



IN THE HIGH COURT AT HOMA BAY

CIVIL APPEAL NO. 7 OF 2014

(FORMERLY KISII CIVIL APPEAL NO. 58 OF 2012)

BETWEEN

NASHON KERATI MURIRI T/A

MURIRI AUCTIONEERS APPELLANT

AND

CHACHA MWITA MUCHUNI RESPONDENT

(Being an appeal from the ruling and order of Hon. A. P.Ndege, SRM in Senior Residents Magistrate's Court at Kehancha in Misc. Civil App. No. 1 of 2012 dated 17th April 2012)

JUDGMENT

1. This is an appeal against the ruling and order of the subordinate court dismissing the appellant's ("the auctioneer") application lodged by way of a Notice of Motion dated 19th March 2012 seeking an order, "That the Honourable Court be pleased to assess the auctioneers charges and or/issue order against the respondent for the payment of the applicant charges and/or costs."
2. The auctioneer's case was that he received warrants of attachment and sale from the court under instruction from the plaintiff's advocates in ***Kehancha SRM Divorce Cause No. 2 of 2009, AGM v CMM***. He issued a proclamation and notification of sale in execution of the court order. The auctioneer also attached to the notice of motion a bill for the sum of Kshs. 48,802/= for assessment of his charges.
3. By a replying affidavit sworn on 5th April 2012, the respondent opposed the application on the ground that the auctioneer had not accounted for the things sold and amount realised. Although he admitted that certain items including an ox, two ox ploughs, two sheep, a bicycle, wheelbarrow, yoke and chain all valued at about Kshs 50,000/= were sold, he stated that he paid the decretal sum directly to the judgment creditor's advocate. He further averred that if the auctioneer sold the items stated in the notification, he should inform the court the amount realised.
4. After considering the matter, the learned magistrate held that the auctioneer had not accounted for the proceeds of sale and that since the proceeds were insufficient to cover the charges, then under **rule 7(c)** of the ***Auctioneers Rules***, the charges ought to have been paid by the judgment creditor and not the judgment debtor.
5. The auctioneer now appeals against the decision on the grounds set out in the memorandum of appeal dated 23rd April 2012. The essence of those grounds is that the learned magistrate

erred in holding that the judgment creditor should pay the auctioneer's charges. The auctioneer argues that the learned magistrate ought to have taxed the bill and taken notice of the fact that the properties attached were sold and proceeds paid to the judgment creditor's advocates.

6. The respondent on his part supports the decision of the subordinate court.
7. As this is a first appeal, this court is obliged to reconsider the facts and come to an independent conclusion. As the matter in issue concerns the award of costs, the court should not intervene unless there is an error of principle as award of costs is in the court's discretion.
8. It is worth noting that in the motion before the court, the court was called upon to assess the quantum of charges due to the auctioneer and to decide whether the respondent as judgment debtor should pay the same. The learned magistrate correctly referred to **rule 7** of the **Auctioneers Rules** which provides as follows;

7. A debtor shall pay the charges of the auctioneer unless –

- a) that debtor cannot be found; or*
- b) he has no goods upon which execution can be levied; or*
- c) the sale proceeds are insufficient to cover the charges; in which case the creditor shall pay the charges or the deficiency thereof.*

9. The general rule is that the auctioneer recovers his charges from the judgment debtor unless the circumstances fall within **rule 7** in which case the judgment creditor is called upon to pay the charges. For purposes of this case, the conditions in **rule 7(a)** and **(b)** were not applicable. In his submissions before the subordinate court, the auctioneer stated that he conducted the auction and realized Kshs. 12,000/00 from the sale from which he paid Kshs. 5,000/00 as security expenses and remitted Kshs. 7,000/00 to the judgment creditor's advocates.
10. The auctioneer readily admits that the money recovered, was in the words of **rule 7(c)** of the **Auctioneers Rules**, "*insufficient to cover the charges.*" It follows then that the proper party to pay his charges is the judgment creditor. I therefore affirm the decision of the learned magistrate.
11. Even though the court dismissed the auctioneer's claim, it would have been proper to assess the charges in the event the appeal was successful. Nothing though, turns on this point in view of the finding I have made.

12. The appeal is therefore dismissed with costs to the respondent.

DATED and DELIVERED at MIGORI this 21st day of November 2014.

D.S. MAJANJA

JUDGE

Appellant in person.

Respondent in person.