



REPUBLIC OF KENYA



Elijah v Jimmy Omwenga Nyakagwa t/a Fortunes Auctioneers (Miscellaneous Application 107 of 2022) [2024] KEHC 2595 (KLR) (13 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2595 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
MISCELLANEOUS APPLICATION 107 OF 2022**

**TA ODERA, J
MARCH 13, 2024**

BETWEEN

BENARD O ELIJAH APPLICANT

AND

**JIMMY OMWENGA NYAKAGWA T/A FORTUNES
AUCTIONEERS RESPONDENT**

JUDGMENT

Introduction

1. The Applicant herein filed a chamber summons application dated 6th June, 2022, seeking;
 - a. The Application be deemed as an appeal as envisaged by the provisions under Rule 55 (3) and (4) of the auctioneer's rules of 2009;
 - b. The court be pleased to set aside the ruling and order of the subordinate court delivered in Kisii Misc. Application No. 23 of 2021 wherein the respondent's bill of cost was assessed at Kshs. 263,120 as well as the certificate of cost dated and issued on 10th March, 2021;
 - c. The court be pleased to reconsider the said bill of costs, set aside the assessment of the Auctioneers charges by the learned magistrate dated 4th March, 2021 and, as an appeal, render a decision in respect of the disputed items outlined on the face of the Application;
 - d. The Respondent's Notice of Motion dated 8th February, 2021, and the Respondent's Bill of Costs dated 1st February, 2021, filed with the motion dated 8th February, 2021, for assessment, be struck out for offending the provisions of section 34(1) of the Civil Procedure Act.

All the processes issued and all the proceedings taken out against the Appellant within the cause at the subordinate court, consequent to the Ruling and Order of the Trial Magistrate dated and delivered on 4th March, 2021, inclusive of the Certificate of Costs dated 10th March, 2021,



the warrants of attachment and sale of the Appellant's movable property dated and issued on 14th February, 2021, and attachment of the Appellant's motor vehicle Reg. No. KBJ xxxM on 28th February, 2022, in execution of the lower court's Ruling and Order dated 4th March, 2021 be set aside, recalled and annulled, lifted and/or invalidated as appropriate.

- e. The costs of this appeal, by way of chamber summons, as is prescribed, be provided for.
2. The Application was based on the following grounds;
- a. The Learned Magistrate erred in law and in fact when he failed to appreciate, find and hold that the issue of Auctioneers charges resulting from and in relation to execution of a decree and costs through warrants of attachment and warrants of sale were such issues that fell to be decided pursuant to section 34 (1) of the *Civil Procedure Act* and could not be decided by a separate proceedings other than by proceedings in the suit whose decree was being executed.
 - b. The learned magistrate erred when he failed to notice the fact, arising from his error of law and principle in ground/paragraph I above, that there being no order for execution envisaged by the provisions of Order 22 rule 13(4) of the *Civil Procedure Rules*, 2010 in the suit whose decree was executed, the warrants of attachment and warrants of sale which were issued and the resultant attachment were irregular and unlawful and, therefore, they could not form the basis of costs recovery proceedings by an auctioneer through separate proceedings.
 - c. The Learned Trial Magistrate erred in fact and law when he failed to find and hold that in view of the orders of stay of execution in the primary suit, and in the absence of evidence that the decree in the primary suit had been satisfied, the Respondent, as an auctioneer, was not entitled to payment of any sums as the costs of the execution proceedings in the primary suit.
 - d. The Learned Magistrate erred in law when he failed to take into account and to appreciate the fact that the sums which he allowed in each item in the Respondent's Bill of Costs dated 2nd February, 2021, and without assigning his reasons for so allowing those items, per item, as the recovery expenses and/or Auctioneers charges were manifestly high and/or disproportionate.
 - e. The Learned Magistrate erred in fact and in law when he allowed the Auctioneers charges on account of investigation, serving of proclamation, the application and the bill of costs, taking inventory, filing of that Bill of costs, waiting charges and labour, advocates' fees, advertisement, 16% VAT, amongst other charges, but which charges are neither provided for, nor prescribed, under the Fourth Schedule, Part II of the *Auctioneers Rules*, 2009.
 - f. The Learned Magistrate erred in fact and in law when he allowed charges in the bill of costs for service of proclamation when no proclamation was ever served upon the Applicant.
 - g. The Learned Magistrate erred in law when he failed to appreciate the fact that only such items as prescribed under Fourth Schedule Part II of the *Auctioneers Rules*, 2009, can be claimed in an Auctioneers Bill of costs if and when incurred by an Auctioneer and awarded on assessment and not otherwise, and that all such prescribed sums must be proven by evidence.
 - h. The Learned Magistrate erred in fact and in law when he failed to strike out the Bills of Costs in issue, and the application dated 8th February, 2021, for being an abuse of the court process.
 - i. The Learned Magistrate erred in fact and in law when he held that the fact that the Appellant did not appear in the proceedings of 4th March, 2021, then he was entitled to and assessed the Respondent's Bill of Costs dated 2nd February, 2021 as drawn, without proof, or reasons.



- j. The Learned Magistrate erred in law and fact when he executed and issued a Certificate of Costs for Kshs. 263,120/-, in favor of the Respondent, on the basis of the Respondent's Bill of Costs dated 2nd February, 2021, wherein the Respondent claimed Kshs. 263,120/-.
- k. The Learned Magistrate also erred in law and fact when, without first ordering, specifically, for execution for either the Kshs. 263,120/- claimed by the Respondent in his Bill of Costs dated 2nd February, 2021, which the Learned Magistrate allowed as drawn by a ruling dated and delivered on 4th March, 2021, or the sum of Kshs. 263,120/-, for which a Certificate of Costs dated 11th March, 2021, he signed the warrant of attachment sale of the Appellant's movable property in execution of the ruling and order dated and delivered on 4th March, 2021, but for the recovery, from the Respondent, of Kshs. 263,120/-, pursuant to the Respondent's application for execution filed on 14th February, 2021, absent any orders under the mandatory provisions of Section 38(b) of the *Civil Procedure Act* and Order 22 Rules 13(4), 20, 57(1) & (5) and 58 of the *Civil Procedure Rules*, 2010, thus triggering a series of proceedings which have visited an injustice upon the Appellant.
3. The Application was equally premised the affidavit of Benard O. Elijah, the applicant herein Sworn on the same day. In his affidavit he averred Court granted him leave to appeal out of time vide its order dated 10th May, 2022. He averred too that as the Respondent in Kisii CMC Misc. Application No 23 of 2021 he never served with the application before the subordinate court, or any hearing notice. It was his averment too that the same in the sum of Kshs. 263,120 awarded as costs to the Respondent was disproportionate and unjustified, under the relevant law.
4. He deposed too that the Respondent has since caused execution proceedings for the undue amount of Kshs. 263,120/-, and the Applicant was never notified of the orders. It was his disposition too as he was never served with any proclamation for the sum of Kshs. 263,120/-, yet, on 28th February, 2022, his motor vehicle Reg. No. KBJ xxxM was seized by M/s Credible Auctioneers, in execution for recovery of Kshs. 263,120/-, which attachment was therefore unlawful, irregular and oppressive and should be arrested at the earliest chance. He decried that he was not aware of the existence of the cause at the subordinate court, namely Kisii CMC Misc. Application No 23 of 2021, until 28th February, 2022, when his motor vehicle Reg. No. KBJ xxxM was seized in execution of the orders of the subordinate court for the recovery of Kshs. 263,120/-, there having been no proclamation, and no opportunity of being heard.
5. He contended that in furtherance of the overriding objective of the court as enshrined under all the enabling legislation and to make it affordable, both the prayer for leave to appeal out of time envisaged under Rule 55(3) and (4) of the *Auctioneers Rules*, 2009 and Application for Stay of Execution pending such an appeal, as contemplated under Order 42 of the *Civil Procedure Rules* be heard together as no prejudice shall be occasioned to either party, at all. He decried that he stood suffer substantial loss, in the nature and extent of the sum of Kshs. 263,120/- which sum has no basis in law, the costs of the execution proceedings for recovery of that amount, the proceedings before the subordinate court in that cause, or of the primary suit.
6. In response to the Application, the Respondent filed a Replying Affidavit dated 17th August, 2022 where he averred that vide consent order dated 10th May 2022 the applicant was granted 21 days to file an appeal against the decision of the trial court which to elapse on the 31st May 2022 and by the said date the appellant had not filed an appeal as per the orders of the court. He contended thus that the appeal before this court purportedly brought under Rule 55 (3) (4) of the *Auctioneer's Rules* 2009 by way of chamber summons was filed out of time and without leave of the court and thus an abuse of the court process and should be struck out.



7. The Respondent averred further that Appellant has not filed a memorandum of appeal as required by law. He contended that provisions under which the Appellant has mounted this application do not provide for the said procedure save for under rule 55(5) of the Auctioneers Rules 2009.
8. It was equally his averment that the ruling and order of the trial court dated 4th March 2021 was lawfully and procedurally made by a court of competent jurisdiction properly directing herself after the appellant/applicant failed to respond upon service. He reiterated that the applicant contention that he was never been served with the application is false and intended to mislead this honorable court. He reiterated further the applicant was duly served with the copies of the application but he failed to attend court for hearing of the application leaving the court with discretion to proceed ex parte which discretion was judiciously exercised in the circumstance.
9. The respondent deponed that the contested bill of cost dated 2nd February 2021 was drawn to the scale, lawfully and proportional to the service rendered to the applicant. He deposed too that the notice of motion application dated 5th February 2021 together with the annexed bill of costs were properly before the court notwithstanding the provisions of section 34 (1) of Civil Procedure Act 2010. He contended that the said section 34 (1) provides on form and procedure whose non-adherence is not fatal to the substance of the application given the oxygen principles and the position in the Constitution of Kenya 2010. He contended too that article 48 of the Constitution of Kenya 2010 provides on access to justice while article 159 (2) (d) provides that justice shall be administered without undue regard to procedural technicalities.
10. It was his disposition too that the learned magistrate was seized of jurisdiction and discretion in assessing the respondent's bill of cost which assessment was done and the bill taxed accordingly. He underscored that the under part 2 of Auctioneers (amendment)rules 2009, the court is seized of powers to increase the fees allowed under the Schedule, having regard to the complexity of the work required to be done, the skill, specialized knowledge and labor expended by the auctioneer. He underscored too that the respondent's bill of cost was not exorbitant nor excessive and that items listed by the applicants as non-existent under the rules were incidental to the due process of auction. He stated further that the court is not limited to items listed under part 2 of the fourth schedule since it still maintains the discretion to increase the fees payable under the schedule and make necessary orders to meets the ends of justice in accordance with inherent jurisdiction of the court.
11. Finally, it was his disposition that the learned magistrate decision on the Notice of Motion application dated 8th February,2021, respondent's the bill of costs dated 1st February 2021 and all consequential orders was anchored on law and supported by facts and evidence and as such, the same ought to be upheld by this honorable court. He underscored that the appeal as filed is incompetent and lacking in merits and as such this court should dismiss it with cost.
12. During the Inter-partes hearing of the Application, with the consent of all parties, directed the Application to be canvassed by way of written submission. In the record before me it is only the respondent who complied wherein he filed his submissions on 16th June, 2023.

Issues Of Determination

13. On perusal of the Application, the response thereto and the Respondent's submissions of the parties the sole issue for determination are whether
 - a. Whether the Application was filed out of time
 - b. Whether this appeal was filed through a proper procedure



Analysis And Determination Of The Issues

Whether this Appeal has been filed through a proper procedure

14. Rule 55 of the [Auctioneer's Rules](#) provides as follows:

- “55 where a dispute arises as to the amount of fees payable to an auctioneer –
- (2) a) In proceedings before the High Court; or
- b) Where the value of the property attached or repossessed 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* (Cap 21, Sub. Leg.), may on the Application of any party to the dispute assess the fee payable.
- 4) An appeal from a decision of a registrar or a magistrate or 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”

15. It is clear from the above provision and in particular rule 55 (4) and (5) that 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 and that the Memorandum of Appeal, by way of chamber summons setting the grounds of the appeal.

16. I thus hold that given that the Applicant approached this court by way of chamber summons which enumerated the grounds of appeal. I thus hold that the Application is proper.

Whether the Application has been filed out of time

17. The Respondent contends that the application is not proper since it is time-barred having been filed out of time. Rule 55 (5) of the [Auctioneers Rules](#) only allows a window of 7 days within which to file an appeal after the decision is made.

18. However, it is clear from the record herein that this court vide its order dated 10th May, 2022 by consent of the Parties granted leave to the Applicant to file his Appeal within 21 days from the date thereof and in default execution to issue. As correctly pointed out by the respondent, the 21 days given by these court expired on 31st May, 2022.

19. Therefore, chamber summons Application herein having been filed on 8th June, 2022, the same was filed out of time and in default of the court order made on 10th May, 2022 and no leave has been sought. The appellant is thus guilty of laches.

20. From the forgoing therefore the Appeal is thus struck out with costs to the Respondent.

21. It is so ordered.

T.A ODERA

JUDGE

13.3.24

Delivered virtually in the presence of;



Okema Steve hold brief for GM Nyambati for Respondent

Court Assistant: Oigo

