



Makini Auctioneers Agencies v AAR Insurance Kenya Limited (Miscellaneous Civil Application 386 of 2019) [2023] KEHC 4131 (KLR) (5 May 2023) (Ruling)

Neutral citation: [2023] KEHC 4131 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS CIVIL APPLICATION 386 OF 2019**

**OA SEWE, J
MAY 5, 2023**

BETWEEN

MAKINI AUCTIONEERS AGENCIES APPLICANT

AND

AAR INSURANCE KENYA LIMITED RESPONDENT

RULING

1. Before the court for determination is the Chamber Summons dated December 22, 2020. It was filed as an appeal by Makini Auctioneers Agencies under Rule 55(4) and (5) of the *Auctioneers Rules*, 1997 and all other enabling provisions of the law for orders that:
 - (a) The court be pleased to allow this appeal against the Ruling on Taxation of the Auctioneer's Bill of Costs dated October 2, 2019 made by Hon. Joshua Nyariki, Deputy Registrar, on December 16, 2020.
 - (b) The Ruling on Taxation delivered by Hon. Nyariki, DR, on December 16, 2020 dismissing the Auctioneer's Bill of Costs dated October 2, 2019 be set aside.
 - (c) The court be pleased to tax the Auctioneer's Bill of Costs dated October 2, 2019 as drawn or assess the same in such other terms as may appear reasonable, in the alternative, the Auctioneers Bill of Costs dated October 2, 2019 be remitted back to the Deputy Registrar to be taxed afresh with suitable directions.
 - (d) The costs of the application be borne by the respondent.
2. The appeal was premised on the following grounds, as set out on the face of the application:
 - (a) The Deputy Registrar erred in both fact and law in dismissing the Auctioneer's Bill of Costs dated October 2, 2019 against clear directives by the High Court made on October 19, 2018.



- (b) The Deputy Registrar erred in both fact and law in failing to appreciate that the Auctioneer was directed by the High Court to look up to the respondent for payment for the execution carried out on July 27, 2018.
 - (c) The Deputy Registrar erred in both fact and law in failing to exercise his discretion judiciously by following the correct principles in law or at all or applying the wrong principles of law in exercise of such discretion and hence falling into error in that he did not even give a decision as to how he would have taxed or assessed the Bill in the event he would have allowed it.
 - (d) The Deputy Registrar erred in both fact and law in failing to appreciate that there was no application for striking out the Auctioneer's Bill of Costs or a Preliminary Objection raised against the Bill of Costs.
 - (e) The Deputy Registrar erred in both fact and law in failing to distinguish that there were two separate and distinct instructions to execute, issued to the applicant.
 - (f) The Deputy Registrar fell into error when he held that the first warrants had expired, instead of being set aside.
3. The application was supported by the affidavit of the applicant, George Munyambu Kinyua, sworn on December 22, 2020. He averred that he was entrusted with Warrants of Attachment and Sale dated July 25, 2018 by the judgment creditor, AAR Insurance Kenya Ltd, with instructions to execute the same against the judgment debtor, Musumali Meghji Insurance Brokers Ltd. That he accordingly proceeded to make a proclamation against the judgment debtor's property, but the attachment was set aside by a ruling dated October 19, 2018, by which the respondent herein was to pay his charges.
 4. The applicant further averred that, because the respondent did not settle his charges, he filed a Bill of Costs dated October 2, 2019; which Bill was dismissed by a ruling delivered on December 16, 2020; hence this appeal. The applicant further averred that, the judgment debtor paid the Auctioneer's fees arising out of the subsequent attachment carried out on November 15, 2018; and that thereafter, on March 14, 2019, the parties recorded a Consent in Mombasa Civil Appeal No. 99 of 2018: Masumali Meghji Insurance Brokers Ltd v AAR, in which it was agreed that the judgment debtor was to settle all the outstanding Auctioneer's charges. According to him, the parties had in mind the charges arising out of the 2nd attachment carried out on November 15, 2018; and certainly not the first attachment of July 27, 2018.
 5. Thus, it was the averment of the applicant that, had the Deputy Registrar considered the full effect of the Order made by Hon. Chepkwony, J. on October 19, 2018, he would not have dismissed the Bill of Costs dated October 2, 2019. He further averred that, in any event, the Deputy Registrar was under obligation to undertake the taxation for purposes of any subsequent appeal arising. Accordingly, the applicant prayed that the appeal be allowed and the ruling and orders of the Deputy Registrar dated December 16, 2020 dismissing the Bill of Costs dated October 2, 2019 be set aside. He also prayed that the Court be pleased to tax his Bill of Costs dated October 2, 2019 as drawn or assess the same in such other terms as may appear reasonable; or in the alternative, the said Bill of Costs dated 2nd October 2019 be remitted back to the Deputy Registrar to be taxed afresh with suitable directions.
 6. In response to the appeal, the respondent relied on the replying affidavit sworn on October 14, 2021 by its Legal Officer, Mr. Martin Kuruga. He averred that the applicant verbally agreed, through a clerk, to assist in the execution of a decree issued by the Chief Magistrate's Court in Mombasa CMCC No. 1139 of 2017; that the applicant thereafter duly took out Warrants of Attachment and Sale pursuant to which a Proclamation was served on the judgment debtor. Mr. Kuruga explained that, unknown to



the respondent's Advocates, an order of stay of execution had been issued which later led to the filing of a contempt application. The contempt application was determined on the October 19, 2018 by Hon. Chepkwony, J.; and one of the orders was that the respondent settles auctioneer charges, if any.

7. At paragraphs 8 and 9 of the replying affidavit, Mr. Kururga averred that, after the Court of Appeal lifted the stay order, and while the respondent was awaiting fresh action on execution, the applicant informed it that the judgment debtor was willing to settle the decretal amount in instalments. Consequently, the applicant was advised by the respondent's counsel of the need to waive all legal charges and interest for both matters before the High Court and Court of Appeal so long as the judgment debtor had committed to pay the full decretal amount as per the decree dated May 18, 2018 plus all sums due to the auctioneer. Mr. Kuruga pointed out that all the discussions were done through the applicant; and that it was agreed that the applicant would recover all his charges from the judgment debtor; which was done. Thus, he asserted that the applicant's charges in the total sum of Kshs. 1,200,000.00/= were settled; and therefore there is no basis for taxation.
8. Mr. Kuruga further averred that, the amount of Kshs. 1,200,000/= paid by the judgment debtor as the applicant's charges was, in any case, manifestly excessive. At paragraph 17 of the replying affidavit, he proposed that, going by the scale provided for in the Fourth Schedule of the Auctioneers Rules, the applicant was entitled to no more than Kshs. 396,383.54, made up as hereunder:
 - (a) Receipt of court warrants - Kshs. 1,000/=
 - (b) Fees before attachment - Kshs. 4,000/=
 - (c) Fees on attachment:
Kshs. 4,001 to Kshs. 100,000 at 10% - Kshs. 10,000/=
Kshs. 100,001 to Kshs. 1,000,000/= at 5% - Kshs. 50,000/=
Over Kshs. 1,000,000/= at 2% of balance of
Kshs. 16,194,177/= at 2% - Kshs. 323,883.54
 - (d) Attendance for taxation - Kshs. 2,100/=
9. Accordingly, the respondent prayed for the dismissal of the appeal with costs. He annexed copies of the Consent recorded in Mombasa Civil Appeal No. 99 of 2018, Mombasa Civil Application No. 375 of 2018 and Mombasa CMCC No. 1138 of 2017. The Consent was in the following terms:
 - (a) The full and final amount payable is Kshs. 17,075,195.00
 - (b) That Kshs. 5 million deposited in court pursuant to the Court of Appeal directions dated December 6, 2018 in CA NO. 375 of 2018 be released to the Plaintiff's advocates account namely Mbichire & Co. Advocates forthwith.
 - (c) The balance of Kshs. 12,075,195.00 is to be paid in twelve (12) post-dated cheques of Kshs. 990,000.00 payable monthly from 30th April. The thirteenth cheque will be for Kshs. 195,195.00.
 - (d) The Defendant (Masumali Meghji Insurance Co. Ltd) to withdraw the appeal both at the High Court (Civil Appeal 99 of 2018) and at the Court of Appeal (CA No. 375 of 2018).
 - (e) The plaintiff (AAR Insurance Kenya Ltd) to withdraw the execution proceedings against the defendant (Masumali Meghji Insurance Co. Ltd).



- (f) The Defendant (Masumali Meghji Insurance Co. Ltd) to settle all outstanding Auctioneers fees.
10. The applicant filed a further affidavit on December 2, 2019 to refute some of the respondent's assertions in its replying affidavit. He reiterated that he initially received Warrants of Attachment and Sale and that he duly levied an attachment that was undone by the court and an order given that his charges be paid by the respondent. He therefore contended that this initial attachment had nothing to do with the 2nd successful attachment for which he was duly paid by the judgment debtor. He further averred that, at no time did he agree to waive his charges in respect of the initial attachment and therefore that the respondent cannot be seen to be riding on the back of the judgment debtor in terms of payment of the charges due to him.
11. The appeal was urged by way of written submissions. In his written submissions, Mr. Njoroge proposed the following issues for determination:
- (a) Whether the jurisdiction of appeal has been properly invoked;
 - (b) Whether the Deputy Registrar erred in dismissing the Bill of Costs dated October 2, 2019;
 - (c) Whether the appeal should be allowed, and if so, what are the appropriate reliefs;
 - (d) What order should be made as to costs.
12. Mr. Njoroge made reference to Rule 55(4) and (5) of the *Auctioneers Rules* in urging the Court to find that the jurisdiction of the Court was properly invoked. He further submitted that the appeal turns on the Court's interpretation of the effect of the Consent recorded on March 14, 2019 vis-à-vis the earlier order of Hon. Chepkwony, J. dated October 19, 2018 as regards the applicant's fees. In Mr. Njoroge's submission, the Consent did not set aside or vary the earlier order dated October 19, 2018; and that the respondent remains liable to pay the applicant's costs for the 1st execution, which was set aside.
13. Mr. Njoroge relied on Order 25 Rule 5(1) and (2) of the *Civil Procedure Rules* as well as the case of *Josephat Wainaina Iraya t/a Queen Chick Inn v Daniel Arap Moi & another* [2008] eKLR for the proposition that without proof that the Consent was adopted or recorded as an order of the court in the respective files, the same cannot be enforced as between the parties. Thus, counsel prayed that the appeal be allowed and the orders prayed for in the Chamber Summons dated December 22, 2020 be granted.
14. On his part, counsel for the respondent, Mr. Mbichire, relied on his written submissions filed on May 6, 2022. He reiterated the factual basis of the appeal as captured in the respondent's replying affidavit and urged the court to find that the Consent was duly filed and adopted in the three files referred to at paragraph 13 of the respondent's replying affidavit, namely: Court of Appeal Civil Appeal No. 105 of 2018, HCCA No. 99 of 2018 and CMCC No. 1139 of 2017; and that pursuant thereto, the applicant was paid his charges in the sum of Kshs. 1,200,000/=. He relied on *Michael Okatch Omondi v Kevin Kwana Lunani* [2020] eKLR, *Brooke Bond Liebig (T) Ltd v Mallya* [1975] EA and *Contractors Ltd v Margaret Oparanya* [2004] eKLR to concretize his submissions on consent orders.
15. Thus, Mr. Mbichire defended the decision of the Deputy Registrar and pointed out that, in any event, the applicant was overpaid, going by the Scale set out in the Fourth Schedule of the Auctioneers Rules. He relied on *KANU National Elections Board & 2 others v Salah Yakub Farah* [2018] eKLR as to the limited circumstances in which the discretion of the taxing master may be interfered with.
16. In the light of the foregoing, the only issue that arises for determination herein, is whether the Deputy Registrar erred when he dismissed the applicant's Bill of Costs dated October 2, 2019, there being



no contestation on the jurisdiction of the court to handle the application. Indeed, Rule 55 of the Auctioneers Rules is explicit that:

- (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) 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.
 - (4) An appeal from a decision of a registrar or a magistrate or the Board under subrules (2) and (3) shall be to a judge in chambers.
 - (5) The memorandum of appeal, by way of chamber summons setting out the grounds of the appeal, shall be filed within 7 days of the decision of the registrar or magistrate.
17. A perusal of the documents on the file confirm that the Chamber Summons dated December 22, 2020 was filed within the period of 7 days provided for in Rule 55(5) above. In fact, the competence or otherwise of the appeal did not arise, and therefore is a non-issue.
18. As to whether the Deputy Registrar erred when he dismissed the applicant’s Bill of Costs dated October 2, 2019, it is now trite law that the Court will only interfere with the decision of a taxing officer in cases where there is an error in principle. In the case of Republic v Ministry of Agriculture & 20 others Ex-Parte Muchiri W’ Njuguna [2006] eKLR, Hon. Justice J. B. Ojwang (as he then was) stated as follows: -
- “...The court cannot interfere with the taxing officer’s decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an interference that it was based on an error of principle...”(see also KANU National Elections Board & 2 others v Salah Yakub Farah, supra)
19. I have accordingly perused the file herein and noted that impugned ruling in Civil Appeal Case No. 99 of 2018: Masumali Meghji Insurance v AAR Insurance Kenya Ltd delivered on October 19, 2018 has been annexed to the Supporting Affidavit at pages 11 to 21 thereof. It is therefore indubitable that orders were issued by the Court (Hon. Chepkwony, J.) as follows: -
- (a) Declaration that all actions taken towards execution of Decree after July 5, 2018 are a nullity and the same are set aside except the Decree and Certificate of Costs.
 - (b) The plaintiff/respondents shall pay the auctioneers costs, if any are claimed.
 - (c) The managing Director of the plaintiff, the financial Controller and the Head of Legal, be and are hereby fined Kshs. 100,000.00/= to be paid forthwith.



- (d) The plaintiff/respondent's advocate, Mr. Mbichire be and is hereby fined Kshs. 50,000.00/= to be paid forthwith.
- (e) In default, parties to be arraigned in court on October 20, 2018 to show why they cannot be sentenced to serve prison terms.
20. It is plain therefore that, in respect of the initial attachment, which attachment was set aside vide the ruling of October 19, 2018, the respondent was to bear the costs of the applicant. It is however not lost on the court that the dispute was thereafter settled vide the Consent dated March 14, 2019, and that the Consent was filed, not only in Mombasa Civil Appeal No. 99 of 2018, but also in Mombasa CA No. 375 of 2018 and Mombasa CMCC No. 1138 of 2017. The Consent was in the following terms:
- (a) The full and final amount payable is Kshs. 17,075,195.00
- (b) That Kshs. 5 million deposited in court pursuant to the Court of Appeal directions dated December 6, 2018 in CA NO. 375 of 2018 be released to the plaintiff's advocates account namely Mbichire & Co. Advocates forthwith.
- (c) The balance of Kshs. 12,075,195.00 is to be paid in twelve (12) post-dated cheques of Kshs. 990,000.00 payable monthly from 30th April. The thirteenth cheque will be for Kshs. 195,195.00.
- (d) The Defendant (Masumali Meghji Insurance Co. Ltd) to withdraw the appeal both at the High Court (Civil Appeal 99 of 2018) and at the Court of Appeal (CA no. 375 of 2018).
- (e) The plaintiff (AAR Insurance K Ltd) to withdraw the execution proceedings against the defendant (Masumali Meghji Insurance Co. Ltd).
- (f) The defendant (Masumali Meghji Insurance Co. Ltd) to settle all outstanding Auctioneers fees.
21. It is not within the ambit of this appeal to interrogate whether or not the Consent was in fact adopted as an order of the Court. Suffice it to say that the parties acted on it and compromised their pending disputes; including the payment of the applicant's outstanding fees. It is therefore instructive that, in *Flora Wasike v Destimo Wamboko* [1988] 1 KAR 625, Hancox, JA, reiterated the principle that:
- “... a consent judgment or order has a contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled which are not carried out.”
22. As to what would justify the setting aside of a contract, guidance was given in the case of *Brooke Bond Liebig (T) Ltd v Mallya* [1975] EA 266 in which a passage from *Seton on Judgments and Orders*, 7th Edition, Vol. 1 p. 124 was quoted with approval thus:
- “Prima facie, any order made in the presence and with the consent of Counsel is binding on all parties to the proceedings or action and those claiming under them and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court ... or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.”
23. Accordingly, in so far as the Consent dated March 14, 2019 indicated that the judgment debtor was to settle all outstanding auctioneer fees without differentiation, it follows that those fees included the



fees due in respect of the ruling and orders made on October 19, 2018. It is significant that the consent was brokered by none other than the applicant; and therefore, if he was differently minded, he would have championed that view for inclusion in the Consent.

24. The upshot of the matter is that it has not been shown, in this appeal, that the Deputy Registrar erred in dismissing the applicant's Bill of Costs dated October 2, 2019. I therefore find no merit in the Chamber Summons dated December 22, 2020. The same is hereby dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 5TH DAY OF MAY 2023

OLGA SEWE

JUDGE

