



**Mercy Kalya t/a Kalya Auctioneers v Koskei (Miscellaneous Civil Appeal E004 of 2023) [2024] KEHC 4917 (KLR) (9 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 4917 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERICHO  
MISCELLANEOUS CIVIL APPEAL E004 OF 2023**

**JK SERGON, J**

**MAY 9, 2024**

**BETWEEN**

**MERCY KALYA T/A KALYA AUCTIONEERS ..... APPELLANT**

**AND**

**JOSEPH KIPKEMOI KOSKEI ..... RESPONDENT**

**RULING**

1. The application coming up for determination is a chamber of summons dated 8th February, 2023 seeking the following orders;
  - (i) That this Honourable Court be pleased to set aside the orders of Honourable B.R. Kipyegon in Kericho CMCC Misc. Civil Suit No. 23 of 2022, Mercy Kalya T/A Kalya Auctioneers v Joseph Kipkemoi Koskei made on 1st February, 2023 and order for re-assessment of the Auctioneers Bill of Costs before a different taxing master.
  - (ii) That in the alternative, this Honourable Court be pleased to set aside the orders of Honourable B.R. Kipyegon in Kericho CMCC Misc. Civil Suit No. 23 of 2022, Mercy Kalya T/A Kalya Auctioneers v Joseph Kipkemoi Koskei made on 1st February, 2023 and the same be substituted by an order of this court re-assessing the Auctioneers Bill of Costs afresh.
  - (iii) That the costs of this Application be borne by the Respondents.
2. The application is supported by grounds on the face of it and the supporting affidavit of Mercy Kalya the applicant herein.
3. The applicant avers that in Kericho CMCC Miscellaneous Civil Suit No. 23 of 2022, she filed an application dated 2nd August, 2022 seeking assessment of her Auctioneers Bill of Costs.



4. The applicant further avers that the respondent herein *vide* a replying affidavit dated 21st October, 2022, responded to the said application. The respondent in his replying affidavit conceded that proclamation was done and that warrants of sale had been issued against him.
5. The applicant further avers that consequently, Honourable B.R. Kipyegon in Kericho CMCC Misc Civil Suit No. 23 of 2022, delivered a ruling on 1st February, 2023 dismissing the application in its entirety.
6. The applicant faulted the Learned Magistrate for disregarding submissions on items 1 to 5 of the Bill of Costs which are provided for in section 4, Part II of the *Auctioneers, Rules* 1997.
7. The applicant faulted the Learned Magistrate for failing to award costs of attachment and those of the suit, which costs were supported by documentary evidence which was annexed to her application.
8. The applicant maintained that the mere fact that the Auctioneers Bill of Costs was not drawn to scale as per the ruling by the Learned Magistrate was not sufficiently cogent to warrant the dismissal of the entire application and in any case it was the duty of the court to assess the applicant's Auctioneers Bill of Costs to scale.
9. The applicant contended that the respondent in their replying affidavit did not challenge the validity of the Auctioneers Bill of Costs rather their main contention was that the Auctioneers Bill of Costs was exaggerated and the same had not been drawn to scale.
10. The applicant maintained that she was aggrieved by the ruling of the taxing master. The applicant was therefore apprehensive that should the ruling delivered on 1st February, 2023 not be vacated and substituted by an order of this court re-assessing the bill afresh or issue an order directing the re-assessment of the Auctioneer's Bill of Costs by a different taxing master, the applicant would suffer gross injustice and would be denied of her rightful legal fees for work done as stipulated in the *Auctioneers Act*.
11. The respondent filed a replying affidavit in opposition to the instant application. The replying affidavit was deponed by Joseph Kipkemoi Koskei the respondent herein.
12. The respondent contended that the applicant had not set out any cogent grounds on which this Court can interfere with the decision of the taxing master.
13. The respondent maintained that the decision of the taxing master was legally sound and that the learned taxing master had properly directed himself in assessing the Auctioneer's Bill of Costs.
14. The parties were directed to file written submissions, however, at the time of writing this ruling the parties had not complied.
15. I have considered the pleadings by the parties and the sole issue for this court's determination is whether the Learned Magistrate erred in dismissing the Auctioneer's Bill of Cost in its entirety without considering the merits therein. The answer is in the affirmative. The Learned Magistrate failed in discharging his duties of assessing the contested bill of costs. In the case of *M/S Behan and Otieno v Pan African Insurance Company*, Kisumu High court, Misc. Case No. 229 of 2003 the court held that:- "Each taxation master has the sole discretion and responsibility to decide the amount payable when a dispute arises as to the amount payable." Section 55 of the *Auctioneers Act* No. 5 of 1996 provides as follows;

“(1) (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 instructions shall be charged in accordance with these Rules.

- (2) 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 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.
- (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.”

16. In *National Industrial Credit Bank Limited v S. K. Ndegwa Auctioneer* [2005] eKLR the Court of Appeal in considering a dispute regarding the legal entitlement by the auctioneer to fees for proclamation held as follows; “...The purpose of the attachment is the execution of the decree. The essence of the attachment is to remove the goods from the possession of the judgement-debtor and place them in the custody of the law so that they can be sold to satisfy the judgement debt if the judgement-debtor does not pay the debt... It is clear from Rule 12 as read with Rule 14 of the *Auctioneers Rules* and the contents of the prescribed form, that is, Sale Form 2 that the proclamation of the movable goods is legally and effectively an attachment. From the moment the goods are proclaimed, the judgement-debtor is deprived of the legal possession and physical control of the goods and instead the goods are placed in the custody of the law and the court through the auctioneer. The judgement-debtor can only redeem them by the payment of the debt. If the judgement-debtor fails to pay the auctioneer moves to the second stage of conducting the sale of the attached goods... We are satisfied that the learned Judge correctly construed the word “proclamation” in the context in which it is used in the *Auctioneers Rules* and reached the correct decision that the auctioneer was entitled to fees for attachment prescribed in paragraph 4 of Part II of the Fourth Schedule.”
17. In the instant matter, it is not disputed that Mercy Kalya T/A Kalya Auctioneers, the applicant herein, issued a proclamation notice dated 9th December, 2021 and warrants of sale against the Respondent. In the foregoing the applicant having issued a proclamation notice to the respondent, I find that the respondent was deprived of the legal possession and physical control of their goods. The applicant is therefore entitled to fees for attachment prescribed in paragraph 4 of Part II of the Fourth Schedule, in the circumstances, it is therefore imperative to have the Auctioneer’s Bill of costs reassessed.
18. Consequently, the chamber of summons dated 8th February, 2023 is hereby allowed giving rise to issuance of the following orders;
  - (i) The orders by Honourable B.R. Kipyegon on 1<sup>st</sup> February, 2023 vide Kericho CMCC Misc. Civil Suit No. 23 of 2022, Mercy Kalya T/A Kalya Auctioneers v Joseph Kipkemoi Koskei are set aside.
  - (ii) An order for re-assessment of the Auctioneers Bill of Costs is issued by a different taxing master other than Hon B. R. Kipyegon.
  - (iii) The costs of this application to be borne by the Respondent.

**DELIVERED, SIGNED AND DATED AT KERICHO THIS 9TH DAY MAY 2024.**

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**J.K. SERGON**



## **JUDGE**

In the Presence of:-

C/Assistant – Mr. Rutoh

Miss Cherotich holding brief for Morata for Appellant

No appearance for Bor for Respondent

