



REPUBLIC OF KENYA



Kamenya v Jimmy Omwenga Nyakagwa t/a Fortune Auctioneers (Civil Appeal 116 of 2021) [2023] KEHC 1393 (KLR) (1 March 2023) (Judgment)

Neutral citation: [2023] KEHC 1393 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL 116 OF 2021
PN GICHOHI, J
MARCH 1, 2023**

BETWEEN

KENNETH KAMENYA APPELLANT

AND

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

(Being an appeal from the Order and judgment delivered by Hon. S.K. Onjoro Principal Magistrate on 27th August, 2021 in Kisii Misc. Appl. No. 33 of 2021)

JUDGMENT

1. The background of this appeal is that vide application dated February 22, 2021 Jimmy Omwenga Nyakagwa t/a Fortune Auctioneers (appellant) sought taxation of his bill of costs against Kenneth Kamenya (respondent) which arose from a notice of motion dated February 22, 2021 in Kisii Msc. Application No. 3 of 2021.
2. In that application, Jimmy Omwenga Nakagwa t/a Fortune Auctioneers who was the Applicant / Decree Holder sought that the auctioneer's bill of costs dated January 26, 2021 be taxed and a Certificate of taxation be issued . He further sought that a judgment does issue in terms of the certificate of costs.
3. The grounds were that they had received warrants instructions to levy distress for rent against the respondent judgment/debtor. that they had proceeded to proclaim the properties of the respondent judgment debtor and obtained an order for security. Thereafter, the respondent/judgment debtor settled the arrears therein. Further, the Applicant sated therein that he was entitled to his commission / and or fees upon giving a fourteen-day statutory notice payable by the judgment debtor as per the Auctioneer Rules but the judgment debtor had failed to pay the said costs hence the application.



4. Kenneth Kamenya opposed the bill vide a replying affidavit dated 31st March 2021 on the grounds that he had paid a total of Ksh. 117, 000/= but even after clearing the same, the Auctioneer came to attach his goods for failure to pay rent. He therefore sought that the application be dismissed with costs. The Bill of Costs was eventually taxed at Ksh. 38,280/= vide a ruling delivered on August 27, 2021 by Hon. S. K. Onjoro , a Principal Magistrate.
5. Aggrieved by the said ruling, Kenneth Kamenya has now appealed to this court. In his Memorandum of Appeal dated September 28, 2021, he has raised Six (6) grounds of appeal as follows;
 1. That the learned magistrate erred in law by not finding that the respondent was not entitled to attachment fees.
 2. That the learned magistrate erred in law and misdirected himself by allowing the applicant's application despite not being predicated on material evidence.
 3. That the learned magistrate erred in law by not finding that the Appellant had no rent arrears at the time of the purported attachment.
 4. That the learned magistrate erred in law in failing to correctly evaluate, both oral and documentary evidence tendered by the Appellant thereby arriving at a wrong conclusion hence wrong ruling.
 5. That the learned magistrate erred in law by failing to adequately consider the appellant's evidence, submissions and authorities relied on hence arrived at a wrong conclusion and judgment.
 6. That the learned magistrate erred in law, failed, and in fact ignored to appreciate the fact that the Respondent's bill of costs was actuated with malice and hence arrived at a wrong conclusion and ruling.
6. The appeal was disposed of by way of written submissions. In their submissions dated January 24, 2023 and filed by the firm of Bosire Gichana & Co. Advocates , counsel for the Appellant gives the history of the matter and submits that the respondent is not entitled to auctioneer 's fees. He therefore prays that the appeal be allowed.
7. The respondent too filed submissions dated January 24, 2023 through the firm of G. M. Nyambati & Co Advocates who similarly gave the background of the matter. Counsel submits on the main issue that is , whether the Respondent is entitled to the fees as taxed.
8. While citing the Court of Appeal decision in *National Industrial Credit Bank Limited v S.K.Ndegwa Auctioneer* [2005]eKLR where the Court found that proclamation of movable goods is legally and effectively an attachment , counsel submits that the question of material evidence of attachment as contended by the Appellant is irrelevant to the extent that a proclamation amounts to attachment and proclaimed properties need not be physically moved or seized.
9. Counsel therefore submits that the respondent was entitled to fees from the moment he proclaimed the Appellant's property hence, the learned magistrate construed the law properly in awarding the respondent his costs . He urges the court to dismiss the appeal with costs.



Determination

10. From the memorandum of appeal and submissions herein, the broad issue is whether the respondent was entitled to his fees eventually taxed by the learned magistrate. In his submissions in the lower court dated July 6, 2021, counsel for the respondent argued in paragraph 13 and 14 thereof:-

13. The action of attaching cannot be equated to proclamation for the simple reasons that the process is mutually exclusive. The proclamation comes before the attachment. The Auctioneer Rules under Chapter 526 of law of Kenya in the portion dealing with attachment clearly separates charges on attachment before and after.

14. The fees chargeable are thus different. Part II item 4 of the Auctioneers Rules provide for “fees on attachment /repossession/distrain and expenses “now that there was no attachment or actual seizure of the Respondent’s goods, the Applicant is only entitled to transport fees of Kshs. 5,000 since it is within Kisii town. In any case the Respondent had already paid the Applicant an amount of Kshs. 8,000 which already exceeds the fees he is entitled for transport.”

11. Contrary to the Appellant’s assertion that the magistrate did not consider his submissions, the magistrate stated:

“The Respondent claimed that he had paid all the arrear and as such no proclamation took place. That the applicant is not entitled to costs he is seeking.

I have considered the submissions of the parties herein and the issue for determination is whether the auctioneer is entitled to the costs he is seeking. The proclamation is indicated to have taken place on December 4, 2020. The Respondent however claims that he had cleared all rent arrears and relied on receipts as at January 12, 2021 the Respondent still had rent arrears of Ksh. 77,900. The Respondent cannot thus claim that he had no rent arrears and that proclamation was not done. There is therefore no evidence that he had paid the rent arrears in full. In the premises I find that proclamation was indeed conducted properly.”

12. A look at the bill of costs shows that the magistrate took into account the submissions. What is apparent here is the construction of the words “proclamation and attachment” in regard to the issue of whether the auctioneer was entitled to fees. This has not been settled between the appellant and the respondent. The basis for taxation of auctioneer costs is rule 12 of the Auctioneer Rules and the manner in which an auctioneer’s charges are assessed was settled by the court of appeal in *National Industrial Credit Bank Limited v S.K.Ndegwa Auctioneer* [2005]eKLR where it held:-

It is true that the manner and the procedure of attachment stipulated in order 21 rule 38 *Civil Procedure Rules* appear to be in conflict with the procedure prescribed in rule 12 of the *Auctioneers Rules*. However, it is clear that the *Auctioneers Act* is a modern statute and the procedure contained in rule 12 of the *Auctioneers Rules* is indeed intended to be a reform of the old procedure contained in order 21 rule 38 of the *Civil Procedure Rules* which clearly needs to be amended to remove any inconsistencies.

The actual words used in the two rules is not decisive of whether an attachment has taken place. One has to consider the essence and purpose of the attachment. 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 judgment-debtor and place them in the custody of the law



so that they can be sold to satisfy the judgment debt if the judgment-debtor does not pay the debt. To place the goods in the custody of the law it is not necessary, as Mr. Gatonye correctly submitted, that the goods must be carried away from the premises of the judgment-debtor. In the commentary to order 21 rule 43 of the Indian rule which is in pari materia to order 21 rule 38, the authors of Mulla, The Code of Civil Procedure 16th Edition state in part at page 2667:

“where a warrant of attachment is executed by affixing it to the out door of the warehouse in which goods belonging to the judgment debtor are stored, it amounts to “actual seizure” within the meaning of the present rule”.

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 judgment-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 judgment-debtor can only redeem them by the payment of the debt. If the judgment-debtor fails to pay the auctioneer moves to the second stage of conducting the sale of the attached goods.”

13. I am therefore satisfied that the appellant in this matter was still in rent arrears and once the proclamation was done, the respondent was entitled to his fees. In the upshot, there is no merit in this appeal and the same is dismissed. The learned magistrate’s decision dated August 27, 2021 is hereby upheld. The costs of this appeal are awarded to the Respondent.

appeal.

DATED, SIGNED AND DDELIVERED IN OPEN AT KISII THIS 1ST DAY OF MARCH, 2023

PATRICIA GICHOHI

JUDGE

In the presence of:

Ms Nyaenya for Bosire Gichana for Appellant

N/A for Respondent

Kevin Isindu, Court Assistant

