



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CIVIL APPEAL NO. 181 OF 2010**

**KENYA POWER & LIGHTING**

**COMPANY LIMITED ..... APPELLANT**

**VERSUS**

**DAVID OBARE OMWOYO t/a**

**OMWOYO AUCTIONEERS ..... RESPONDENT**

*(Appeal from the Order in Kisii CM Misc. Application No. 157 of 2009 (Hon. M.N Gicheru - CM.)*

**JUDGMENT**

- 1.** This appeal arises from the Order issued on 15<sup>th</sup> April 2010, by the Chief Magistrate in **Kisii CM Misc Application No. 157 of 2009**, in which the appellant, **Kenya Power & Lighting Co. Ltd.** was the applicant in the Notice of Motion dated 11<sup>th</sup> December 2009, taken out against the respondent herein, **David Obare Omwoyo t/a Omwoyo Auctioneers.**
- 2.** In the application, the appellant sought orders to the effect that all the proceedings conducted and orders issued on 2<sup>nd</sup> December 2009, and the subsequent execution be declared illegal, unprocedural and of no effect at all. That, there be stay of proceedings and/or stay of execution or further execution and sale pending inter-partes hearing of the application.
- 3.** The grounds in support of the application were contained in the body of the Notice of Motion and included the following:-
  - (a) That, the proceedings in the miscellaneous cause are illegal, irregular, unprocedural and of no legal effect.
  - (b) That, the orders herein were obtained by misrepresentation, non-disclosure of material facts and mischief.
  - (c) That, the orders directly conflict with the court orders of 12<sup>th</sup> November 2009, issued by the honourable court in Kisii CMCC No. 77 of 2003.
  - (d) That, the proceedings were done in complete secrecy in absence of service.
  - (e) That, the auctioneer's conduct has amounted to gross abuse of the court process.

(f) That, it is in the interest of justice and fairness that the orders sought are granted.

(g) That, the respondent/applicant herein has been prejudiced improperly and unfairly.

4. These grounds were fortified by the supporting affidavit dated 11<sup>th</sup> December 2009, deponed by the applicant's advocate on record.

The respondent herein, opposed the application vide grounds of opposition dated 27<sup>th</sup> January 2010, but prior to that, on the 14<sup>th</sup> December 2009, interim orders in terms of prayer (c) of the application were granted in that, there be stay of proceedings and/or execution or further execution and sale pending the hearing and determination of the application "inter-partes".

5. The application was ultimately heard inter-partes on the 16<sup>th</sup> February 2010, and the ruling made on 15<sup>th</sup> April 2010.

The appellant/applicant was aggrieved by the ruling and lodged this appeal on the basis of the grounds contained in the memorandum of appeal dated 30<sup>th</sup> November 2015.

The parties agreed to canvass the appeal by way of written submissions. In that regard, the appellant filed its submissions through the firm of **Kibichiy & Co. Advocates**, and the respondent did likewise through the firm of **Oguttu Mboya & Co. Advocates**.

This court has given due consideration to the rival submissions in the light of the grounds of appeal. Its role is to re-consider the application and arrive at its own conclusions.

Apparently, the application was dismissed by the lower court on two grounds only i.e the applicant ought to have filed the application in the High Court by dint of Rule 55(4) of the Auctioneers Rules, 1997 and that, the auctioneer (respondent) was acting in pursuance of lawful court orders and could not therefore be faulted.

6. In effect, grounds (a) (b) (c) and (e) of the application were overruled and dismissed by the lower court. These were the most relevant grounds in addition to ground (d) which was apparently not considered. They tally and fit in properly with grounds 1, 2, 5, 7 and 8 of the grounds of appeal.

7. In his impugned ruling, the learned trial magistrate noted that Rule 55(4) of the Auctioneers Rules 1997, provided that an appeal from a decision of a registrar or magistrate or the board shall be to a judge in chambers. Therefore, the application at hand ought to have been filed in the High Court.

8. Basically, this matter was a taxation cause instituted by the respondent auctioneer for purposes of taxation of his bill of costs arising from **Kisii CMCC No. 77 of 2003**, in which the appellant/defendant had been sued by one Nelson Oisebe.

The taxation proceedings for assessment of the bill were conducted on the 2<sup>nd</sup> December 2009, before the deputy registrar but in the absence of the appellant. The bill was thus assessed at Kshs. 816,860/40 cts.

9. Thereafter, the applicant in the present cause No. 157 of 2009 (Respondent in this appeal) moved with speed and obtained warrants of attachment of the appellant's movable property. A proclamation to that effect was issued on 15<sup>th</sup> December 2009, by Nyaluoyo Auctioneers after the appellant had on 14<sup>th</sup> December 2009, filed the impugned application dated 11<sup>th</sup> December 2009.

10. The application was brought essentially under S.3 and 3A of the Civil Procedure Act and was for orders to the effect that the impugned proceedings of the 2<sup>nd</sup> December 2009 and the subsequent execution be declared illegal, unprocedural and of no effect at all.

The appellant also sought a stay of proceedings and/or execution and sale pending the hearing and determination of the application.

**11.** A temporary order of stay of proceedings and/or execution was granted “ex parte” under certificate of urgency on 14<sup>th</sup> December 2009. The impugned application was ultimately heard “inter partes” on the 16<sup>th</sup> February 2010, when it was conceded by the appellant that the impugned proceedings of the 2<sup>nd</sup> December 2009, were in fact taxation proceedings.

**12.** Indeed, grounds (a), (b), (c) and (e) of the application were a challenge on the conduct of the taxation proceedings by the deputy registrar and grounds 1, 2, 5, 7 and 8 of the grounds of appeal are an extension of the challenge.

It was obvious that the appellant was challenging the assessment of the respondent’s bill of costs and the manner in which it was conducted by the learned deputy registrar/trial magistrate.

**13.** Being a challenge on the taxation proceedings and the resultant assessment of costs, the appellant ought to have moved the court under the Auctioneers Act and more specifically Rule 55(4) of the Auctioneers Rules 1997. In that event, the proper court would have been the High Court rather than the Magistrate Court.

**14.** The impugned application in as much as it was brought before the wrong court and under the wrong provisions of the law, was not only a misconception but also an abuse of the court process with a view to having the decision on assessment of the respondent’s bill of costs interfered with in the wrong manner by the lower court rather than the High Court.

**15.** Consequently, grounds (a), (b), (c) and (e) of the impugned application were properly overruled by the trial court. On the same breathe, grounds 1, 2, 5, 7 and 8 of this appeal are hereby overruled.

**16.** Ground (d) of the application was also vital but it did not receive any consideration by the trial court. It is in this appeal reflected in grounds 3, 4 and 6 of the appeal.

The appellant contended that the impugned proceedings were conducted in complete secrecy in the absence of service. Herein, it is contended that the appropriate application together with the auctioneer’s bill of costs were not served upon the appellant or served properly as required by law thereby depriving the appellant of the opportunity to participate in the taxation proceedings.

**17.** The appellant thus prays on account of lack of service for an opportunity to participate in the taxation of the respondent’s bill of costs.

For this to happen, the ex-parte taxation proceedings conducted on 2<sup>nd</sup> December 2009, would have to be set aside to allow for fresh proceedings in the presence of both the appellant and the respondent.

**18.** On that 2<sup>nd</sup> December 2009, the respondent’s notice of motion dated 27<sup>th</sup> October 2009, was due for hearing after having been fixed for that day on 30<sup>th</sup> October 2009 in the absence of the appellant. The respondent was duly directed to serve the appellant prior to the scheduled date. However, on that date the respondent appeared for hearing but not the appellant.

**19.** The trial court was informed by the respondent that the application was not opposed. He asked the court to allow the application and assess the bill of costs at Kshs. 816,860/40cts.

Indeed, the trial court allowed the application after observing that it was not opposed and that the relevant affidavit of service was proper.

**20.** The trial court acted under the belief and assurance by the respondent that the appellant was properly served with the material notice of motion and all accompanying documents. The appellant disputed the

fact in its application of the 11<sup>th</sup> December 2009, but as stated hereinabove, the issue was not considered by the trial court when it dismissed the application in its impugned ruling of 15<sup>th</sup> April 2010.

21. It is therefore incumbent upon this court to consider the issue afresh and draw its own conclusions on it.

In that regard, the starting point would be the relevant affidavit of service dated 6<sup>th</sup> November 2009, deponed by a process server called Kennedy A. Kituzi.

He averred that he received the necessary application dated 27<sup>th</sup> October 2009, from the respondent with instructions to effect service upon the first defendant/respondent, Kenya Power & Lighting Company.

22. He then proceeded to Stima Plaza 2<sup>nd</sup> Floor Ngara at Kborot road where the said company was located and met a secretary called Irene who received a copy of the application but declined to sign. He came to know the said Irene on the date of service i.e 5<sup>th</sup> November 2009. He indicated that he effected the service pursuant to Order V of the then Civil Procedure Rules.

23. The said Order V Rule 2 of the Civil Procedure Rules (now Order 5 Rule (3) CPR, 2010) provided for service on a corporation in the following terms:-

*“Subject to any other written law, where the suit is against a corporation the summons may be served-*

*(a) On the secretary, director or other principal officer of the corporation, or*

*(b) If the process server is unable to find any of the officers of the corporation mentioned in Rule 2(a), by leaving it at the registered office of the corporation or sending it by prepaid registered post to the registered postal address of the corporation, or if there is no registered office and no registered postal address of the corporation by leaving it at the place where the corporation carries on business or by sending it by registered post to the last known postal address of the corporation.”*

24. Herein, the relevant affidavit of service does not reflect adherence to the requirements aforementioned. It does not state in which town Stima Plaza 2<sup>nd</sup> Floor Ngara-Kborot road is situated nor whether that is the place where the appellant’s registered office is located. It also does not with clarity state who this lady called Irene was in relation to the appellant. It implies that she was a member of the secretariat staff of the appellant company and not one of its officials envisaged in Order V Rule 2(a) of the Civil Procedure Rules.

25. In essence, the affidavit clearly shows that the appellant was not served with the relevant hearing notice accompanied by the relevant notice of motion and related documents to allow him appear in court on 2<sup>nd</sup> December 2009, and defend the respondent auctioneer’s application of the 27<sup>th</sup> October 2009, which led to the impugned application of the 11<sup>th</sup> December 2009 by the appellant.

26. It was that application of the 27<sup>th</sup> October 2009, which instituted the impugned taxation proceedings of the 2<sup>nd</sup> December 2009.

Besides, the proceedings arose from Kisii CMCC No. 77 of 2003, in which the appellant was the defendant and was duly represented by a firm of advocates known as Kibichiy & Co. Advocates who are also the appellant’s advocate in this appeal. Instead of serving them on behalf of the appellant, the respondent purported to effect direct service upon the appellant.

27. In **Maina V. Mugiria [1983] KLR 78**, the Court of Appeal held that:-

*“The principles governing the exercise of the judicial discretion to set aside an “ex-parte” judgment obtained in default of either party to attend the hearing are:-*

*(a) Firstly, there are no limits or restrictions on the judge’s discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties.*

*(b) Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice .....*”

**28.** With the finding hereinabove that the appellant was not at all or properly served with the notice of motion dated 27<sup>th</sup> October 2009, which prompted the taxation proceedings of the 2<sup>nd</sup> December 2009 and ultimately the impugned ruling of the 15<sup>th</sup> April 2010, this court would readily exercise discretion in this appeal in favour of the appellant and set aside not only the impugned proceedings but also the impugned ruling with the sole purpose of doing justice to both parties.

**29.** In that regard, ground (d) of the application dated 11<sup>th</sup> December 2009, is hereby sustained along with grounds 3, 4 and 6 of the appeal.

In sum, the appeal is allowed to the extent that the impugned proceedings of the 2<sup>nd</sup> December 2009 and the resultant ruling of the 15<sup>th</sup> April 2010, are hereby set aside with an order that afresh assessment of the respondent’s material bill of costs be undertaken in the presence of both parties before a different competent taxing master/deputy registrar.

The costs of the appeal be borne by the respondent.

Ordered accordingly.

**[Delivered and signed this 9<sup>th</sup> day of February 2017].**

**J.R. KARANJAH**

**JUDGE**

**In the presence of**

Mr. Ochoki holding brief for Kibichiy

for Appellant

Respondent Absent

CC Njoroge/Dorothy