



REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL NO. 12 OF 2014

BETWEEN

OSCAR ODONGO T/A

ODONGO INVESTMENT AUCTIONEERS APPELLANT

AND

CO-OPERATIVE BANK OF KENYA LIMITED 1ST RESPONDENT

DAVID OBARE OMWOYO T/A

OMWOYO AUCTIONEERS 2ND RESPONDENT

(Being an appeal from the Ruling and Order of Hon. P. Mayova, Ag. SRM in Homa Bay Chief Magistrates Court Misc. Civil Application No. 38 of 2013 dated 9th July 2014)

JUDGMENT

1. The genesis of this matter is that on 18th December 2013, the subordinate court taxed a bill of costs in favour of the 2nd respondent (“Omwoyo Auctioneers”). Omwoyo Auctioneers then instructed the appellant (“Odongo Investment”) to recover the costs by way of execution through attachment and sale of moveable property. The 1st respondent (“the Bank”) paid the assessed amount on 31st January 2014. However, Omwoyo Auctioneers further instructed Odongo Investment to proceed with attachment to recover the sum of Kshs. 21,600/00 being the amount paid for the warrants of attachment together with the auctioneer’s costs.
2. In order to forestall execution, the Bank filed a Notice of Motion dated 5th February 2014 in which it sought the following substantive order;

[4] The Honourable court be pleased to set aside and/or declare void the warrants of attachment of movable property given/issued on 30th January 2014 and all consequential processes thereafter.
3. Upon filing the motion, counsel for the Bank appeared before the magistrate *ex-parte*, sought and obtained an order of stay of execution on condition that the sum of Kshs. 21,600.00 was deposited in court within 2 days. The Bank deposited the money in compliance with the order.
4. The motion was argued inter-parties and in a ruling delivered on 9th July 2014, the learned

magistrate lifted the attachment and directed that the sum of Kshs. 21,600.00 be released to Omwoyo Auctioneers and awarded Kshs. 40,000.00 as costs in favour of Odongo Investment.

5. It is the award of and assessment of costs in favour of Odongo Investment that has precipitated this appeal. The crux of the appeal, as set out in the memorandum of appeal dated 4th August 2014, is that the learned magistrate erred in assessing costs when the issue of costs was not an issue before the court at the time of hearing the Bank's notice of motion. Counsel for the appellant, in the written submissions, contended that in proceeding to assess the costs due to the appellant, the learned magistrate departed from the issue before him and that the issue of the ascertainment of the appellant's costs and quantum thereof was not before the court either through the pleadings or submissions. Counsel cited the case of ***Provincial Insurance Company of East Africa v Mordekai Nandwa CA KSM Civil Appeal No. 179 of 1995 (UR)***, and ***IEBC v Stephen Mutinda Mule & 3 Others NRB CA Civil Appeal No. 219 of 2013 [2014]eKLR*** to support the proposition parties are bound by their pleadings and the court could not deal with issues which were not urged before it. The appellant prays that the appeal be allowed and part of the decision dealing with assessment of the appellant costs be set aside and the appellant be granted liberty to file its bill of costs for assessment.
6. In summary, counsel for Bank supported the learned magistrate's decision on the ground that the court was well within its jurisdiction to deal with all the issues surrounding the execution with finality including the costs to due to the appellant as part of it duty to determine a matter before it. The Bank found support for its position in the overriding objective outlined in **section 1A** of the ***Civil Procedure Code (Chapter 21 of the Laws of Kenya)***. The appellant cited the provisions of **section 55(3)** of the ***Auctioneers Act (Chapter 526 of the Laws of Kenya)*** which empowers the court to assess fees payable to an auctioneer on application by any party.
7. The 2nd respondent did not participate in these proceeding although he was served with process.
8. In dealing with the issue of costs for the appellant, the learned magistrate expressed himself as follows;

Considering all the factors, particularly the need to bring this protracted litigation to a final and just closure and considering the money expended by the bank in payment of costs in this case, I find that a global sum of the 2nd Auctioneer (Odongo) will suffice. Doing the best I can, I order the bank to pay the Auction an all inclusive sum of Kshs. 40,000.00 for the proclamation done plus court attendances and other incidental expenses. The Court hopes the order will bring the matter to an end.

9. Having reviewed the material before the subordinate court, I find that the issue of costs was an integral part of the decision made by the learned magistrate. The court has an obligation, under **section 1A** of the ***Civil Procedure Act***, to facilitate the just expeditious, proportionate and affordable resolution of all disputes governed by the Act. **Section 34(1)** of the ***Civil Procedure Act*** 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.

10. The issue before the court concerned the execution of a court order and the court exercised its discretion to see that the matter was determined with finality having regard to the nature of the litigation and the amounts involved. It cannot be said that the issue of the appellant's costs was not on the table for consideration by the learned magistrate. It was incidental to determination of whether the execution could proceed in the circumstances of the case and the costs incurred the execution.
11. It is noteworthy that the amount to be recovered was Kshs 20,175.00 and the value of the goods proclaimed, which according to proclamation issued by the appellant, was Kshs 40,000.00. Under

the **4th Schedule** to the **Auctioneers Act**, the fee for attachment based on the value of the goods proclaimed is Kshs. 5,000.00. Taking into account all the incidental expenses and attendances, the amount assessed by the learned magistrate was fair and reasonable. I therefore find and hold that the learned magistrate was right in assessing the total costs due and accordingly awarding it to the appellant in order to obviate the need for further assessment and consequent increase of costs to all the parties thereby undermining the overriding objective.

12.I therefore dismiss the appeal with costs to the 1st respondent.

13.I assess the costs of the appeal at Kshs. 10,000.00 only.

DATED and DELIVERED at HOMA BAY this 9th day of March 2014.

D.S. MAJANJA

JUDGE

Mr Rambo, instructed by Muthaura, Mugambi, Ayugi & Njonjo Advocates for the appellant.

Ms Moguche, instructed by Oguttu-Mboya Company Advocates for the 1st respondent.