



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL APPEAL NO.9 OF 2019

CO-OPERATIVE BANK OF KENYA LTD.....APPELLANT

VERSUS

JEOPFRICK N. MUINDE t/a

KIMU AUCTIONEERS.....RESPONDENT

{Being an appeal against the Ruling of Hon. B. M. Kimtai – SRM Keroka dated and delivered on the 4th day of December 2018 in the original Keroka Principal Magistrate’s Court Misc. Civil Appl. No. 39 of 2018}

JUDGEMENT

1. This appeal arises from the decision of the lower court made pursuant to **Rules 7, 55 (5) and Schedule IV** of the **Auctioneers Rules, 1997**.
2. The said decision arose after the respondent/Auctioneer moved the court by way of a Notice of Motion dated 23rd August 2018 seeking orders: -

“1. THAT honourable Court/Taxing Officer be pleased to Assess/Tax the annexed Auctioneers Bill of costs.

2. THAT consequently to prayer (1) herein above being granted, the Honourable Court be pleased to issue certificate of taxation in respect of the Auctioneers Bill of Costs herein.

3. THAT consequently to prayer (2) herein above being granted the Honourable court be pleased to enter judgement in favour of the Applicant in terms of the certificate of taxation.

4. THAT costs of this Application be born by the Respondents.

5. THAT such further and/or other grounds be made as the court may deem fit and expedient.”

3. The grounds for the application as can be discerned from its face and the supporting affidavit were that on 17th August 2017 the Co-operative Bank (the appellant herein) instructed the Auctioneer to repossess household goods, business stock and any moveable property of its debtor and that pursuant to those instructions the auctioneer proclaimed the debtor’s properties and as such incurred expenses and is entitled to his commission. Further, that the appellant had neglected and/or refused to pay the auctioneers fees.

4. Upon being served with the Notice of Motion the appellant filed a notice of preliminary objection and grounds of opposition dated 18th October 2018 which stated: -

“6. A preliminary objection that the present application is untenable, misconceived, bad in law, inept, incurably defective mischievous and an abuse of this Honourable Court’s process as it offends the provisions of Rule 7 of the Auctioneers Rules, 1997.

7. THAT the bill of costs was not served upon the Respondent for it to be disputed fast before the jurisdiction of this Honourable court can be invoked pursuant to the provisions of Rule 55 (3) of the Auctioneers Rules. Accordingly, this Honourable Court lacks jurisdiction to entertain this matter.

8. THAT the Respondent can only pay auctioneers fees if the debtor/Borrower cannot be found, or has no goods upon which execution can be levied and that’s not the case in the present case (2).

9. THAT the amount indicated and or demanded in the Applicant's Bill of Costs is exaggerated and without any evidential or legal backing and the same ought to be disallowed.

10. THAT the application as it stands is good for dismissal and the Respondent prays that costs should be awarded to it."

5. The trial Magistrate heard the preliminary objection and the application by way of written submissions and by a ruling delivered on 4th December 2018 overruled the preliminary objection and grounds of opposition and proceeded to tax the respondent's bill at KShs. 28,930.4, issued a certificate of costs, entered judgement in favour of the respondent for the above amount and awarded the costs of the application to the respondent.

6. Being aggrieved by that ruling of the Learned Magistrate the appellant preferred this appeal. The same is premised on grounds that: -

"1. The Learned Magistrate erred in law and fact in dismissing the preliminary objection, raised by the Respondent/Appellant that the Bill of Costs as drawn violated the provisions of Rule 7 and Rule 55 of the Auctioneers Rules, 1997 without any legal basis.

2. That the Learned Magistrate erred in law and fact in proceeding to assess the Bill of Costs yet no dispute had arisen as required under Rule 55 of the Auctioneers Rules, 1997 instead of directing the applicant to file a suit for the recovery of the money owing, if any.

3. The Learned Magistrate erred in fact and law in assessing the following items that are not provided for in law and were not supported by any evidence or legal backing:

i. Service of proclamation

ii. Preparation of auctioneers bill of costs

iii. Filing of auctioneers bill of costs

iv. Services of Auctioneers Bill of Costs

v. Preparation commissioning and filing return of service

vi. Attending court for assessment.

4. The Learned Magistrate erred in law and fact by over-assessing the Commission payable and or owing to the Respondent.

5. The Learned Magistrate erred in law and fact in proceeding to tax the Bill of Costs without giving reasons for arriving at his decision and conclusions.

6. The Learned Magistrate erred in law and fact in proceeding to grant costs to the respondent.

7. The Learned Magistrate erred in fact and in proceeding to assess the Bill of Costs at the awarded sum and issuing a Certificate of Taxation in respect of the said Bill of costs and thereafter entering judgement in favour of the Respondent."

7. The appeal which is vehemently opposed was canvassed by way of written submissions.

8. The appellant submitted that the Learned Magistrate did not have jurisdiction to tax the respondent's bill as against it because **Rule 7** of the **Auctioneers Rules, 1997** clearly provides that the auctioneers charges shall be paid by the debtor the only exceptions being those set out in the rule. The appellant submitted that the respondent did not bring himself within those exceptions and he ought to have pursued the debtor to recover his fees. The appellant contended that no effort was made by the respondent to recover his fees from the debtor either by writing a demand letter or by filing a suit for recovery of the fees.

9. On the allegation by the respondent that the debtor's husband laid claim and removed the goods the subject of the instructions the appellant submitted that Rules 14 and 54 of the Auctioneers Rule made it an offence to do so and wondered why the said husband did not file an objection and why the respondent being an officer of the court did not press criminal charges against the husband of the debtor. The appellant further submitted that the respondent ought to have served it with an invoice before filing the bill for taxation as that is what was envisaged by **Rule 55 (3) of the Rules.**

10. On the assessment of the bill, Counsel for the appellant submitted that some of the items in the bill are not provided for in the Fourth Schedule and they ought not to have been allowed. Counsel contended that in any event the fee payable is based on the value of the attached goods or the actual amount recovered whichever is lower in that regard. Counsel relied on the Court of Appeal decision in the case of **National Industrial Credit Bank Limited v S K Ndegwa Auctioneers [2005] eKLR** where it was held: -

"The main object of paragraph 4 is clear. It is intended to provide values on the basis of which the auctioneer's charges should be assessed. We think that it is reasonable that the auctioneer's charges for attachment should be based on the value of the goods attached and not on the decretal sum. It is to be remembered that the auctioneer is to be remunerated for the

actual work done and not on the basis of what he could have done had he attached goods equivalent in value to the decretal sum. That is the meaning we give to paragraph 4 of Part II of the Fourth Schedule in order to make it operative.”

11. Counsel submitted that the amount the auctioneer was instructed to recover was Kshs. 72,478.76 and the goods proclaimed were worth Kshs. 40,000 but the fees demanded in the bill was Kshs. 97,939. He wondered where the appellant was expected to get such an amount to pay the respondent. Counsel urged this court to find that if any commission is due then it should only be Kshs. 4,000.

12. The appellant also took issue with the form of the Learned Magistrate’s ruling and submitted that it did not meet the threshold required by the law in that the same did not contain the issues for determination, an analysis of the law and the reasons for the decision. The appellant submitted that in the circumstances the sums awarded were arbitrary and urged this court to correct the error. The appellant further submitted that the procedure followed by the auctioneer and subsequently the Learned trial Magistrate in taxing the bill, issuing a certificate of taxation and entering judgement is not known to the law. Counsel argued that monies owed to an auctioneer can only be recovered by way of a civil debt but not otherwise and urged this court to allow the appeal.

13. On his part, the respondent/auctioneer reduced the issues for determination in this appeal to: -

“1. Whether the respondent’s Bill of Costs violated Rule 7 and 55 (3) of the Auctioneers Rules and whether the trial court had jurisdiction to entertain the original application.

2. Whether the trial court’s assessment of costs was excessive in the circumstances.”

14. Counsel then answered the two issues in the affirmative and submitted that neither **Rule 7** nor **Rule 55** exonerates a creditor from being a party or necessary party in an auctioneer’s action for assessment and recovery of fees payable to him; that the appellant is not on record as saying that the fees payable to the respondent was not in dispute as at the time the auctioneer went to court and that the act of going to court in itself amounted to a dispute unless the appellant is conceding. Further, that to the extent that neither the debtor nor the appellant settled the respondent’s bill and none has so far consented to the amount, a dispute existed to warrant the filing of the bill and that therefore the trial Magistrate acted within the law to dismiss the preliminary objection.

15. On the bill itself, Counsel submitted that the bill was drawn to scale and the assessment was just, fair and lawful.

16. The respondent relied on two cases: -

1. Ndungu Dennis v Anne Wangari Ndirangu & Another [2018] eKLR

2. Co-operative Bank of Kenya Limited v Joefrick N. Muinde t/a Kimu Auctioneers Kisii HCCA No. 53 of 2019.

17. By this appeal this court is called upon to interpret **Rules 7 and Rule 55 of the Auctioneers Rule, 1997** and also to consider the fees chargeable to an Auctioneer under Part II of the FOURTH SCHEDULE.

18. **Rules 7 and 55 of the Auctioneers Act** 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.

Rule 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.”

19. I have fully considered the rival submissions and the authorities cited by Counsel. I find no difficulty in allowing this appeal. **Rule 7** of the **Auctioneers Rules, 1997** which I have set out in full is written in simple and plain language. It clearly stipulates that “**a debtor shall pay the charges of the auctioneer**” and continues to set out the only exceptions upon which the client would pay. As was held by Majanja J in **Co-operative Bank of Kenya Limited v Joefrick N. Muinde t/a Kimu Auctioneers (supra)** whether or not the exceptions set out in **Rule 7** have been established is a question of fact and I dare add to be proved by the auctioneer.

20. I have perused the Notice of Motion filed by the respondent in the lower court and nowhere does he state either that the debtor could not be found, or that she had no goods upon which execution could be levied or that the sale proceeds were insufficient to cover his charges. True in the supporting affidavit he alluded to removal of some goods by the debtor’s husband but in my understanding those were the goods he had proclaimed to attach had it not been for the fact that the debtor went to the bank and cleared the debt. It was not demonstrated that those goods belonged to the debtor’s husband but not to her. Neither was it proved that the debtor did not have goods which the respondent could attach to settle his costs. It seems to me that the respondent’s complaint was that he could not proceed with the assignment because the debt was paid. The Fourth Schedule recognizes that kind of scenario and has therefore provided for ½ the costs. In his submissions he seems to base his argument on the fact that he filed his bill because his fees were not paid either by the debtor or by the client yet he had partially carried out the instructions. My reading of the rule is **that his first point of call should have been the debtor and only once the exceptions under Rule 7 were established could he pursue the appellant for payment.** As I have stated he did not whether in the lower court or in this appeal bring himself under any of those exceptions. It is not enough to state as he did that he incurred expenses and was therefore entitled to his fees. Neither can his argument that neither the debtor nor the appellant has reached an agreement with him to settle the costs held. The law is clear and it ought to be followed.

21. It is my finding that the trial Magistrate misdirected himself by holding that the only issue was whether the auctioneer’s fees had been paid and by dismissing the preliminary objection without considering it on the merits. The trial Magistrate should have considered whether the respondent had fulfilled the exceptions set out in **Rule 7** of the **Rules** before taxing the bill as against the appellant. That is not to say that he did not have jurisdiction to tax the bill as jurisdiction to do so is clearly vested in him by **Rule 55 (3)** of the **Rules**.

22. On the bill itself, my finding is that the same was not drawn to scale and that the trial Magistrate erred in allowing items not provided for. The Auctioneers charges are provided for at **Part II** of the **FOURTH SCHEDULE**. That schedule does not provide for commission on proclamation, service of proclamation and investigations and the same should not have been allowed. Disbursements, postage, stationery and telephone are payable under item 4 of the schedule and ought to have been confined to what was actually spent or expenses incurred but that was not the case. Preparation of the auctioneers Bill of Costs, commissioning, filing the same, filing of return of service and attending court for assessment of the costs all of which are itemised in the bill and were allowed by the trial Magistrate are also not provided for. I would also agree with the appellant’s submission that even on the items allowable in the schedule some of the amounts claimed were not pegged on any known law, the basis for such fees having been settled by the Court of Appeal in the case of **National Industrial Credit Bank Limited v S K Ndegwa Auctioneer (supra)** to be the value of the goods attached and not the decretal sum and in any event should have been ½ the fees as provided in item 7.

23. The upshot is that this appeal is allowed and the ruling of the trial Magistrate dated 4th December 2018 is set aside.

24. The respondent shall be at liberty to reapply but strictly in accordance with **Rule 7** and **Part II** of the **FOURTH SCHEDULE** of the **Auctioneers Rules**.

25. The respondent shall bear the costs of this appeal and the ruling herein shall apply mutatis mutandis to **HCCA NO. 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35 and 36 OF 2019.**

26. It is so ordered.

Signed, dated and delivered in open court this 14th day of November 2019.

E. N. MAINA

JUDGE