated **14/08/2019**, which he now turns against to challenge. By his actions he acquiesced to the decision of the Court. His actions sealed his fate at that point. Since he had neither Appealed against the decision of the Court nor applied for its review immediately he became aware of it, he cannot be heard to say that he has now changed his mind.

21. The demand for more payment of the sum on the decretal sum and auctioneers' fees is therefore no good reason to seek a review and setting aside of the earlier Court orders. By the time he made the payments without questioning the validity or otherwise of the orders, the Court became *functus officio* on the issues thereon and to that extent, the matter at that point cannot be reopened. Litigation must come to an end at that point.

22. The law on *functus officio* of a court of law is now settled. By the term *functus officio* it means the officer (of the Court for that matter) has fully performed his or her office or work: he has finished all he is required to do and cannot therefore do anything more. That reminds this Court of an analogy for ease of understanding, for those who believe in the Holy Book: the great phrase in the Holy Bible, "It is finished" (*See*, John **19:30** of KJV where, it is written that after Jesus took the vinegar he cried that way and bowed his head and gave up his spirit). He did not do any other thing or work afterwards. Not even being touched until he would ascend to the Father (See John **20:17**).

23. Thus, once the process is finished, *the work of the Court ends*. The Court cannot go back to the merits of its decision until a higher Court orders otherwise. I hope the parties herein will now understand what happened immediately the Applicant decided not to challenge the

decision of the Court and instead paid the Respondents in response thereto.

24. For further clarity, at the time the Applicant made the first step towards going the way of making payments towards the realization of the decree of the Court, without any order of the Court to do so on a condition, for instance, to make the payments as security for interim performance of the decree, he perfected the decree. All that the Court had decided on up to that point became sealed as right or correct and accepted as perfect. It cannot be reopened on merits again. By comparison, when the Court perfects its work by completing it, it becomes *functus officio*. It is not permitted to reconsider that work on merits whatsoever. A number of authorities will illustrate this principle better.

25. On it, the Court of Appeal in ***Kenya Broadcasting Corporation v Geoffrey Wakio [2019] eKLR***, stated as follows:-

> ***"To sum up, a court is functus when the proceedings are fully concluded and the judgment or order has been perfected. This, however, does not foreclose proceedings which are incidental to or natural consequence of the final decision of the court including any other matter on which the court could exercise supplemental jurisdiction. Therefore, in determining whether the court is functus officio one should look at the order or relief which is being sought in the case despite that judgment has already been rendered by the court."***

26. Also, in ***Dickson Muricho Muriuki v Timothy Kagondu Muruiki & 6 others [2013] eKLR (Civil Application Nyr 21 of 2013 (UR 5/2013),*** the same Court rendered itself on the issue as follows:-

> **"On the issue of whether this Court has jurisdiction to stay execution of its orders or stay any proceedings after the final delivery of its judgment and pending the hearing and determination of an intended appeal to the Supreme Court, we are of the view that once this Court has pronounced the final judgment, it is *functus officio* and must down its tools. In the absence of statutory authority, the principle of *functus officio* prevents this Court from re-opening a case where a final decision and judgment has been made (*emphasis mine by way of underline*). We bear in mind that in the new constitutional dispensation, most cases will end at the Court of Appeal and it is inadvisable for this Court to be able to issue stay orders after delivery of its judgment. We remind ourselves that the principle of *functus officio* is grounded on public policy which favours finality of proceedings. If a court is permitted to continually revisit or reconsider final orders simply because a party intends to appeal to the Supreme Court or the Court may change its mind or wishes to continue exercising jurisdiction over a matter, there would never be finality to a proceeding. The structure of the Kenyan courts is that there must be finality of proceedings at the Court of Appeal in those cases where certification to the Supreme Court has not been granted. Allowing this Court to issue stay orders after judgment would be detrimental to the concept of finality in litigation within hierarchy and structure of the Kenyan courts."**

27. Additionally, in ***Telkom Kenya limited v John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya limited) [2014] eKLR,*** the same Court held that -

> ***"Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon….***
>
> ***The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued."***

28. And in ***Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others [2013] eKLR,*** the Supreme Court cited with approval the following excerpt from the article ***"The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law" (2005) 122 SALJ 832*** authored by Daniel Malan Pretorius. The excerpt reads: -

> ***"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."***

29. Finally, in ***Nakuru HCCC No. 275 of 1998, Dhanji Jadra Ramji -Vs- Commissioner of Prisons & Another*** the judge expressed himself as follows;

> ***"Having discharged its duty this court is therefore functus officio, defined in the Black's Law Dictionary, Ninth Edition as "[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."***

30. The above authorities bring out the meaning of and import that once the Court has finished its work on the merits of an issue, there remains no more work for it to do on that, except as provided for by law in the exceptions that exist. It downs its tools save in situations where there are consequential steps to take as a result of that decision or clerical errors to be corrected in terms of **Section 99** of the **Civil Procedure Act.** In the instant case, it is this Court's view that once the Applicant moved to perfect the decree of the Court by paying the sums which were due therein, and he admitted to that fact that he was informed, whether correctly or wrongly, that he would not be followed over the same and he accepted it, he cannot go back to the merits of the court's decision that led to that action he took.

31. The second point that arises from the first issue is that the Applicant moves the Court to vacate or set aside the orders of **03/03/2020** based on **Order 22 Rule 25** and **Order 45 Rule 1** of the **Civil Procedure Rules**. In regard to **Order 22 Rule 25**, the Applicant did not

explain its relevance. He did not bring out the fact of the existence of a suit pending between him and the decree holder herein, to warrant a stay of execution of the judgment of this Court pending the determination of that suit. This Court will therefore not dwell on a non-existent fact.

32. His main argument on the one hand, as explained by way of his written submissions, is that by the Court's ruling of **03/03/2020** his Application dated **14/08/2019** was dismissed for non-filing of submissions and that the former Advocate failed to apply for its reinstatement, by which mistake of Advocate he should not be punished. He invoked **Article 159(2)** of the **Constitution** to cure that 'technicality'. The Respondents on the other hand stated that the Application was struck out for failure on the part of the Applicant to file submissions. These two positions are fallacious or erroneous and require that the record ought to be made straight by looking at what took place before and at the delivery of the ruling challenged.

33. On **14/08/2019** the Applicant herein filed the Application dated the same date. On **11/10/2019** the Respondent filed a Replying Affidavit sworn on **9/10/2019** in response thereto. On **14/10/2019** the Court directed parties' counsel who were present in Court to file submissions on the Application within **14** days apiece. On **14/11/2019** the Respondent's counsel confirmed the filing of their submissions while the Applicant's counsel prayed for seven (**7**) more days to file theirs. A ruling date was given, with a rider that the Applicant's file the submissions within the seven days prayed for. On **03/03/2020** the ruling was delivered in open Court the presence of both counsel. By the said ruling the Court decided that for reason of non-compliance of the orders regarding submissions the defendant had failed to prosecute his Application hence it was dismissed with costs.

34. I have reproduced the record for reason of grounding my finding that the Application was considered on merits. Once the decision was delivered, if the Applicant was aggrieved by it, the only way open for him to challenge it was by way of appeal. He never exercised that right. **Order 45 Rule 1** of the **Civil Procedure Rules** which the Applicant relies on to move this Court in the instant Application provides for three reasons by which a party can move the Court for a review in the event that he should have appealed from its decision but did not.

35. However, it has been stated before that review under **Section 80** of the **Civil Procedure Act** or **Order 45** of the **Civil Procedure Rules** is not an alternative or a substitution to appeal. One has to bring himself within the Rule. Where a party is supposed to challenge a decision on appeal he should do so rather than resort to apply for review (See the case of ***re Estate of Japhet Avugwi Luseno (Deceased) [2020] eKLR)***. In essence, when a decision has been made on merits and an appeal is allowed therefrom, an aggrieved party ought to challenge that by way of appeal and not review. Review has its on special place in the civil procedure, and it caters for situations where the three grounds given in the next paragraph exist. A party is not permitted to squander his right of appeal and rise up long after the time and processes of appeal have been closed (or even during the pendency of the time) and purport to move the Court for review to substitute former process.

36. Order 45 Rule 1 of the **Civil Procedure Rules** which provides for applications for review should be read as a whole and not disjunctively. It provides in part at the relevant phrase as follows:-

> ***"Any person considering himself aggrieved-***
>
> ***(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or***
>
> ***(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new…. may apply for a review of judgment to the court which passed the decree or made the order…"***

37. The word "and" joins the two previous phrase (a) and (b) to the three conditions under which an application for review may be made. It therefore means that if a party is aggrieved from a decree from which an appeal is allowed but he has not preferred an appeal therefrom, he can only apply for review if, for instance, he discovers a new and important matter. He is not permitted to move the Court just because he realizes that his chances of appeal are now closed hence he rushes back to the same court to disturb its judgment or order.

38. The above having been stated, **Section 80** of the **Act** or **Order 45 Rule 1** of the **Rules** provide for three grounds a party can move the Court for review as long as he does so without unreasonable delay. They are:-

> **(a) discovery of new and important matter or evidence,**
>
> **(b) some mistake or error apparent on the face of the record,**
>
> **(c) other sufficient reason.**

39. The Applicant herein did not in any way argue about or bring out any point to the effect of having made his Application based on any of the grounds stated above. For that reason, I will not belabor the point to analyze any and each of the grounds vis-à-vis the facts given by the Applicant or his submissions. But I must state that the submissions that the Application was dismissed and an application should have been made for its reinstatement was incorrect. It was not dismissed on a technicality or on account of non-attendance: it was dismissed on merit. That placed the order of dismissal on the path of an appeal not one for reinstatement.

(b) Whether the Applicant should be allowed to file a further Affidavit in support of the Application dated 14/08/2019

40. The next issue to consider is whether the Applicant should be allowed to file a further Affidavit in support of the Application dated **14/08/2019**. From the outset, it is clear that the Applicant having not merited in the first issue cannot merit on this one too. The reason is that since the orders of **03/03/2020** have neither been vacated nor set aside, the Application dated **14/08/2019** is not open for consideration herein. Logically therefore, the issue of filing a Further Affidavit thereon will not arise. In any event, what the Applicant failed to do towards that Application was not the filing of a Further Affidavit but submissions. At no point in time did the Applicant pray for leave to file a Further

Affidavit before asking for time to file written submissions as the record bears it out. The need to file a further affidavit can only be an afterthought.

(c) Whether the Respondents should be ordered to give account of the payment the money received from the Applicant and deposit it in Court

41. The Applicant prayed for orders that the Respondents give account of the money they received from him and they be ordered to deposit the sum in Court. The Applicant did not explain clearly the reasons why he wished the order to issue. However, from his two Affidavits in support of the Application, he deponed that he believed he had paid a sum of over **Kshs. 340,000/=** in execution of the decree of the Court. He then stated that he had been informed by the auctioneer (3rd Respondent) at the time of execution that he had fully paid the sums due on the decree only for him to be surprised on **24/6/2021** by being arrested for failure to pay some more money. He then swore that he had neither agreed with the auctioneer the sums due and payable for his fees nor, as he submitted, had the auctioneer taxed his costs as required by **Section 22** of the **Auctioneers Act** whereas the items charged were both exaggerated and demanded twice. He faulted the Proclamation as having been backdated and the sale of his animals as having not been advertised, contrary to **Rule 13** of the **Auctioneers Rules**. He then swore in the further Affidavit that he was not indebted to the Respondents.

42. The Auctioneer denied the depositions and instead stated that the Applicant had taken away some of the proclaimed heads of cattle to an unknown destination and that those that he attached and sold only fetched **Kshs. 49,000/=**. He stated further that the sum was the sale in addition to the payment of **Kshs. 140,000/=** paid via M-pesa. He then swore that the Applicant still owed **Kshs. 77,995/=** to the judgment creditor besides the auctioneers' charges of **Kshs. 140,286/=**.

43. I considered facts and the law on this issue as submitted by the Applicant. First, I found the Applicant with a number of untruths in many respects. For instance, in the Affidavit sworn on **1/07/2021**, he stated a fact that the Proclamation was backdated. I looked at the Proclamation which he annexed as **JM 3** to his Supporting Affidavit. It was dated **26/01/2021**, the same date of Proclamation. When that date was compared with his deposition at paragraph **6** of the Affidavit where he stated that he was given a proclamation on **26/01/2021** there was no discrepancy in the dates.

44. Again, in paragraph **5** he swore that he was never informed by his previous Advocates about the dismissal of his Application dated **14/08/2019** and did not know it until he was arrested on **24/06/2021** (*emphasis mine*). But, even assuming he did not know of the dismissal, in paragraph **6** of the same Affidavit he swore that he was informed by way of a Proclamation of his properties on **26/01/2021** about the existence of the decree. These were six months before the stated later date. Again, at paragraph **9** he deponed the he paid a sum of **Kshs. 340,000/=** to the auctioneers while in paragraph **8** he swore that he paid **Kshs. 140,000/=**. The two were incorrect. He seemed to explain them away at paragraph **7** where he annexed copies of agreements amounting to **Kshs. 200,000/=** for purchase of cows whose descriptions did not match with the attached and auctioned animals as shown in the warrants returned to Court. Such clear white lies do not avail a party to a matter anything good. If anything, they soil his hands and make him/her easily lose his otherwise good matter.

45. Turning to the law referred to by the Applicant on this issue, **Section 22** of the **Auctioneers Act** does not relate to the acts that took place between **26/1/2021** and the time when the sale of the attached animals was made. The Section provides for cases where an auctioneer is instructed by a seller of properties to sell it for him or on behalf of that seller. Where that is the case, the auctioneer can sue for and recover his charges unless they are specifically agreed to between him and the seller. The Section clearly distinguishes that relationship from the one where an auctioneer sells property by way of auction arising from an attachment. It does not happen that way. The latter is governed by **Section 21** of the **Act** and the **Auctioneers Rules** made under **Section 30**. However, **Rule 18(4)** of the **Auctioneers Rules, 1997** is the one that requires him to give by way of tabulation or an itemized account of the monies he received and paid either to Court or the instructing client in case of sale of movable property. I have perused the Court file and noted that on **01/03/2021** drew an itemized account of the money he received from the sale and his expenditure both of which he filed in Court on **16/08/2021**.

46. One fact the Auctioneers deponed to, which the judgment debtor did not dispute, was that the proclamation made on his heads of cattle was for **seven** (**7**) indigenous **cows** and **five (5) calves**. He deponed further that when he went to attach the proclaimed animals he found that the good ones had been moved away from the home and only **two (2) cows** and **two (2) calves** remained. These were the properties he attached. Granted that the facts were true since they were not disputed or rebutted, I find the actions of the Applicant contrary to **Rule 14** of the **Auctioneers Rules, 1997** hence unlawful. Removal of proclaimed property from whether it is when the proclamation is carried out is an offence. If it happens, it is meant to defeat justice. For that reason, since the actions of the Applicant were such that they ultimately interfered with the Court process to defeat justice, he cannot be heard to be truthful. He who comes to equity must and ought to come to it with clean hands. The Applicant's hands are soiled, and extremely so.

47. In the end I find that to the extent that the Auctioneer has acknowledged receipt of the sum of **Kshs. 140,000/=** from the Applicant and which sum the Applicant too agrees that he paid, and in so far as the Auctioneer filed in Court an itemized account of how much each of the animals he attached fetched from the auction and totaled to **Kshs. 49,000/=**, he has rendered an account of the sums he received from the sale of the attached property hence there is no need to render one once more. But in the interest of justice, I direct that he, the Auctioneer, files and taxes (*inter partes*) his bill on his fees resulting from the attachment for purposes of giving the Applicant chance to express his challenge on any of the items charged or fees claimed and he (the Applicant) pays it or the taxed sum be levied in further execution against him together with any decreatal sum still owing, until payment in full.

(d) Who should bear the costs of the instant Application

48. For the reasons given above I find that entire application is unmerited and fails in totality. But as I have stated at **paragraph 36** above, basing my finding on **Section 3A** of the **Civil Procedure Act**, in the interest of justice, I direct that the Auctioneer files and taxes his Bill of Costs as against the Applicant. Since costs follow the event, the Applicant shall bear the costs of this Application.

Orders accordingly.

Dated, signed and **delivered** at **Kitale via electronic mail** on this **27th** day of **January, 2022.**

HON. DR. *IUR* FRED NYAGAKA

JUDGE, ELC, KITALE.