



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CORAM: D. S. MAJANJA J.**

**CIVIL APPEAL NO. 53 OF 2019**

**BETWEEN**

**CO-OPERATIVE BANK OF KENYA LIMITED .....APPELLANT**

**AND**

**JOEFRICK N. MUINDE t/a**

**KIMU AUCTIONEERS .....RESPONDENT**

***(Being an appeal from the Ruling and Order of Hon. G. N. Barasah, RM at the Magistrates Court at Ogembo in Misc. Civil Case No. 21 of 2018 dated 28<sup>th</sup> May 2019)***

**JUDGMENT**

1. This is an appeal from a decision of the subordinate court under **Rule 55(5)** of the **Auctioneers Rules, 1997** (“the **Rules**”). Before I deal with grounds of appeal and the parties respective arguments, let me set out the background facts leading to the appeal.
2. The proceedings before the subordinate court were commenced by the respondent (“the Auctioneer”) who moved the court by a Notice of Motion dated 23<sup>rd</sup> August 2018 made pursuant to **Rules 7** and **55(1), (2)** and **(3)** of the **Rules** in which he sought orders that the court be pleased to assess or tax the annexed bill of costs and thereafter issue a certificate of costs and enter judgment for the said amount. The motion was supported by grounds set out in the face of the application and the supporting affidavit sworn by the Auctioneer on 23<sup>rd</sup> August 2018.
3. The Auctioneer deponed that the appellant (“the Bank”) instructed him to repossess household chattels, business stock and any moveable property from one Zachary Mokuia Magoro (“the Debtor”) who was carrying on business in Ogembo. He proceeded to the Debtor’s business premises where he proclaimed their business assets. After the days set in the proclamation had expired, the Auctioneer proceeded to the premises and found that the Debtor had closed the hotel business and sold all the items that he had been proclaimed. He heard that he had relocated to Malindi. The Auctioneer made returns to the Bank and demanded his fee and commission which the Bank failed to pay necessitating the application before the subordinate court.
4. In response to the motion, the Bank filed a notice of preliminary objection and grounds of opposition dated 16<sup>th</sup> October 2018. The Bank contended that the application was incompetent and an abuse of the court process as it offended the provisions of **Rule 7** of the **Rules**. It contended the court lacked jurisdiction as the bill of costs was not served on the Bank hence it was not disputed contrary to **Rule 55(3)** of the **Rules**. The Bank stated that it could only pay auctioneers fees if the Debtor could not be found, or had no goods upon which execution could not be levied which was not the case. It urged that the bill of costs was exaggerated and without any legal basis.
5. With leave of the court, the Auctioneer filed a further affidavit sworn on 5<sup>th</sup> December 2018 in which he deponed that prior to filing the application, he notified the Bank of his intention to tax his bill by his letter dated 27<sup>th</sup> March 2018 which he delivered to the Bank via courier.
6. The parties filed written submissions and by ruling dated 28<sup>th</sup> May 2019, the learned magistrate held that the Auctioneer had met the conditions set out in **Rule 7** and **55(3)** of the **Rules** and then proceeded to tax that bill at Kshs. 30,575/-. In effect the court dismissed the Bank’s preliminary objection thus precipitating this appeal. The thrust of the appeal set out in the memorandum of appeal by way of chamber summons dated 4<sup>th</sup> June 2019 is essentially a rehashing of the Bank’s preliminary objection and the grounds of opposition. Both parties filed written submissions in support of their respective positions.
7. This appeal revolves around the interpretation of **Rules 7** and **55** of the **Rules** which provide as follows:

## **7. Payment of auctioneer's charges**

*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.*

## **55. Fees and disbursements payable to an auctioneer**

*(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.*

8. The Bank submitted that the circumstances under which it was required to pay the are clearly stated in **Rule 7** aforesaid and that they are as follows; if the debtor cannot be found, if the debtor has no goods upon which execution cannot be levied or the sale proceeds are insufficient to cover charges. It referred to the case of ***E J Austin and 2 Others v Chon Jeum Suk Kim* MSA HCCC No. 335 of 2001 [2017] eKLR** and ***Joseph Gikonyo t/a Garam Investments v National Social Security Fund* [2016] eKLR** to support its case.

9. The Bank contended that it was the duty of the Auctioneer to pursue the Debtor and that it ought to have filed suit against him to recover its fees and commission in light of **Rule 7** of the **Rules**. It submitted that the Auctioneer did not demonstrate that he had reported the matter to the police as the Debtor had committed a criminal offence by carrying away proclaimed goods.

10. The Auctioneer supported the decision by the trial magistrate. The Auctioneer's response to the Bank's arguments was that **Rule 7** of the **Rules** did not exonerate the Bank from paying fees and that he had established the grounds to necessary to claim his fees and commission from the Bank.

11. Having considered the arguments of the parties, I am of the view that the issue whether or not the conditions precedent under **Rule 7** have been established is a question of fact. In this case, the Auctioneer set out the grounds for moving the court in its deposition. The grounds in **Rule 7** of the **Rules** are disjunctive and from his affidavit, the Auctioneer deponed that when he went to collect the proclaimed goods, the Debtor had left the premises, disposed of the goods and relocated elsewhere. The Bank did not respond to these averments hence the facts as deponed to by the Auctioneer were uncontroverted and deemed to be true and correct.

12. I reject the Bank's arguments that the Auctioneer was required to file suit to recover its fees and commissions from the Debtor. Nothing in **Rule 7** supports that argument. Moreover, there is no privity of contract between the Auctioneer and Debtor and the Auctioneer being an agent of the Bank as a disclosed principal cannot sue the Debtor for his fees and commission. I therefore dismiss this ground of appeal.

13. Turning to **Rule 55(3)** of the **Rules**, the Bank's argument is that there was no dispute between it and the Auctioneer which would warrant taxation. It submitted that the Auctioneer was required to raise his fee note after execution and it is only when the creditor disputes the amount claimed that the auctioneer may proceed with taxation otherwise the rule would not make sense. In response, the Auctioneer took the position that in so far as the Bank had not indicated that the amount claimed was not in dispute hence it was entitled to proceed with the taxation.

14. It is correct that **Rule 55(3)** of the **Rules** envisages a dispute between the Auctioneer and his client, in this case the Bank. The uncontested evidence in this case as set out in the Auctioneer's further affidavit, is that he sent his demand by the letter dated 27<sup>th</sup> March 2018. The Bank did not deny receipt of the demand and did not tender any payment to the Auctioneer. It is only 5 months later in August 2018 when the Auctioneer decided to file his bill for taxation. I find that since the Auctioneer did not receive any response or payment, it was entitled to assume that there was dispute and proceed to file its bill. That there is a dispute is confirmed by the fact that the Bank did not

tender payment to settle the Auctioneers fees if indeed there was not dispute. I therefore dismiss this ground of appeal.

15. The final issue in this appeal concerns the quantum of fees assessed. The assessment of fees is a matter of the taxing officer's discretion and this court will not intervene unless there is an error of principle or that the taxing officer took into account irrelevant facts or failed to take into account relevant facts or on the whole the amount is inordinately high or low. In this case, the trial magistrate did not set out the basis for assessment or taxation of the costs. In the circumstances, I set aside the award of taxed costs.

16. In conclusion, I allow the appeal only to the extent that the Bill of Costs shall be taxed afresh by another magistrate other than Hon. Barasah.

17. As parties agree, this judgment shall apply to the following appeals; **KISII HCCA Nos. 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65 and 66 of 2019**. As regards costs, I award the respondent costs which I assess at Kshs. 40,000/- being costs for all the appeals

**DATED and DELIVERED at KISII this 19<sup>th</sup> day of JULY 2019.**

**D.S. MAJANJA**

**JUDGE**

Mr Omoto instructed by Nyachae and Ashitiva Advocates for the appellant.

Mr Nyatundo instructed by Nyatundo and Company Advocates for the respondent.