



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL & ADMIRALTY DIVISION**

**MISC. CIVIL CASE NO. 5 OF 2012**

**PETER W. MWANGI T/A THAMES TRADERS AUCTIONEERS.....PLAINTIFF**

**VERSUS**

**ANN WAIRIMU WANYEKI.....1<sup>ST</sup> DEFENDANT**

**KARANJA KHAHU .....2<sup>ND</sup> DEFENDANT**

**BOTH T/A ST. STEVENS MEMORIAL ACADEMY**

**RULING**

1. In 2010, Anne Wairimu Wanyeki & her school St. Stevens memorial Academy (hereinafter “the Applicant”) were sued by a security firm known as Alibe Security Services in Limuru PMCC No.327 of 2010 for a sum of Kshs.152,841/-. The security firm obtained judgment and sought to execute for Kshs.193,624/-. The execution was levied by Peter Mwangi T/A Thames Traders (hereinafter “the Auctioneer”). It would seem that the amounts on the decree was settled less Kshs.41,889/30. This sum was later on recovered from the Applicant through an execution levied by Nairobi Channels Auctioneers.
2. On 28<sup>th</sup> January, 2013, the Auctioneers through Elan Traders attached the Applicant’s motor vehicle registration No. KAG 167M. The attachment was as a result of warrants issued by this court in these proceedings whereby the Auctioneer had caused his costs of the said, attachment of 2011 to be assessed by the Deputy Registrar of this court at Kshs.44,181/-
3. On 31<sup>st</sup> January, 2013, the Applicant took out a motion on notice expressed to Section 40 Rules 1 & 2 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The motion sought injunctive orders of a prohibitory and mandatory nature together with a prayer to set aside the proceedings before the Deputy Registrar. The Applicants contention is that she had fully paid the decretal sum in the said **PMCC No.327 of 2010**, that the auctioneers cost were fully settled with the Advocates for the said Alibe Security Services through Nairobi channels Auctioneers who were the last auctioneers to have executed against the Applicant, that the Applicant had not been served with the bill of Costs leading to the decree herein, that the costs assessed were excessive in the circumstances of the case and that in any event the Deputy Registrar had no jurisdiction to

- entertain the auctioneers bill of costs as the costs emanated from a matter in the lower court.
4. In his Replying Affidavit sworn on 13<sup>th</sup> March, 213 filed in court and 24<sup>th</sup> May, 2013, the Auctioneer opposed the application. He contended that on 26<sup>th</sup> July, 2011 he attached vehicles belonging to the Applicant, that he was owed auctioneer's costs as a result of the said attachment. That the application was incompetent as it was brought under wrong provisions of the law, that there was no appeal before court in terms of Rule 55 (4) of the Auctioneers Rules, that the Applicant was obliged to pay the costs that had been assessed by this court which was in any event reasonable.
  5. The auctioneer further contended that the Deputy Registrar had jurisdiction to tax his bill, that the Applicant had been duly served with the due process relating to the taxation and that there was no need to issue or serve the Applicant with a demand letter fro said costs. The auctioneer urged that the application be dismissed.
  6. Having carefully considered the Affidavits on record, the written submissions and the authorities relied my take of it is as follows:- whilst the parties have raised various pertinent issues regarding the merit of the application, I think there are two (2) issues which are very crucial and which I propose to consider. These are the competency of the application and the jurisdiction of the Deputy Registrar and therefore this court to entertain the issue of the Auctioneer costs.
  7. On the first issue, Ms Mwau submitted that the Applicants motion was incompetent for two (2) reasons. Firstly, that the motion was expressed to be brought under Section 40 Rules 1 and 2 of the Civil Procedure Rules. That Section 40 of the Civil Procedure Act deals with rest and detention of a judgment debtor and not attachment which is dealt with Section 44. I agree with Ms Mwau that from the heading of the motion, the application seems to be defective. It states that it is brought under "**Section 40**". However, that defect in my view is not fatal. The objection is a mere technicality under Article 159 (2)(d). I say so because the citing of Section 40 did not cause any prejudice to the Auctioneer. It is clear that the motion read "**Section 40, Rules 1 & 2 of the Civil Procedure Act.....**" since we do not have Section 40 Rules 1 & 2 of the Civil Procedure Rules, it is clear that the Applicant meant "**Order 40**" of the Civil Procedure Rules. Further, a reading of the prayers sought would show that what the Applicant sought was injunctive prayers, clearly meaning the application was meant to be anchored under Order 40 of the Civil Procedure Rules and not Section 40 of the Civil Procedure Act. For the foregoing reasons, I am of the view that the objection was of a technical nature as the Auctioneer was not misled as the nature of the application and the reliefs sought. I will therefore sustain the motion.
  8. The other objection by Ms Mwau was that the application was incompetent as it sought to challenge a taxation of the auctioneer's costs by the Deputy Registrar. According other, the procedure of challenging a taxation is by way of an appeal under rule 55(4) and (5) of the Auctioneers Rules. Since the application before court is by way of an injunction application Ms Mwau submitted the same is fatally incompetent. Intertwined with this objection is the Applicant's objection that the proceedings before the Deputy Registrar were null and void for want of jurisdiction under Rule 55(2) of the same. I propose to deal with these two issues together.
  9. Both objections are premised under Rule 55 of the Auctioneer's Rules/ Rule 55 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 instruction 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 repossess 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, 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.***

***(4) An appeal from a decision of a registrar or a magistrate or the board under sub-rules (2) and (3) shall be to a judge in chambers.***

***(5) The memorandum of appeal, by way of chamber summons setting out the grounds of the appeal, shall be filed within 7 days of the decision of the registrar or magistrate.”***

10. It is clear from the foregoing that an objection to an assessment of costs by a Deputy Registrar or a magistrate as the case may be is to appeal by way of chamber summons to a judge setting out the grounds of appeal. Such appeal must be filed within 7 days of the date of the decision of the registrar or magistrate. Before court is a Notice of Motion and not a chamber summons. It is one seeking injunctive orders and not an appeal against the registrar's decision. To that extent, I agree with Ms Mwau that the application is fatally incompetent and does not lie.

11. On her part, the Applicant has contended that the proceedings before the Deputy Registrar were a nullity as the Deputy Registrar lacked jurisdiction in view of the provisions of Rule 55(2) of the Auctioneers Rules. Under sub rule 2, the Deputy Registrar of this court can only deal with costs that arise from proceedings in the High Court or where the value of the property attached would bring the proceedings in connection with it. Within the jurisdiction of the High Court. In any other case, jurisdiction lies with a magistrate or the auctioneer's Board. The suit that gave rise to the attachment arose from a suit in a principal magistrate's court. The Inventory dated 26<sup>th</sup> July, 2011 which forms the basis of the Auctioneers Bill of Costs shows that the auctioneer himself had assessed the value of the items allegedly attached to be Kshs.240,000/-. That value in my view falls within the jurisdiction of the magistracy and not the High Court. That being the case, I hold that there was no jurisdiction on the part of the Deputy Registrar to deal with the Auctioneers Bill of Costs. As put by Ringera J (as he then was) in the case of **Ying –vs- Ren Msa HCCC No.128 of 1998 (UR):-**

***“Jurisdiction is so basic and fundamental..... that in its absence the proceedings would be coram non judica and the court would be acting in vain. All its decisions and orders would be a nullity.”***

12. That being my view, those entire proceedings were unwarranted. I will strike out the Applicants Notice of Motion dated 31<sup>st</sup> January, 2013 for being incompetent. I will also set aside and dismiss the entire proceedings before the Deputy Registrar and the resultant orders arising therefrom. I will under Section 3A of the Civil Procedure Act, direct the Auctioneer Peter W. Mwangi and Elan Traders to forthwith release to the Applicant motor vehicle Registration No. KAG 167M. The Auctioneer, Peter W. Mwangi will bear the costs of the execution including the storage charges for the said motor vehicle since he is the one who commenced the proceedings in a wrong forum.

13. Each party shall however bear his/her own costs of the application.

**DATED and DELIVERED** at Nairobi this 19<sup>th</sup> day of July, 2013.

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**A. MABEYA**

**JUDGE**