



Muchiri t/a Raphan General Contractors v Kinja t/a Blue Access Ltd; Tsusho Capital Kenya Limited (Objector); Rutere t/a Giant Auctioneers (Applicant) (Civil Case 8 of 2017) [2024] KEHC 12446 (KLR) (17 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12446 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL CASE 8 OF 2017
RM MWONGO, J
OCTOBER 17, 2024**

BETWEEN

RAPHAEL MURITHI MUCHIRI T/A RAPHAN GENERAL CONTRACTORS PLAINTIFF

AND

MARTIN LAWRENCE KINJA T/A BLUE ACCESS LTD RESPONDENT

AND

TSUSHO CAPITAL KENYA LIMITED OBJECTOR

AND

MUGAMBI RUTERE T/A GIANT AUCTIONEERS APPLICANT

RULING

1. The Applicant is a licenced auctioneer. He received lawful warrants of attachment from the court directing that Motor Vehicle Registration No. KCG 954R be attached. He exhibited the warrant in his application.
2. Subsequently, the objector sued for the release of the said vehicle. The court in a ruling of 29th May 2020 found that the objector had an equitable interest in the vehicle. As a result, the court lifted the attachment of the vehicle and awarded costs of those proceeding to the objector.
3. Following that ruling, the applicant filed a notice of motion dated 30th June, 2020 seeking the following orders:
 1. That this application be certified as urgent and be heard ex-parte in the first instance.



2. That this Honourable Court be pleased to direct who will pay the auctioneers fees and storage charges.
3. That this honourable court be pleased to order release of attached motor vehicle KCG 954R upon payment of auctioneer's fees and storage charges.
4. That the Costs of this application be provided for.
4. The application is premised on the grounds that:
 - i. The auctioneer executed lawful orders from this honourable court and is entitled to payment.
 - ii. The storage facility is distinct entity from the parties herein and declining and/or refuse to release the motor vehicle without payment.
 - iii. The auctioneer has no money to pay storage charges.
5. The applicant/auctioneer deposed a supporting affidavit with the following major averments:
 - i. That my firm received warrants of attachment from this honourable court expressly directing motor vehicle KCG 954R be attached.
 - ii. That on 11th June 2020 this honourable court raised the attachment of motor vehicle KCG 954R without directing who will pay auctioneers fees and storage charges of the said motor vehicle.
 - iii. That annexed and marked MR3 and MR4 are copies of storage and auctioneer's charges respectively.
 - iv. That I do not have the money to pay storage charges as I was out of business due to Covid 19 pandemic hence seeking intervention of this honourable court.
 - v. That I am apprehensive soon there will be a release order for release of the said motor vehicle and I fear being cited for contempt.
6. The plaintiff who is the decree holder filed a replying affidavit with, inter alia, the following major averments:
 - i. That the court record will bear me witness that on 4th April, 2018 a consent order was recorded as to how the defendant was to pay the decretal amount in instalments commencing 13/4/2018 whereby it was to pay Ksh.300.000/= and the balance of Ksh.429.175/= to be paid in monthly instalments of Ksh.50.000/= with effect from 15 May, 2018 and thereafter on the 15th
 - ii. That it was further agreed that upon the payment of the 1st instalment of Ksh. 300,000/= on 13/4/2018, the motor vehicle was to be released to the defendant.
 - iii. That the defendant was to pay reasonable auctioneer charges to the applicant herein.
 - iv. That the defendant defaulted in the payment and this led to the prosecution of the application dated 27th March, 2018 and hence the ruling dated 29th May, 2020.
 - v. That it's clear from the consent order of 4th April, 2018 on who was to bear the auctioneers charges. That consent order has never been set aside or reviewed by another consent order.
7. The objector filed a replying affidavit with the following major averments:



- i. That the Objector filed an application dated 27th March 2018 objecting to the attachment of the Vehicle in execution of the decree for judgment holder's decretal sum and the same was allowed on 29th May, 2020 by Honourable L.W. Gitari's in her ruling in the matter.
 - ii. That the honourable judge in her ruling allowed our objection and raised the attachment and for that matter we are arranging to collect the Vehicle and it is only fair that upon collection, the vehicle be released without seeking storage costs from the Objector.
 - iii. That it is our considered opinion that since the court directed the Applicant herein to attach the vehicle upon the request or application by the judgment holder, the judgment holder can bear the storage costs of the Vehicle.
 - iv. That the Objector stands to suffer irreparable loss and damage should the applicant, Giant Auctioneers hinder collection of the Vehicle on the basis of unpaid storage charges.
8. The defendant opposed the applications raising the following grounds of opposition:
1. That the prayers sought in the notice of motion dated 30th June, 2020 are barred by the doctrine of res-judicata.
 2. That the notice of motion dated 30th June, 2020 is vexatious, a sham and an abuse of the court process.
 3. That the notice of motion dated 30th June, 2020 is only meant to bring back litigation over the matters in this suit that had already been conclusively determined.
9. The parties filed written submissions as directed by the court.

Applicant's Submissions

10. On the issue who will pay the auctioneers' fees and storage charges: the applicant submitted that this issue was canvassed in the consent order dated 4/4/2018 which stated:
- i. That the Defendant/Judgment Debtor was to pay the decretal amount of Ksh. 729,175/= in instalments.
 - ii. That upon payment of the first instalment, the motor vehicle was to be released to the Defendant.
 - iii. The Defendant was also to pay auctioneer charges to the Applicant herein.
11. Further it was submitted that Rule 7 of the Auctioneers Rules of 1997 provides on payment of auctioneer's charges that: A debtor shall pay the charges of the auctioneer unless:
- " a) The debtor cannot be found or
 - a. he has no goods upon which execution can be levied; or
 - b. the sale proceeds are insufficient thereof to cover the charges, in which cases the creditor shall pay the charges or the deficiency."



12. The applicant relies on the case of E.J. Austin & 2 Others v Kim Long Kyu & Another Civil Suit No.335 of 2001 (2017) eKLR where the court stated that:

“In conclusion, the law says and I must abide by the law, that the judgment debtor pays the auctioneer’s fees.”

13. The applicant further submitted that the court order dated 21/7/2020 directing that the attachment of the said motor vehicle be raised, is not binding on Upcountry Security Services Limited since they are not a party to the suit. In addition, that company is a separate and distinct entity from the auctioneer.

14. On whether the auctioneer can contract the services of an independent third party for purposes of storing attached property, the applicant submits that: Under Rule 8 of the Auctioneers Rules of 1997, the law provides that:

“(1) subject to these rules, the auctioneer seizing or repossessing goods under a court warrant or letter of instruction shall be responsible for the safe custody and insurance of any moveable property seized or repossessed by him until it has been sold or the seizure/repossession is withdrawn.”

15. Finally, the applicant submits that an auctioneer is only obligated to keep the attached property in safe custody. The auctioneer therefore has the liberty to make any arrangements that he deems necessary for the safe custody of the attached property. Such arrangements may include storing the attached property with an independent third party. Thus, the auctioneer herein did not transcend the boundaries of the law by engaging the services of Upcountry Security Services Limited to store the attached motor vehicle.

Objector’s written submissions

16. The Objector submits that it is aware of a consent signed between the Plaintiff/Judgement Creditor and Defendant/Judgement Debtor on 4th April, 2018 which included among other terms that the Defendant was to pay reasonable Auctioneer's charges. As such, it appears that there was already an agreed party to bear the Auctioneer's charges. Thus, the Objector is not responsible for the Applicant's storage charges because it did not give instructions to any party directing that the said Vehicle be stored in a particular place and cannot, therefore, bear the brunt of another party's actions.

17. On the issues as to who should pay the auctioneer’s fees the objector submits that the consent order recorded in court on the 4th day of April 2018 which provided the mode of payment of storage charges by the Defendant, the provisions of written law binding upon the parties to the consent and the Applicant, are clear on who should pay the storage charges claimed by the Applicant.

18. The objector states that it was never party to the said consent nor did it at any one-point issue instructions to the applicant to repossess and store the Vehicle. Reliance was placed on the case of [*Wairimu Gitua v Peter Mugo Nganga & another Civil case No.5258 of 1989*](#) where Mbogholi J held:

“Ordinarily, whoever moves to make an attachment has the duty to ascertain the identity or ownership of the property to be attached. If it then happens that wrong property has been attached it is the attaching party who should bear the costs occasioned thereby. The owner of the property wrongfully attached is entitled to possession of the property unconditionally.

And so, I now order that the said motor vehicle registration number KRZ 999 shall be released to the objector forthwith and unconditionally.



The auctioneer must have incurred costs. Indeed, that is why this matter has reached this point. He was instructed by the advocates for the plaintiff. He has to recover those costs from the said advocates but that shall not be a condition for the release of the said motor vehicle as the objector is an innocent party.”

19. Further, they submit that in the case of *Micah Tonui v William Cheruiyot Kirui* [2014] eKLR. Where one of the orders sought in the application was that the motor vehicle registration KAW 126H Toyota Station Wagon, currently held by Moco Auctioneers, be released conditionally to the applicant for safe keeping to avoid storage charges. In that case, Omondi J as she then was stated on the issue of storage charges as follows:

“The Auctioneer costs should abide the outcome of the appeal as in my view the loser in the appeal ought to bear the costs of the auctioneer.”

Issue for Determination

20. The core issue for determination is: which party should pay the auctioneers fees and storage charges.

Analysis and Determination

21. The Applicant seeks directions from the court on who should pay the storage charges for storage of the suit Toyota Hilux registration number KCG 954R. The circumstances are that the applicant had received warrants of attachment from this honourable court expressly directing motor vehicle KCG 954R be attached.
22. Following the attachment, on 11th June, 2020 this honourable court raised the attachment of motor vehicle KCG 954R without directing who will pay auctioneers fees and storage charges incurred for the said vehicle. Consequently, the Objector submits that it is not responsible for the applicant's storage charges because it did not give instructions to any party directing that the vehicle be stored and cannot therefore bear the blunt of another party's actions.

Who should pay the auctioneer's fees?

23. The statutory position on payment of auctioneer's fees is in the *Auctioneers Act* and the Rules there under Rule 7 of the Auctioneers Rules, of 1997, provides as follows on: payment of auctioneer's charges:

“A debtor shall pay the charges of the auctioneer unless:

- a. The debtor cannot be found or
- b. he has no goods upon which execution can be levied; or
- c. the sale proceeds are insufficient thereof to cover the charges, in which cases the creditor shall pay the charges or the deficiency.”

24. In the case of *E.J. Austin & 2 others vs Kim long Kyu & another Civil Suit No. 335 of 2001* (2017) eKLR the court stated:

“In conclusion, the law says and I must abide by the law, that the judgment debtor pays the auctioneer fees.”



25. The objector submits that the consent order recorded in court on the 4th April 2018 provided the mode of payment of storage charges by the Defendant. The objector says that the consent is clear on who should pay the storage charges claimed by the Applicant, and is binding on the parties.

26. I have perused the proceedings of the 4th April 2018 and note that the consent was as follows:

“Mr. Maina: The vehicle had been attached.

There be a clause that the defendant pays reasonable auctioneer’s charges.

Mr. Abuor: That is so.

Mr. Rurige: That is so.

Court: Order - The consent reached is adopted as the order of this court with an order that the defendant shall pay reasonable auctioneer’s charges”.

27. The applicant submitted that this issue was canvassed under the said consent order as follows:

- i. That the Defendant/Judgment Debtor was to pay the decretal amount of Ksh 729,175/= in instalments.
- ii. That upon payment of the first instalment, the motor vehicle was to be released to the Defendant.
- iii. The Defendant was also to pay auctioneer charges to the Applicant herein.

28. As regards the parties herein, it is clear that the objector cannot be responsible for the costs of the auctioneer. This court in its ruling of 29 May 2020 found that the attached vehicle was not available for attachment ab initio. The court further awarded costs of the objector proceedings to the objector as compensation for their troubles.

29. This leaves the Decree holder, the Defendant/Respondent and the applicant.

30. The plaintiff/deed holder/judgment creditor cannot also be held liable for the fees of the auctioneer in circumstances where the auctioneer, acting on a court warrant, attached a vehicle specified on the warrant. These were the circumstances in this case. The only situation specified under the Auctioneer’s Rules where the judgment creditor is required to pay the auctioneer’s charges is under Rule 7 of the Rules. This occurs: where the debtor cannot be found; or has no executable goods; or the sale proceeds are insufficient to cover the charges.

31. This leaves the judgment debtor and the applicant.

32. Rule 7 of the Auctioneers rules 1997, as already stated, is set out in very clear terms that:

“7 Payment of Auctioneer’s charges

A debtor shall pay the charges of the of the auctioneer unless;

- a. The debtor cannot be found, or
 - b. He has no goods upon which execution can be levied;
- or
- c. The sale proceeds are insufficient to cover the charges in which case the creditor shall pay the charges or deficiency thereof.” (Emphasis added)



33. Thus, the general rule is that it is for the debtor to absorb the fees and charges of the auctioneer, unless a separate agreement has been entered into by the parties.
34. This is not to imply that an auctioneer can be imprudent, negligent or reckless and still recover his fees from a debtor. Under Section 23 of the [Auctioneers Act](#), he has certain statutory duties. The section provides that the auctioneer has a triple duty: to act in a manner befitting an officer of the court; to act in accordance with the rules prescribed when repossessing, attaching, storing or selling any property; and to maintain appropriate books of accounts.
35. The question as to whether the auctioneer was negligent or breached his duties is however, not before the court. The appropriate forum for assessing that question is a complaint against an auctioneer under the Act. Indeed, under the Act, Section 26 provides an aggrieved party the right to recover damages from an auctioneer for any unlawful or improper exercise of his power.
36. The above position is buttressed by the finding in *Joseph M. Ng'ang'a & 2 others v Lawrence Muriungi Gichunge & another* [2016] eKLR where Seron J stated:

“In my humble view, the answer to the above question is straight forward; the judgment debtor is bound to settle the decretal sum plus the consequential execution costs. In other words, the judgment debtor should settle the auctioneer’s charges.”

Conclusion and Disposition

37. Ultimately, and in light of the foregoing discussion, I find and hold that the auctioneer’s fees are payable by the Respondent/Judgment Debtor.
38. It is so ordered.
39. Costs in the cause.

DATED AT KERUGOYA THIS 17TH DAY OF OCTOBER, 2024

R. MWONGO

JUDGE

Delivered in the presence of:

Mwagiru holding brief for Kagio for Plaintiff/Decree Holder

Rurige for Defendant/Judgment Debtor/ Respondent

No representation Muia for Objector

No representation Auctioneer in Person - Applicant

Murage, Court Assistant

