



REPUBLIC OF KENYA



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**Kenya Commercial Bank v Mulwa; Sadique Enterprises Auctioneers (Respondent)
(Civil Appeal 124 of 2021) [2023] KEHC 17326 (KLR) (16 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 17326 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 124 OF 2021
HM NYAGA, J
MARCH 16, 2023**

BETWEEN

KENYA COMMERCIAL BANK APPELLANT

AND

JONATHAN NDOLO MULWA DEBTOR

AND

SADIQUE ENTERPRISES AUCTIONEERS RESPONDENT

*(being an appeal from the ruling of HON. H. Okwany (PM) delivered on 11th
February 2021 in Misc. Civil Application No. 13 of 2020 at Mavoko Law Courts)*

JUDGMENT

1. This appeal arises from a Ruling delivered on 11th February 2021 by Hon H Okwani SRM in respect to an application dated February 24, 2020.

Background

2. The Respondent is an auctioneer within the meaning of the term Under Section 2 of the [Auctioneers Act](#). The Appellant is a financial institution, and for the purposes of this Appeal had instructed the Respondent Auctioneer to recover a sum of Kshs 83,211/= from one Norman Mulinge Masila (the debtor).
3. Vide an application dated June 24, 2020, the Respondent/Auctioneer sought the following orders:-
 1. That the honorable court be pleased to direct/order that the instructing party /respondent is liable to pay auctioneers charges and expenses arising from execution/repossession done by the auctioneer/applicant.



2. That the auctioneer bill of costs dated 24th June, 2020 and attached herewith be deemed as properly drawn and filed and the same be taxed and assessed by the taxing master and paid forthwith by the respondent after taxation.
3. Costs of the application be provided for.
4. After hearing the submissions of the parties, the learned magistrate allowed the application and taxed the Auctioneers Bill of Costs as drawn.
5. Aggrieved by the decision the Appellant filed a Chamber Summons, the mode provided under Rule 55 (4) of the Auctioneer Rules. The Appellant sought the following orders;-
 1. That the ruling by the Learned magistrate Honourable H. Onkwani on taxation of the Bill of Costs filed in Miscellaneous Application No 13 of 2020 by the respondent against the appellant herein and dated 11/2/2021 be hereby set aside in its entirety.
 2. That in the alternative, the bill be reviewed and taxed off or remitted with appropriate directions to a Taxing Officer as the court shall deem fit for reconsideration.
 3. That the costs of this appeal be provided for.
6. The appeal was canvassed by way of Written Submissions.

Appellant's Submissions

7. The Appellant's argument is that no dispute had arisen on the Bill of Costs under Rule 55 of the Auctioneers Rules and therefore the learned magistrate should not have proceeded to tax the Bill of Costs.
8. It is also argued that under the said Rules, the debtor is always liable to pay Auctioneers fees except in the circumstances set out in the proviso to Rule 55 of the said Rules. That the Auctioneer ought to have served the debtor with the invoice before filing the bill for taxation and it was only after the Appellant objected to the bill did the auctioneers have the recourse of filing the Bill of Costs. I was referred to African Merchant Assurance Co Ltd vs Hezron Gatuma Onsongo [2019] eKLR.
9. The Appellant also stated that there existed a Service Level Agreement between the Appellant and the Respondent which provided that the Respondent was entitled to a commission of 10% on the amount collected. In view of this agreement, it is argued, the parties are bound by the same and the court has no role in interfering with the same. Counsel cited Pius Kimaiyo Langat vs Co-operative Bank of Kenya Limited [2017] eKLR.
10. Counsel for the Appellant also faulted the learned magistrate for allowing items that were not provided for in law and were not supported by any evidence;
 - a. Preparation of Bill of Costs
 - b. Filing of Auctioneers Bill of Costs, Notice of Appointment and Submissions.
 - c. Service of Auctioneers Bill of Costs
 - d. Advocates instruction fees
 - e. VAT.
11. On this point, counsel for the Appellant cited Co-operative Bank Limited vs Jeofrick N Muinde T/A Kimu Auctioneers [2019] eKLR.



12. Additionally, it is argued that by virtue of the fact that the Auctioneer only proclaimed the debtor's goods before the bank was paid or instructions halted, then the Auctioneer is only entitled to ½ of the fees as provided under Schedule 4 of the Rules. It is not fair, it is argued, to base the Auctioneer's fees on the decretal amount because in some cases, the value of the attached goods maybe less than the decretal amount.
13. Lastly, it is the Appellant's contention that the learned magistrate failed to give reasons that resulted in her decision. I was referred to [Co-operative Bank Ltd vs Jacinta Nkirote and Another](#) [2022] eKLR.

Respondents Submissions

14. The Respondents submits that this court ought not to interfere with the finding of the lower court unless it finds that the same is based on no evidence, misapprehension of the evidence or that the trial court applied the wrong principles in reaching its findings.
15. It is submitted that it is clear that a dispute had arisen between the parties as evidenced by the correspondence in the Record of Appeal.
16. It is further submitted that from the material before the court, the Bank itself did confirm that some loans were fraudulently obtained and that the debtors were not able to repay the same. Therefore, the bank was the one rightly meant to pay the auctioneer.
17. That the trial court was bound by the decision in Bungoma HCC No 312 of 2019 which stated that once instructions are halted, the instructing client ought to foot the auctioneer's fees.
18. It is further argued that service of a proclamation is not a separate step from the entire legal process since once proclaimed the goods are in control of the auctioneer who is therefore entitled to full fees. I was referred to Nbi HCCC No 1818 of 2000, National Industries Credit Bank Limited vs Majani Mingi Sisal Estates Limited and 2 Others.
19. The Respondent further denies the existence of the purported service level agreement between the parties as alluded to by the Appellant. The Respondent further states that the Appellant is introducing new issues that were never raised in the trial court. That no leave has been sought to raise the new issue.

Determination

20. Having considered the application I find that the following are the issues for determination;-
 - (a) Whether the learned magistrate had jurisdiction to entertain the Auctioneer's Bill of Costs in the absence of a dispute under Rule 55 of the [Auctioneer's Rules](#).
 - (b) Whether the Respondent was entitled to costs payable by the Appellant.
 - (c) Whether the Bill of Costs as drawn is in accordance with the Law and more specifically the Auctioneer's Rules.

I will begin with the first issue.

21. Parties have cited Rule 55(2) of the [Auctioneer's Rules](#). The same states as follows;-

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.

22. From the Appellant's point of view, the Auctioneer has never presented a tabulation of her costs. It was their position that no dispute has arisen, as envisaged by law, to warrant the filing of the Bill of Costs in the first place. For that reason, it is argued, the trial court had no jurisdiction to hear the matter.
23. There is no doubt that Rule 55(2) provides that where a dispute arises a magistrate or the board may on the application of any party to the dispute assess the fees payable.
24. The Rules clearly contemplate that a dispute ought to have arisen before the Auctioneer can file his/her Bill of costs. The onus is on the Auctioneer to show the court that such a dispute has arisen. The existence of a dispute ought to be express or can be inferred from the documents before the court.
25. Curiously, despite stating that the Bank was made aware of the auctioneer's charges, the Auctioneer has not annexed any invoice breaking down her costs to the Bank. The trial court was asked to determine that issue. It referred to a trail of emails and specifically the one dated January 23, 2020.
26. I have looked at the said email, I am not convinced that it amounts to a tabulation of fees payable. The subsequent email dated January 28, 2020 from the Bank does not qualify as a dispute of the fees. It merely asked the Auctioneer to provide a break down of the costs. It also asked the Auctioneers to send a fee note. There is nothing to show that the Auctioneer sent a fee note as requested.
26. Therefore, from my reading of Rule 55(2) of the *Auctioneer's Rules*, and in agreement with the Appellant, the filing of the Bill of Costs was premature.
27. In her Ruling the Learned Magistrate stated as follows;
- ”.... The respondent has submitted that under the law this court has no jurisdiction to deal with the issue of Auctioneer Costs. A closer examination of Section 55 of the Rules in case of dispute as to the costs. The High Court assumes jurisdiction. I therefore find that the respondent is liable to pay the auctioneers fees.
28. The critical words of the trial court were that the High Court assumes jurisdiction yet the court was not sitting as a High Court.
29. The question that begs an answer is whether a magistrate's court in this case Mavoko Chief Magistrate's Court, had jurisdiction to entertain the application.
30. From the material before me the instructing bank was Kenya Commercial Bank, Kikima Branch. The debtor in question was based in Kikima, Makeni County. It is thus not clear why the Auctioneer decided to file the Bill of Costs at Mavoko Law Courts, in Machakos County.
31. In my view, reference to a “magistrate” does not mean presenting the bill to any magistrate. An analogy must be drawn to other legal disputes. If the cause of action arose in Kikima ,or the debtor, or the respondent herein was in Kikima, then the court having geographical jurisdiction over Kikima was the one seized of jurisdiction to handle the matter. This is in line with the provisions of Section 15 Of the *Civil Procedure Act* which provides for the place of filing a suit. It states as follows;-

Other suits to be instituted where defendant resides or cause of action arises.



Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction—

- a. the defendant or each of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain; or
- b. any of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain, provided either the leave of the court is given, or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid acquiesce in such institution; or
- c. the cause of action, wholly or in part, arises.

Explanation.(1)—Where a person has a permanent dwelling at one place and also a temporary residence at another place, he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary residence.

Explanation.(2)—A corporation shall be deemed to carry on business at its sole or principal office in Kenya, or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.

Explanation.(3)—In suits arising out of contract, the cause of action arises within the meaning of this section at any of the following places, namely— (i) the place where the contract was made; (ii) the place where the contract was to be performed or the performance thereof completed; (iii) the place where in performance of the contract any money to which the suit relates was expressly or impliedly payable.

Illustration.—(a) A is a tradesman in Nairobi. B carries on business in Mombasa. B by his agent at Nairobi buys goods of A and requests A to deliver them to Mombasa by rail. A may sue B for the price of the goods either in Nairobi, where the cause of action has arisen, or in Mombasa, where B carries on business.

Illustration.—(b) A resides at Kisumu, B at Nairobi, and C at Mombasa. A, B, and C being together at Nakuru, B and C make a joint promissory note payable on demand and deliver it to A. A may sue B and C at Nakuru, where the cause of action arose. He may also sue them at Nairobi, where B resides, or at Mombasa, where C resides; but in each of these cases, if the non-resident defendant objects, the suit cannot proceed without the leave of the court.

32. The provisions above are meant to streamline court proceedings and avoid haphazard filing of claims. In this case, though the issue was not canvassed, I find that the bill of costs, if it was necessary in the first place, ought to have been filed either at a Court that exercised jurisdiction over Kikima, where the instructions emanated from, or at Nairobi, where the Banks Head Office is situated and where the contract between the parties was entered into. There is nothing to explain why the bill was presented to Mavoko Law Courts.
33. On the above grounds, I find that the court at Mavoko was not seized of the necessary geographical jurisdiction to entertain the Bill of Costs in the first place.



34. In the celebrated case of the The *Owners of Motor Vehicle 'Lilians' vs Caltex Oil Kenya Limited Limited* (1989) eKLR the court was clear on what effect of Jurisdiction or lack thereof has on a court. It held as follows;

Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

35. Having made the above findings I don't think that I need to delve into the other issues which touch on the bill itself. Nevertheless, the court is obligated to determine the same in the event that my finding on jurisdiction is overturned.

36. The Appellant has referred to a service level agreement which was denied by the Respondent. Annexed to the Replying Affidavit was a copy of the document duly executed by both sides. The Respondent disowned the same yet their signature and stamp appears on it. It is my considered view that the Agreement was in force at the time of issuance of instructions on May 22, 2019. The Auctioneer cannot purport to dismiss it.

37. As for the specific items on the bill, I will refrain from addressing them since this may unfairly influence the court that will be seized of this matter after the disposal of this appeal.

38. After considering the Appeal, the submissions filed, I find that this is a case where the court is entitled to review the orders of the trial court. This is based on the issue of jurisdiction of the court to entertain the Bill of Costs in the first place. Subsequently, I allow the appeal and direct that:-

- a. The Auctioneer shall forward his/her fee note/invoice to the Bank for consideration.
- b. In the event of a dispute as envisaged under the Rules, the Auctioneer is at liberty to file his Bill of costs in a court of competent jurisdiction or before the Auctioneers Licensing Board.
- c. The Appellant shall have the costs of this Appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 16TH DAY OF MARCH, 2023.

H. M. NYAGA

JUDGE

In the presence of;

C/A Immanuel

Mr. Watuka for Appellant

N/A for Respondents

