



REPUBLIC OF KENYA



KENYA LAW
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**Ogesa v Ombati t/a Hazara Auctioneers (Civil Appeal 7 of 2022)
[2024] KEHC 1091 (KLR) (7 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1091 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL 7 OF 2022
DKN MAGARE, J
FEBRUARY 7, 2024**

BETWEEN

SYLVIA KEMUNTO OGESA APPELLANT

AND

JARED BON OMBATI T/A HAZARA AUCTIONEERS RESPONDENT

JUDGMENT

1. The Appellant herein filed an Application dated 1st March 2021 substantially seeking the reliefs as follows:
 - i. That the do set aside its Orders dated 4th December 2020
 - ii. That the Applicant be granted leave to file response to the Application dated 20th July 2020
 - iii. That the attachment of Motor vehicle Registration No. KCN 858R be declared a nullity and the motor vehicle released.
2. The Application was supported by the Affidavit of the Appellant principally on the following Grounds:
 - a. The Application from which the attachment order was granted proceeded ex parte.
 - b. The Appellant was not served with the Application.
 - c. The Appellant has paid auctioneer charges through Platinum Credit Limited and so the Respondent sought to unjustly enrich themselves.
 - d. There was no proclamation and notification of sale duly served upon the Appellant.
3. The Respondent filed its Replying Affidavit sworn on 17th March 2021 opposing the Application substantially on the grounds that:



- a. The Respondent obtained instructions from Platinum Credit Ltd to repossess motor vehicle registration number KCN 858R registered in the name of the Appellant who had failed to repay the loan.
 - b. After the Respondent attached the motor vehicle for the purposes of sale, the Appellant moved court and obtained an order for release of the motor vehicle and that the auctioneers fees be taxed and agreed upon.
 - c. There was no agreement on fees and the Respondent filed Misc. Application No. 44 of 2021 to obtain their fees.
 - d. The Appellant was served with the Application.
 - e. Upon taxing the bill of costs, the court became functus officio.
 - f. The [Auctioneers Act](#) and Rules did not anticipate setting aside auctioneer's fees and only appeal would ensure.
4. The Court considered the Application and the submissions by the parties and rendered its Ruling dated 28th January 2021. In the Ruling, the Trial Court dismissed the Application with costs.
 5. Aggrieved, the Appellant, who was the Applicant filed this Appeal.

Record of Appeal

6. The Appellant raised 7 grounds of Appeal. substantially, the grounds raised are as follows: The Trial Court erred in law and fact in:
 - a. Exercising his discretion in disregard of the principles of law.
 - b. Disregarding that the Appellant had a pending application to cross examine the process server in respect of service of the Application.
 - c. Failing to find unjust enrichment in favour of the Appellant.

Submissions

7. The Appellant filed submissions dated 21st November 2023.
8. It was submitted that the Appellant had adduced evidence to the effect that the auctioneers fees had been paid and so the Bill of Costs was untenable.
9. Counsel submitted that the Trial Court erred in not finding unjust enrichment against the Respondent. They relied on the case of Chase International Investment Corporation & Another v Laxman Keshra & Others (1978) KLR 143 to canvass the submission that the Respondent had enriched himself at the expense of the Appellant.
10. They also relied on Joel Mwangangi v Prisca Mukorimburi (2022)eKLR where the court stated thus:

.. the idea of unjust enrichment is intended to prevent a person from retaining money for benefit which is against conscience that he should keep it, as he should, in justice restore it to the Plaintiff. The gist is that the Defendant is obliged to make restitution.
11. It was submitted that the Appellant was not served with the Application dated 1st 20th July 2020. Reliance was placed on the case of CMC Holding Ltd v Nzioki (2004) KLR 173 to submit that the



discretion to set aside ex parte orders was meant to ensure that the Defendant does not suffer injustice or hardship.

12. It was also submitted that the Response to the Application had triable issues and the court erred by shutting out the Appellant from filing it in court for judicial consideration.
13. The Respondent does not appear to have filed submissions.

Analysis

14. In a nutshell, I understand the Appellant's case to be that the execution process arising from the Order 4th December 2020 cannot be lawful when in fact the Appellant settled auctioneer's charges and was not granted an opportunity to be heard in the Application leading to the impugned Orders of Court. I note that the date of the order was repeatedly cited by the Appellant and the trial court as 4th December 2021 which I consider a reversible error of fact and correct to 4th December 2020.
15. I have perused the said Order. It arose from the Application dated 20th July 2020 in which the Respondent sought the assessment of costs. The Trial Court assessed costs at Kshs. 290,342.60 as payable to the Respondent.
16. I also note from the proceeding and evidence filed in Court and it is not disputed by the parties that Court in Kisii CMCC No. 157 of 2020 set aside the sale and directed for immediate release of the impugned motor vehicle on 17th June 2020.
17. Clearly, that was before the Application dated 20th July 2020 was filed. To my mind therefore, it is imperative to establish who was liable to pay the auctioneer's costs. I say so because, the Respondent could have sought to tax the bill of costs against the wrong party.
18. When faced with a similar fact issue in *Gusii Mwalimu & 2 others –v- Mwalimu Hotel Kisii and Nzoia Sugar Co Ltd –v- Nzoia Sugar Co. ltd & 3 others* [2014] eKLR Justice Mabeya held in the later that;

“As far as I know, the position in law is that, the effect of issuance of Warrants against a judgment/debtor is that any costs incurred in their execution is upon such debtor. However, when such Warrants are recalled and annulled, it means that whatever was done pursuant to their issuance is also a nullity. The debtor is absorbed from acting on them. That leaves the Court with the party who applied for their issuance, in this case the Applicant. It is the Applicant who caused the issuance of the Warrants that were a nullity. Any costs incurred as a result thereof must fall where they lie, at the Applicant's doorstep. Accordingly, I hold that the charges of the auctioneer in the execution of the Warrants dated 11th and 12th October, 2011 are payable by Nzoia Outgrowers Company Ltd.”
19. Therefore, it is common ground that the Respondent in this case was instructed by Platinun Credit Limited to carry out proclamation, attachment and sale against the Appellant. The Respondent acted on the instructions. The court subsequently set aside the attachment. Can the Appellant still be said to be liable to pay the resultant auctioneer's fees. I think not.
20. Fees charged by the Auctioneers is only payable by the debtor upon instructions that are valid. Once the proceeds of the action by the Auctioneer are nullified due to an illegality, procedural impropriety or other irrational causes, the instructing party is liable to meet the Auctioneer's charges flowing from the condemned process. In the case of *Plamay Company Limited vs Consolidated Bank of Kenya Limited*



[2014] EKLK, quoted with approval the decision of Josiah Kamanja Njenga vs Housing Finance Corporation of Kenya and Another (2014) e KLR, where Angote J. Stated that: -

“Having analyzed the chronology of events, I take the view that the Auctioneer’s fees is only payable once the Bank gives to the Auctioneer awful instructions.”

21. Having found that after the attachment was nullified, the Auctioneer’s charges were to be paid by the person who instructed the Auctioneer, in this case Platinum Credit Limited, I do not think it will serve any purpose to delve into more issues. The Application dated 20th July 2020 was clearly misdirected against the Appellant and the Court was entitled to allow the Application dated 1st March 2021 in terms of prayer 5 and order the release of the motor vehicle. For the avoidance of doubt, the Appellant is not entitled to pay any storage charges in respect of the unlawful attachment.
22. As to the claim that the Appellant had paid the Auctioneer’s fees to the Respondent, the Appellant did not seek recourse for any amounts already paid to the Auctioneer. She only challenged unjust enrichment without particularizing the extent and in fact made no prayer in the Application as to the recovery of such specific amount paid. The Appellant is at liberty to pursue the Respondent for recovery.

Determination

23. In the upshot I allow the Application as follows:
 - a. The Ruling and Order dated 28th January 2021 is set aside.
 - b. The attachment, seizure and detention of the Appellant’s Motor vehicle Registration No. KCN 858R is illegal, null and void.
 - c. The Motor Vehicle Registration No. KCN 858R shall be unconditionally released to the Appellant forthwith.
 - d. Before release, Motor vehicle Registration No. KCN 858R to be valued and depreciation cost, if any, shall be paid by the Auctioneer.
 - e. The Auctioneer shall pay storage charges, if any, for the Motor vehicle Registration No. KCN 858R.
 - f. The Auctioneer shall refund the amount already paid by the Appellant.
 - g. Each party shall bear its own costs.

DATED, SIGNED and DELIVERED virtually at MOMBASA on this 7th day of February, 2024.

KIZITO MAGARE

JUDGE

In the presence of:-

Bosire Gichana & Co Advocates..... for the Appellant

Ocharo Kaba & Co Advocates.....for the Respondent

Court Assistant - Brian

