



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION – MILIMANI

MISC. CASE NO. 303 OF 2007

**SAMUEL MACHARIA KAGAI t/a BELL & HAMMER GENERAL
MERCHANT.....PLAINTIFF**

VERSUS

KENYA COMMERCIAL BANK

LTD.....DEFENDANT

RULING

The Applicant in the Notice of Motion dated 24th August 2010, has moved the Court by way of a Miscellaneous Application brought under **Order L Rule 1** of the **Civil Procedure Rules, Section 1A** and **3A** of the **Civil Procedure Act** and **“any other enabling provisions of the Law”**. He prays that judgment be entered for him against the Respondent, in the sum of Kshs. 99,667.20 with interest at Court rates. The said sum represents auctioneer’s costs taxed in favour of the Applicant as per the Certificate of Costs annexed **“as SKM1”** to his supporting affidavit of 24th August, 2010.

The Application is premised on the ground that the judgment is necessary to facilitate the execution of a decree against the Respondent who has refused to pay the taxed costs despite demand being made by the applicants’ advocates under cover of a letter dated 24th March 2010, annexed to the supporting affidavit as annexure **“SKM2”**. The applicant has asked the court to take into consideration overriding principles in accordance with **Section 1A** of the **Civil Procedure Act** in order to expedite the matter. Counsel argued that the court has a very wide discretion in this regard.

The Application is opposed on the strength of legal arguments made orally at the hearing of the same. Counsel for the Respondent has submitted that the applicant is not entitled to a judgment under a Miscellaneous Application and ought to have filed a suit in order to obtain a judgment and decree for execution. He distinguished the applicant’s costs from an Advocate/Client Bill of costs which can be enforced by way of a judgment obtained under the Advocates Remuneration Rules. According to counsel, the costs herein, having been taxed under **Section 55** of the **Auctioneers Act**, which only gives the High Court power to assess the fees payable to an auctioneer and to resolve any disputes as to liability, between

the auctioneer and the party charged with the responsibility to pay the taxed costs.

I agree with counsel for the applicant that the court has a very wide discretion to make orders as are necessary to resolve disputes in the interests of justice. I must state, however, that equity always follows the law. The law, as I understand it is that, in civil matters, judgment and decree are provided for under **Section 25** of the **Civil Procedure Act** which provides as follows:

“Section 25. The court, after the case has been heard, shall pronounce judgment, and on such judgment a decree shall follow:

Provided that it shall not be necessary for the court to hear the case before pronouncing judgment-

(i) where the Plaintiff is drawn claiming a liquidated demand, and either -

(a) the Defendant has not entered such appearance as may be prescribed ; or

(b) the Defendant, having entered such appearance, has failed to file a defence within the time prescribed; or

(ii) in such cases as may be prescribed under Section 81 (2) (f)”

Section 81(2) makes provisions for Summary Procedure, *inter alia*, in suits in which the Plaintiff seeks only to recover a debt or liquidated demand in money payable by the Defendant, with or without interest, arising out of a contract express or implied; or **on an enactment**, where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty;....

Neither of the parties hereto cited any authority to support their differing positions but this court is alive to the fact that differing opinion exists as regards when a decree can issue to enforce taxed costs. That, however is as regards the execution for costs awarded under the Advocates Act.

The court is also aware of the Ruling of the Honourable Lady Justice Koome of 18th January 2010, made in an application quite similar to the one before this court. i.e. Misc. Application No. **1665 of 2007** **MARGARET ANINDO T/A IGARE AUCTIONEERS vs. HARAMBEE SACCO SOCIETY, ALI NASHIR KURJI & RIAZ KURJI all T/A ELITE COMPUTERS.** Whilst I understand the learned judges position in the matter I nonetheless and with profound respect depart from the findings therein since the decision is not binding upon me.

Going by the definition of a decree under **Section 2** of the **Civil Procedure Act**, I am of the view that a decree cannot issue in the present case unless a declaratory suit is filed. Under the Section, a decree is deprived as-

“The formal expression of an adjudication which so far as regards the court expressing it conclusively determines the rights of parties with regards to all or any of the matters in controversy in the suit and may either be preliminary or final; it includes the striking out of a Plaintiff, a determination of any question within Section 34 of Section 91-----”

Section 34 relates to questions to be determined by the court executing the decree while **Section 91** deals with application’s for the restriction of a decree that has either been varied or reversed.

Under the Civil Procedure Act, **“suit”** means all civil proceedings commenced in any manner prescribed. As correctly put by counsel for the Respondent in his submissions, **Order IV Rule 1** provides

that **“every suit shall be instituted by presenting a plaint to the court or in such other manner as may be prescribed”**. The only prescribed alternative to the filing of a Plaint is the commencement of a suit by way of an Originating Summons under **Order XXXVI** which clearly spells out the circumstances, by whom and in respect of which reliefs Originating Summons can be taken out. A claimant such as the applicant herein is clearly excluded.

Unlike Taxation of Costs under the **Advocates Act** and **Rules**, which has been given special recognition and specifically provided for under **Order L11 Rule 5**, the Auctioneers Act does not provide for a judgment and decree to issue following taxation and the power of the court in regard to auctioneers’ fees under that Act is limited only to assessment and the determination of disputes as to liability for such costs. I do not think **Section 1A** is intended for the court to overlook express provisions of the law. Moreover, the Section clearly expresses itself as being applicable to the resolution of civil disputes governed under the Act (i.e. the Civil Procedure Act). For avoidance of doubt the said provision provides as follows:

“ 1A (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the Civil disputes governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1)

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court”.

Seeing that summary procedure is available for a claim such as would be filed by the applicant herein, I do not consider this to be a case where **Section 1A** of the **Civil Procedure Act** need to be invoked to circumvent the provisions of the Civil Procedure Act and Rules as relate to judgments and decrees. Declaratory suits have not been done away with by the enactment of **Section 1A** of the **Civil Procedure Act** and there must have been good reason for parliament to come up with **Section 25** of the **Civil Procedure Act** and providing special treatment (by way of summary procedure) to cases such as would be filed by litigants such as the applicants herein, and also the enactment of **Order II Rule 7** of the Civil Procedure Rules which provides that suits for declaratory judgments on orders shall not be subject to objection on the ground that only such judgment or order is sought without more, and that a binding declaration of right may be made irrespective of whether or not consequential relief is or could be claimed.

The issue of time and costs does not therefore arise in this case since costs will always follow the event. This means that any costs as would be incurred by the applicant in filing a substantive suit will be paid by the Respondent, who stands condemned to pay the Applicant’s costs as per the Certificate of Taxation. As the court cannot usurp the power of parliament to create new laws, persons such as the applicant before court ought to advocate for the formulation and enactment of new rules under the Auctioneers Act as happened in the case of advocates. The current Auctioneers Act provides for the Chief Justice to do so under----- **Section 30** which provides as follows:

Section 30 Auctioneers Act

“The Chief Justice may make rules for the better carrying out of the provisions of this Act and in

particular, such rules as may provide for –

(a)-----

(b)-----

(c)-----

(d)-----

(e)-----

(f) the forms to be used, the fees payable by and the Remuneration of Licensed Auctioneers

(g)-----

In view of the above I am not persuaded that a judgment ought to issue in this case. I refuse to grant the application and hereby dismiss the same with no order as to costs.

SIGNED and DELIVERED at NAIROBI this 16TH day of DECEMBER, 2010.

M. G. MUGO

JUDGE

In the presence of:

No appearance For the Applicant

Mr. Ogunde holding brief for Mr. Liko For the Respondent