



**Odongo t/a Investment Auctioneers v BN Kotecha & Sons Limited (Civil Appeal E027 of 2021) [2023] KEHC 23128 (KLR) (20 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 23128 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E027 OF 2021  
DKN MAGARE, J  
SEPTEMBER 20, 2023**

**BETWEEN**

**OSCAR OTIENO ODONGO T/A INVESTMENT AUCTIONEERS APPELLANT**

**AND**

**BN KOTECHA & SONS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. This is a reference from a decision by Honourable G. Kiage given on February 26, 2021.
2. The applicant is an auctioneer. He received instructions to execute a decree. He served proclamation and the 2<sup>nd</sup> respondent proceeded to obtain stay of execution.
3. The application is against the 2<sup>nd</sup> respondent only. The 2<sup>nd</sup> respondent is said to have filed an appeal *vide* Mombasa HCCA No E005 of 2020. The appeal is against the decree in the primary suit. The court found no merit in the application and dismissed the same.
4. The court took issue with the fact that the application is through a Misc application. He therefore was of considered view that the matter should be filed through the matter in CMCC 1280 of 2017. He ordered that this file be placed inside the parent file.
5. In the replying affidavit a director of the 2<sup>nd</sup> defendant Hermert Kotecha, swore an affidavit stating that: -
  - a. The court gave onerous terms as a condition for stay pending appeal.
  - b. They were aggrieved and filed an appeal.
6. They filed an application being Misc 394 of 2019, seeking stay of the order dated May 30, 2019. The said order was given on January 23, 2020. The auctioneers bill is in respect to warrants issued on the decree of May 30, 2019, execution had been stated by the time the stay was granted.



7. They state that the application is premature. They stated that this was pre-empting the appeal. Their position is that this will lead to an absurd and embarrassing situation in administration of justice.
8. The decision necessitated the filing of an appeal through chamber summons dated March 5, 2021. In the notice of motion, the applicant sought the following orders:-
  - a. That the honourable court be pleased to issue certificate of taxation in respect of the auctioneer bill of costs dated January 25, 2020.
  - b. That the honourable court be pleased to issue certificate of taxation in respect of the auctioneer bill herein.
  - c. That the honourable court do enter judgment in favour of the applicant against the respondent in terms of certificate of taxation and order execution.
  - d. That the cost of this application be borne by the respondent.
  - e. Such further orders be made as the court may deem fit, just and expedient.
9. Submissions were filed, the contents of which I have read and will deal with within the analysis.

### **Analysis**

10. This is a fairly simple and straight forward matter has taken ages and litres of ink to determine. The parties agreed on the facts that: -
  - a. There was an order dated May 30, 2019.
  - b. The court ordered that failure to comply with the order was to attract payment of the entire decretal sum
  - c. The stay lapsed on June 30, 2019.
  - d. Execution occurred on September 2, 2019.
  - e. Stay orders were sought thereafter.
11. In this whole scenario there is no fault by an auctioneer. He is an officer of this court executing the warrants duly issued by the court. The stay was obtained after execution.
12. In the case of in *Nzoia Sugar Co Ltd v Nzoia Sugar Co Ltd & 3 others* [2014] eKLR Justice Mabeya held that;

“As far as I know, the position in law is that, the effect of issuance of warrants against a judgment/debtor is that any costs incurred in their execution is upon such debtor. However, when such warrants are recalled and annulled, it means that whatever was done pursuant to their issuance is also a nullity. The debtor is absorbed from acting on them. That leaves the court with the party who applied for their issuance, in this case the applicant. It is the applicant who caused the issuance of the warrants that were a nullity. Any costs incurred as a result thereof must fall where they lie, at the applicant’s doorstep. Accordingly, I hold that the charges of the auctioneer in the execution of the warrants dated 11<sup>th</sup> and October 12, 2011 are payable by Nzoia Outgrowers Company Ltd.”



13. Further, in the case of *National Industrial Credit Ltd v Majani Sisal Estate Ltd and 2 others* HCC 1818 of 2000 the court stated as follows at page 14:-

“I hold that under our laws, once goods or property are proclaimed under rule 12(b) and the prescribed procedure followed the process of attachment takes effect and it does not subsequently matter at what stage it is terminated. Once goods are proclaimed, they become attached and seized by law. The auctioneer from this stage is entitled to charge his commission under rule 11 paragraph 4.

14. Consequently, for purposes of the auctioneer’s fees they became due and payable upon execution. The stay did not set aside responsibility for payment of auctioneer’s charges. It stopped further execution.

15. Therefore, the judgment debtor, that is B.N Kotecha & Sons Ltd was bound to settle the auctioneer’s charges. The court may or may not have set aside the decree or order that allowed execution. However, the auctioneer’s costs had already crystalized, pursuant to the warrants that were validly in force. They were never set aside.

16. At no time did the court set aside the auctioneers charges. I therefore find and hold that the court erred in dismissing the auctioneer’s application.

17. There is the second issue. The court dealt with, that is, the filing of the auctioneer’s costs through a miscellaneous application. The court sought to discourage that practice. The court erred in discouraging the process. It is the correct process of filing for auctioneers cost.

18. Section 34 (1) of the *Civil Procedure Act* provides as doth: -

“All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.

19. A clear reading of the section is that only the issue of execution is to be dealt with. in this case, there was no dispute over execution.

20. Rule 55 of the *Auctioneers Rules 1997* provides as doth: -

(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.
21. Therefore, where a special procedure is provided, the court should provide for and proceed on the basis of that procedure.
22. The court was plainly wrong in advising the auctioneers to file their bills of costs in the main file. The two has no causal link between the parties and as such the auctioneer was correct in filing miscellaneous application.
23. I therefore find the appeal meritorious. I allow it. I note that the appellant was acting in person. I will award him costs of Kshs 25,000/=, to cover his disbursements.

### **Determination**

24. The conclusion for all these is that the appeal is merited. I make the following orders: -
- a. I allow the appeal, set aside in entirety the finding of the court given on February 26, 2021, in lieu thereof, I substitute them with an order directing that the respondent is bound to settle the auctioneers charges.
  - b. The file, being Mombasa HCCC Misc 113 of 2020, is remitted back to the lower court, for taxation of the auctioneer's bill of costs.
  - c. The matter be taxed by a magistrate other than Hon G. Kiage.
  - d. The magistrate be served with an order.
  - e. The filing of the miscellaneous civil application is a proper procedure for taxing the auctioneer's bill of costs.
  - f. Costs of Kshs 25,000/= to the appellant.
  - g. The matter be mentioned on October 2, 2023 before the Chief Magistrate's Court for further directions.
  - h. This file is closed.

**DELIVERED, DATED and SIGNED at MOMBASA** on this 20<sup>th</sup> day of **September, 2023**. Judgment delivered through Microsoft Teams Online Platform.

**KIZITO MAGARE**

**JUDGE**

**In the presence of:**

No appearance for Respondent

Odongo for the Appellant

Court Assistant - Brian

