



REPUBLIC OF KENYA



**Ochieng v Apol; Odongo t/a Odongo Auctioneer (Interested Party) (Civil Appeal E116 of 2021) [2023] KEHC 2438 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2438 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT HOMA BAY  
CIVIL APPEAL E116 OF 2021**

**KW KIARIE, J**

**MARCH 23, 2023**

**BETWEEN**

**MOSES ATUORO OCHIENG ..... APPELLANT**

**AND**

**TRUPHENA ATIENO APOL ..... RESPONDENT**

**AND**

**OSCAR OTIENO ODONGO T/A ODONGO AUCTIONEER .... INTERESTED PARTY**

*(Being an Appeal from the ruling and order in Mbita Senior Resident Magistrate's SRMCC No.92 of 2016 by Hon. Nicodemus N. Moseti –Senior Resident Magistrate)*

**JUDGMENT**

1. On November 24, 2021 Hon. Nicodemus N. Moseti dismissed an application dated February 1, 2021. The application was seeking court orders to bar execution against the appellant. The application was dismissed for want of merits.
2. The appellant was aggrieved by the said ruling and filed this appeal. He raised the following grounds:
  - a. The learned trial magistrate erred in law and in fact by failing to consider the application dated 1/2/2021, together with the annexures thereto on merit thereby occasioning a gross miscarriage of justice.
  - b. The learned trial magistrate erred in law and fact by failing to clearly explain the reasons why the auction of the appellant's motor vehicle was made despite the decretal sums having been fully paid.



- c. The learned trial magistrate erred in fact and in law by finding that the appellant had not exhibited that he complied with the consent judgment dated 30/9/2020 in its entirety contrary to the evidence on record.
  - d. The learned trial magistrate erred in fact and in law by failing to appreciate the fact that the alleged consent recorded on 30/9/2020 was vague and could only be complied with once the auctioneer's fees were assessed and fresh warrants of attachment issued (which warrants were never issued).
  - e. The learned trial magistrate erred in law and in fact by failing to hold and find that the respondent had instructed the auctioneers to recover the decretal sum of kshs.864, 863/- which was paid 8 days before the purported auction was conducted on the 19/12/2020 thereby redeeming the appellant's attached property and bringing to an end the execution process.
  - f. The learned trial magistrate erred in law and fact by failing to hold and find that the auctioneer sold the appellants motor vehicles based on the decretal sum of kshs.864,863/- which was illegal and null as the appellants property had by then been redeemed.
  - g. The learned trial magistrate erred in law and fact by failing to consider and analyze the appellant's submissions thereby occasioning an erroneous estimate of the issues for determination.
  - h. The learned trial magistrate erred in law and fact by descending into the arena of conflict by shifting the burden to the appellant's insurer to indemnify the appellant notwithstanding the overwhelming evidence on record on glaring illegalities committed against the appellant by the respondent and his authorized agents.
3. The appeal was opposed by the respondent through the firm of G.S Okoth & Company Advocates while the interested party opposed the same through the firm of Owiti, Otieno & Ragot Advocates.
  4. The respondent and the interested party did not file grounds of opposition or submissions.
  5. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of *Selle vs. Associated Motor Boat Co. Ltd.* [1965] E.A. 123, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.
  6. The respondent had obtained judgment against the appellant. Subsequently, the appellant and the respondent entered into a consent on September 30, 2020 in the following terms:  
By consent of the parties the decretal sum, party and party costs as well as the auctioneer's fees be paid within 30 days. In default execution to issue.
  7. At the time of hearing of the application the subject of this appeal, the respondent contended that the decretal amount had not been fully paid. The appellant argued that he had fully settled the same.
  8. Whether the decretal sum has been fully settled or not is not a legal issue but an accounting one. If that was the only dispute, then parties were required each to demonstrate what they were contending not in arguments, but by rendering accounts. The learned trial magistrate was therefore justified to dismiss the application; the appellant did not satisfy the court that he had paid the decretal sum and the incidentals thereof as agreed between the parties.
  9. I find that the appeal lacks merit and I accordingly dismiss it with costs.



**DELIVERED AND SIGNED AT HOMA BAY THIS 23<sup>RD</sup> DAY OF MARCH, 2023**

**KIARIE WAWERU KIARIE**

**JUDGE**

