



REPUBLIC OF KENYA



Kahunyo & another v Ngomonge t/a Dollar Auctioneers & another (Civil Appeal E911 of 2022) [2024] KEHC 14682 (KLR) (Civ) (4 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14682 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E911 OF 2022

TW OUYA, J

NOVEMBER 4, 2024

BETWEEN

JAMES KAHUNYO 1ST APPELLANT

PETER MWANGI 2ND APPELLANT

AND

SIMON NGOMONGE T/A DOLLAR AUCTIONEERS 1ST RESPONDENT

RATEMO OIRA & CO ADVOCATES 2ND RESPONDENT

(Being an appeal against the Ruling of the Hon. G.M. Gitonga. (PM) delivered on 31st October, 2022 in Nairobi Milimani CMCC Misc. Application No. 834 OF 2019)

JUDGMENT

Background

1. Simon Ngomonge t/a Dollar Auctioneers, (hereinafter the 1st Respondent), the Applicant before the lower Court, initiated proceedings by way of an Auctioneers bill of costs dated 22.07.2019 vide Nairobi Milimani CMCC Misc. Application No. 834 OF 2019 (hereinafter taxation proceedings) as against Ratemo Oira & Co. Advocates, (hereinafter the 2nd Respondent), the Respondent before the lower Court claiming a total sum of Kshs. 262,505.64/-. In a ruling delivered on 16.12.2021, Hon. Kivuti (PM), taxed the 1st Respondent's bill of cost as drawn.
2. Subsequently, James Kahunyo and Peter Mwangi (hereinafter the 1st & 2nd Appellant/Appellants) moved the Court vide a motion dated 15.09.2022 expressed to be brought pursuant to Sections 1A, 1B, 3, 3A & 63(e) of the *Civil Procedure Act* (CPA), Order 22 Rule 22 and Order 51 Rule 1 of the Civil Procedure Rules (CPR) seeking inter alia that the honorable Court be pleased to order that copies of the duly signed, sealed and certified copies of the decree passed on 29.03.2022, the certificate of



taxation and a certified copy of the ruling in Nairobi CMCC Misc. App. No. 834 of 2019 be availed, supplied and or served upon the Appellants; that the honorable Court be pleased to set aside the decree passed on 29.03.2022 together with all consequential orders against the Appellants; that the honorable Court be pleased to deem the execution process commenced against the Appellants vide warrants of attachment given on the 09.09.2022 and proclamation levied against the Appellants on the 12.09.2022 by the 1st Respondent be deemed irregular and procedural; that the honorable Court be pleased to order that the entire execution proceedings against the Appellants pursuant to warrants of attachment given on 09.09.2022 be vitiated and or set aside in their entirety and the said warrants be recalled and or cancelled; and that without prejudice to the orders sought herein the Auctioneer's charges or fees arising from execution, if at all, be taxed.

3. The grounds on the face of the motion were amplified in the supporting affidavit sworn by Chris Kabita, counsel on record for the Appellants. The gist of his deposition was that the bill of costs was exclusively between the 1st Respondent and Ratemo Oira & Co. Advocates (hereinafter the 2nd Respondent) arising from Milimani CMCC No. 5073 of 2015 – Charles Koka Muyu v James Kahunyo & Peter Mwangi (hereinafter lower Court suit) wherein at all materials the 2nd Respondent was acting as counsel for the Plaintiff in the lower Court suit. That the Appellants have never been parties to the taxation proceedings meanwhile the ruling leading up to the warrants of attachment issued on 09.09.2022 did not have the Appellants as parties to the taxation proceedings therefore it is not clear when and in what manner the Appellants were enjoined to the taxation proceedings. He further deposed that a copy of the decree in the taxation proceedings was never served upon the Appellants to wit the 1st Respondent thereafter erroneously and un-procedurally commenced execution as against the Appellants house-holds goods and motor vehicle registration number KCU 997Q. That in view of the foregoing the proclamation by the 1st Respondent was irregular and ought to be set-aside on accord of the fact that the Appellants stood to suffer irreparable harm as they were condemned unheard prior to issuance of the decree dated 29.03.2022 emanating from the taxation proceedings.
4. Shortly, thereafter the Appellants moved the Court vide another motion dated 21.09.2022 expressed to be brought pursuant to Sections 1A, 1B, 3 & 3A of the CPA and Order 51 Rule 1 of the CPR seeking inter alia that the honorable Court be pleased to deem the attachment of the Appellants motor vehicle registration number KCU 997Q and notification of sale dated 20.09.2022 are irregular null and void having been conducted during the currency of orders of stay of execution granted by the honorable Court on 20.09.2022; and that the honorable Court be pleased to order that the Officer Commanding Police Station (OCS) within whose jurisdiction the said attached motor vehicle is stored at the storage yard to assist ensure and have the motor vehicle registration number KCU 997Q released to the Appellants.
5. Similarly, the grounds on the face of the said motion were amplified in the supporting affidavit sworn by Chris Kabita, the gist of his deposition reiterating that the Appellants were never parties to the taxation proceedings therefore the attachment was an abuse of their right to privacy and use of private property. That the Appellants are equally aggrieved by the 1st Respondent's act of attaching motor vehicle registration number KCU 997Q despite stay of execution issued by the lower Court on 20.09.2022, having being duly served. In summation he stated that the warrants of attachment were irregular meanwhile the continued detention of the Appellants motor vehicle was unfair and detrimental to them as it had cut off their source of livelihood.
6. The 1st Respondent opposed the respective motions vide replying affidavits dated 23.09.2022 and 28.09.2022, the latter of whose gist was that the order issued on 20.09.2022 was served upon it



at 4.01pm after it had already attached the subject motor vehicle therefore any allegation that the attachment was illegal is misleading and untrue.

7. Both motions were contemporaneously disposed of by way of written submissions. In a ruling delivered on 31.10.2022, the lower Court dismissed the Appellants motions with costs.

The Appeal

8. Aggrieved with the outcome, the Appellants preferred the instant appeal challenging the finding by the lower Court premised on the following grounds in their memorandum of appeal as itemized hereunder:

- “1. That the learned Magistrate erred in law and fact by not making any substantive determination on the lingering issues that could be determined authoritatively that the bill of costs was exclusively between the 1st Respondent and 2nd Respondent only.
2. That the learned Magistrate erred in law and fact in failing to appreciate whether the Appellants were parties to the taxation and if service of the bill of costs and notice of taxation was effected upon the Appellants to enable them enter appearance at the taxation hearing which is highly contested and shutting out the Appellants from defending their matter which is a miscarriage of justice.
3. That the learned Magistrate erred in law and in fact in failing to appreciate that the 1st and 2nd Appellant were indeed not parties in the MCCMISC 834 of 2019 dated 22/07/2019.
4. That the learned Magistrate erred in law and fact in failing to appreciate that the 1st and 2nd Appellant were not parties to MCCMISC Application 834 of 2019 and instead purported to rationalize and amend the pleadings unprocedurally to include the Appellants as parties to the bill of costs without undue regard to technicalities.
5. The trial Magistrate erred in fact and in law in failing to appreciate that the 1st Appellant and 2nd Appellant did not participate in the proceedings and taxation in MCCMISC 834 of 2019 as they were not parties to the taxation.
6. That the learned Magistrate erred in law and in fact in failing to appreciate by determining the issue as to whether the Appellants were parties to the taxation MCCMISC 834 of 2019 and prematurity of the bill of costs, warrant of attachment and determining that it was rightfully before him despite all the evidences that was provided during the taxation, prove contrary.
7. That the learned Magistrate erred in law and in fact in his ruling when he dismissed the Appellants application dated 15/09/2022 and 21/09/2022 respectively and allowed the 1st Respondent to proceed with the execution of the taxation of the bill of costs yet the Appellants were not parties to the suit nor participated to the hearing of the taxation cause.



8. That the learned Magistrate erred in law and in fact in failing to appreciate that the execution ought to have been levied against the 1st Respondent who participated in the taxation of the bill date 22/07/2019.” (sic)
9. In light of the afore-captioned itemized grounds of appeal, the Appellants seeks before this Court orders to the effect that: -
 - “ a) That this appeal be allowed with costs.
 - b) That the ruling of 31.10.2022 by the honorable trial Magistrate be set aside, set aside the taxed amount, Auctioneer Bill of Costs be placed before a different taxing officer for appropriate consideration and that Appellants be allowed to file an appeal.
 - c) That the costs of the appeal be borne by the Respondent.
 - d) That such further orders may be made by this honorable Court may deem fit to grant.” (sic)
10. Directions were taken on disposal of the appeal by way of written submissions. Only the 1st Respondent complied, as at writing of this judgment.

Submissions

11. Counsel for the 1st Respondent contemporaneously addressed the various grounds of appeal as itemized by the Appellants. Addressing grounds 1, 2, 3, 4, 5 & 6 of the memorandum of appeal, counsel submitted that the 2nd Respondent instructed the 1st Respondent to execute as against Appellants in respect of the decree issued in the lower Court suit. It was submitted that vide a consent adopted as an order of the Court, between the 2nd Respondent and the firm of advocates acting for the Appellants in the lower Court suit, it was agreed therein that the 1st Respondent would file their bill of costs as against the Appellants. That pursuant to the said consent, the 1st Respondent drew up its bill of costs meanwhile served both the 2nd Respondent and counsel acting for the Appellants in the lower Court suit. Counsel thus contended that the Auctioneers bill of costs was not exclusively between the Respondents meanwhile the Appellants were duly captured as a party in the proceedings, served and represented in the matter at all material times as such the aforecaptioned grounds of appeal, must fail.
12. Concerning grounds 7 & 8 in the memorandum of appeal, revisiting the taxation proceedings and impugned ruling before the lower Court, it was submitted that liability on Auctioneer’s costs rests with the judgement-debtor as per Rule 7 of the Auctioneer’s Rules whereas none of the exceptions to the said rule apply to the Appellants, having already paid, before determination of the instant appeal, the taxed amount in respect of the 1st Respondent’s bill of costs. In summation, the Court was urged to dismiss the instant appeal with costs.

Disposition And Determination

13. At this juncture, it would be apt to observe that the instant appeal was disposed of as part of the Judiciary Rapid Result Initiative (RRI) matters. That said, the original record relating to the taxation proceedings did not form part of the record before this Court however I have duly taken the liberty of considering entirety of the Record of Appeal, the Supplementary Record of Appeal as well as the 1st Respondent’s submissions.



14. Having addressed myself on the above, it is trite that the duty of this Court as a first appellate Court is to re-evaluate the evidence adduced before the trial Court and to draw its own conclusions, but always bearing in mind that it did not have an opportunity to see or hear the witnesses testify. See *Selle and Anor. v Associated Motor Boat Co. Ltd and Others* (1968) EA 123 and *Ephantus Mwangi and Another v Duncan Mwangi Wambugu* (1982) – 88) 1 KAR 278.

15. The Appellants motions before the lower Court was expressed to be brought inter alia pursuant to Sections 1A, 1B, 3, 3A & 63(e) of the CPA, Order 22 Rule 22 and Order 51 Rule 1 of the CPR. The trial Court in disallowing the Appellants motions stated in part that; -

“I have carefully considered that two applications and the affidavit therein together with the annexures. I have equally considered the submissions by the counsel for what I am grateful. I have taken the liberty to peruse the Court file herein.

From the said records, it is clear that Miscellaneous Application Number 834 of 2019 arises from MCC Civil Suit Number 5073 of 2015. By a consent dated 10/07/2019 the list of the documents balance of the decretal sum being Kshs. 151,404 was settled, in the said consent, clause (c) therefore stated as follows:

“That Dollar Auctioneers did file their bill of costs against the Defendants in Court within seven (7) days of the consent order for the same to be determined by Court”

Further that Court made a ruling upon it filing of the said bill of costs when ruling was delivered on 16/12/2020, in the said ruling the Court observed that the matter (referring to the main suit) was settled by filing of consent which consent the Auctioneers fees. Court went further ahead to sign the Auctioneers are entitled to the bill upon the instructing counsel and James Kahunyo, it is instructive to note that James Kahunyo was the 1st Defendant in the present suit.

A certificate of taxation was issued by the said Court dated 24/12/2020 at Kshs. 262,505.64. Attachment and notice of sale motor vehicle registration number KCU 977Q Volkswagen Touareg was issued.

Having seen all the records. I am not persuaded by the Applicants submissions that the bill of costs giving rise to the proceedings (Miscellaneous Application Number 834 of 2019) was between Simon Ngomonge T/A Dollar Auctioneers and Ratemo Oira Advocates. The consent was raised between the parties in CMCC Number 5073 of 2015 was clear that Dollar Auctioneers were to file their bill of costs against the Defendants, not just the advocates, I equally do not feel that the Miscellaneous Application offends Section 34 of the [Civil Procedure Act](#) because it is an application subsisting in the main suit of its own.

Looking at the Court records, this matter and the disclosed circumstances later what’s the attachment of the said motor vehicle, I am equally unable to find merit in the bills application both be dismissed for lack of merit, with costs to the Respondents” (sic)

16. Section 3A of the CPA invoked in the Appellants motion specifically reserves “the inherent power of the Court “to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the court”. The purport of the forestated provision was reasonably canvassed by the Court of Appeal in *Rose Njoki King’au & Another v Shaba Trustees Limited & Another* [2018] eKLR and accordingly requires no restatement.

17. The kernel of the Appellants motion before the trial Court quintessentially sought the setting aside of the decree passed on 29.03.2022, all attendant consequential orders and execution processes against



the Appellants, resulting from the said decree. The latter appears to be advanced by the Appellants on the salient issue that they were never parties to the taxation proceedings meanwhile the ruling leading up to the warrants of attachment issued on 09.09.2022 did not have the Appellants as parties to the taxation proceedings. Thus, a perfunctory interrogation of the core issues and the grounds advanced in the memorandum of appeal, to this Court's mind, the appeal turns on the key question whether trial Court acted on wrong principles in arriving at the finding it did in respect of the issues falling for determination before it.

18. It is settled that the grant or refusal of an application to set aside or vary such judgment or any consequential decree or order, is discretionary. The discretion is wide and unfettered. However, it must be emphasized that like all judicial discretion it must be exercised judicially. Therefore, in considering this appeal, the Court is guided by the principles enunciated by Court of Appeal in *Mashreq Bank P.S.C v Kuguru Food Complex Limited* [2018] eKLR wherein it was stated: -

“This Court ought not to interfere with the exercise of a Judges’ discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of discretion and occasioned injustice. Conversely, a Court exercising judicial discretion must be guided by law and facts and not ulterior considerations. This much was stated by the Court of Appeal in the case of *Mbogo v Shah*, (supra):

“A court of appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising this discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and as a result there has been injustice”.

See also; *United India Insurance Co. Ltd v. East African Underwriters (K) Ltd* [1985] E.A 898”.

19. The object of the discretion to set-aside a judgment or decree, as the case may be or as would be encompassed by reading of Section 3A of the CPA, was succinctly addressed in the case of *Shah –vs- Mbogo and Another* [1967] E.A 116. Though, in the latter decision the Court was addressing itself on setting aside an *ex parte* judgment, the principles espoused therein would apply with some measure to the instant proceedings.
20. Here, it would be appropriate to contextualize the events before the trial Court as can be deduced from the record and supplementary record of appeal. At the outset, the plaintiff before the lower Court suit, whom at all material times was represented by 2nd Respondent, instituted proceedings by way of suit in Nairobi Milimani CMCC No. 5073 of 2015 as against the Appellants, the latter of whom were being represented by the firm of Kairu McCourt & Co. Advocates and later Kimondo Gachoka & Co. Advocates. Nairobi Milimani CMCC No. 5073 of 2015 seems to have proceeded and culminated in a judgment being issued in favour of plaintiff whereafter on 10.07.2019, counsel appearing for the respective parties in the lower Court suit (*Ratemo Oira & Co. Advocates and Kairu McCourt & Co. Advocates*) entered into a consent order that in part states as follows: -

“1. By consent the warrants of attachment dated 26.06.2019 and issued herein pursuant to the judgment and or decree of this honorable Court dated 26.02.2019 be and is hereby settled on the following conditions:

a)



- b) That the motor vehicle registration number KBP 226V attached by Dollar Auctioneers on 06.07.2019 be and is hereby released forthwith and unconditionally to the Defendant upon service of this consent order.
- c) That Dollar Auctioneers do file their bill of costs against the defendants in Court within seven (7) days from the date of service of this consent order for the same to be determined by the Court.
- d)
- e)” (sic)

21. On backdrop of the forestated consent order, the 1st Respondent proceeded to institute taxations proceeding in Nairobi Milimani CMCC Misc. Application No. 834 OF 2019 on 30.07.2019, as against the 1st Respondent, as can be gleaned on the face of the bill of costs. It is equally relevant to note that the said bill of costs captured on its face thereof that it arose from Nairobi Milimani CMCC No. 5073 of 2015. That said, the key protagonists in the bill of costs, captured the 1st Respondent as the Applicant and the 2nd Respondent as the Respondent. As can further be seen from the Record of Appeal, the 2nd Respondent fervently opposed the 1st Respondent’s bill of costs by filing a preliminary objection, a replying affidavit and grounds of opposition, all in objection to the taxation proceedings. A cursory perusal of the latter, this Court gathers that the key thrust of the 2nd Respondent’s objection was that the filing of the bill of costs was in clear contravention of the consent order dated 10.07.2019 whereas the same ought to have been specifically filed as against the Appellants. Meanwhile, the 1st Respondent in response to the 2nd Respondent’s objection appeared to argue that it was not party to the consent order therefore the same was non-binding on it.

22. Without digressing any further, the 1st Respondent’s bill of costs was eventually taxed by Hon. Kivuti (PM) vide a ruling delivered on 16.12.2021, wherein he proceeded to pronounce himself as hereunder: -

“The bill of costs dated 22/7/2019, the auctioneers seeks compensation for services rendered in attachment.

The items in the bills as drawn to scale. The only intention is that the auctioneers prefers the bill upon the Respondent counsel on record Messrs. Ratemo Oira and James Kahunyo.

I have rationalized the instructions; the matter was settled via consent which excluded the auctioneer’s fees. The latter is entitled to tax the bill upon the instructing counsel and James Kahunyo.

Consequently, I find merit in the bill, the same is taxed as drawn.” (sic)

23. The forestated ruling in Nairobi Milimani CMCC Misc. Application No. 834 OF 2019 seems to have led to the issuance of a certificate of taxation and later a decree dated 29.03.2022, that was perceptibly at the heart of the Appellants motions dated 15.09.2022 and 21.09.2022. It would however be remiss not to observe that the said certificate of taxation or decree in question, were both not placed before this Court for its benefit and or scrutiny.

24. Nevertheless, with the forestated set of facts in reserve, despite the proceedings in Nairobi Milimani CMCC No. 5073 of 2015, that eventually led to the consent order of 10.07.2019, the key parties in Nairobi Milimani CMCC Misc. Application No. 834 OF 2019 were undoubtedly the 1st and 2nd Respondent. Obviously leading thereto, was that the 1st Respondent was engaged by the 2nd



Respondent to carry out attachment and execution proceedings as against the Appellants, who were the Defendants (judgment-debtor) in Nairobi Milimani CMCC No. 5073 of 2015.

25. Invariably, upon engagement of the 1st Respondent, there arose the question of their fees for services rendered as Auctioneers. In hindsight of the 1st Respondent's submissions, Rule 7 of the Auctioneers Rules provides that: -

A debtor shall pay the charges of the auctioneer unless—

- (a) that debtor cannot be found; or
- (b) he has no goods upon which execution can be levied; or
- (c) the sale proceeds are insufficient to cover the charges,

in which cases the creditor shall pay the charges or the deficiency thereof.

26. Whereas, Rule 55 (1) & (3) provides 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)

(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)

(5)

27. Patently, in light of the issues herein, the terms of the consent order dated 10.07.2019, cannot be deferred and or discounted. As part of the conditions of the said consent order, it required of the 1st Respondent to file their bill of costs as against the Appellants. The endorsement of the said consent order must have been in realization of the letter and spirit of Rule 7 & 55(1) of the Auctioneers Rule as read with Order 22 Rule 56(2) of the CPR which provides that: - "Any court executing a decree may make orders relating to the payment of the charges for attaching the property or conducting the sale of the property and for the enforcement of such payment."

28. Thus, to address the impugned decision, firstly, the learned Magistrate rightly acknowledged that the taxation proceedings arose from the lower Court suit. Secondly, she equally took due cognizance of the fact that the lower Court suit was conclusively settled by way of a consent order. Thirdly, and being the point of departure, it appears in dismissing the Appellants motions, the learned Magistrate placed undue weight on the taxation ruling delivered on 16.12.2021 to arrive at the finding that the taxation proceeding was not solely between the 1st and 2nd Respondent despite correctly observing that the 1st Respondent's bill of costs ought to have been filed as against the Appellants.

29. Fourthly, it is undisputed that payment of the 1st Respondent's fee was anchored on the consent order in Nairobi Milimani CMCC No. 5073 of 2015. Therefore, any dispute that may have related to payment of its fees by the Appellants, in satisfaction of the lower Court decree, ought to have been canvassed in the said suit by dint of Section 34(1) of the CPA which provides that: - 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. This Court therefore does not agree with the learned Magistrate's reasoning that... "I equally do not feel that the Miscellaneous Application offends Section 34 of the *Civil Procedure Act* because it is an application subsisting in the main suit of its own...." in light of the fact that the taxation proceeding as instituted as against the 2nd Respondent was premised on the 1st Respondent carry out execution instructions as against the Appellant. In any event, by dint of Rule 7 of the Auctioneers Rules, the bill of cost ought to have been specifically directed towards the plaintiff (decree-holder/creditor) in Nairobi Milimani CMCC No. 5073 of 2015, and not the 2nd Respondent, who was merely acting as counsel.

30. By filing the taxations proceedings explicitly as against the 2nd Respondent, 1st Respondent had unmistakably opted to recoup its fees from the former and not the Appellants, given that the miscellaneous taxation proceeding was an independent cause of action to the lower Court suit. Therefore, on accord of the fact that the Appellants were not parties to said taxation proceedings, no order or decree could issue as against them, having not been heard on the taxation proceedings. This despite, the 1st Respondent's attempts to rope them into latter by serving the Appellants through counsel, with a hearing notice on taxation of its bill of costs. Ultimately, neither of the Appellants was a party to the taxation proceedings given how the bill of costs was presented and or drafted. Whereas service did not automatically decode that the Appellants were a party to the said proceedings. Therefore, the 1st Respondent's argument on service, if not languid, is an affront to the Appellants right to a fair hearing.
31. The forestated brings to mind the exhortation by Mbogholi. J (as he then was) in the case of David Njoroge Kinuthia & 653 others v Gnanjivan Screws and Fasteners Limited & 5 others [2021] eKLR, which this Court concurs with. The learned Judge observed that: -

"In the case *Kiai Mbaki & 2 others v Gichuhi Macharia & another* [2005] eKLR the court stated as follows,

"The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard."

It follows that the court cannot issue orders against a person that is not a party to the suit. Further to the foregoing, the main purpose why a party may be joined to a suit is to claim some relief from such a party. The fact that the 2nd and 3rd Respondents purchased the assets of the judgment debtors does not make them shareholders or parties to the suit, neither attract any liability.

Under the Civil Procedure Rules such applications are brought under Order 1 rule 10 (2) of the Rules.

.....

Where a party is not cited in the decree that is sought to be executed, the applying party must satisfy the court how liability may attach in such circumstances. A decree addresses the judgment debtor, and liability thereof must be clearly stated.

32. It follows that any decree or execution ought not to have issued as against the Appellants, given that they were obviously not parties in the taxation proceedings, notwithstanding the consent order and the lower Court suit. Whereas, any attempt to purport to proceed with execution as against the Appellants would be an affront to the provisions of Section 34(1) of the CPA, as earlier addressed by this Court.
33. Penultimately, the participation of the Appellants in Nairobi Milimani CMCC Misc. Application No. 834 OF 2019 was equally quite questionable, as they were neither parties in the matter nor did



they seek joinder to the said proceedings. As it were, they were strangers to the proceedings by seeking substantive orders, nevertheless the trial Court went ahead to hear them, on their two (2) motions. The CPR sets out the design in which a party may be enjoined into proceedings and or be construed as a party to a suit. Herein, neither of the parties in taxation proceedings appropriately moved the Court towards joinder of the Appellants to the said proceedings. Therefore, it is difficult to see how the Court proceeded to address itself to the Appellants motions meanwhile they were not properly enjoined to the proceedings.

34. In view of the foregoing, applying my mind to facts and law it would be difficult in the circumstance not to find that the trial Court did err in its finding. Thus, it is my considered deduction that the trial Court failed to properly exercise its discretion and arrived at a wrong decision by dismissing the Appellants motions let alone entertaining the same. For all the foregoing reasons, the Court finds the appeal meritorious.

Determination

35. This Court allows the appeal in the following terms: -
- i. The ruling of trial Court delivered on 31.10.2022 by the honorable trial Magistrate is hereby set aside and substituted with an order allowing the Appellants motions in the following terms: -
 - a. An order setting set aside the decree passed on 29.03.2022 together with all consequential orders against the Appellants
 - b. An order setting aside the execution process commenced against the Appellants vide warrants of attachment given on the 09.09.2022
 - c. An order to the effect that the proclamation levied against the Appellants on the 12.09.2022 by the 1st Respondent is deemed irregular, un procedural and equally set aside.
 - ii. Costs of the appeal are awarded in favour of the Appellants as against the 1st Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 4TH DAY OF NOVEMBER, 2024

ROA 14 DAYS.

HON. T. W. OUYA

JUDGE

For Appellant.....kabita

For 1st Respondent.....ms Omwenga

Court Assistant.....martin

