

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA
CIVIL APPEAL NO. 177 OF 2024
IN THE MATTER OF THE AUCTIONEER’S ACT
AND
IN THE MATTER OF THE AUCTIONEER’S RULES, 1997

BETWEEN
WEST KENYA SUGAR CO. LTD.....
APPELLANT

VERSUS
SAMSON ITONDE TUMBO T/A
DOMINION **YARD**
AUCTIONEERS.....RESPONDENT

RULING

Appellant’s case

1. The Applicant herein filed a chamber summons application dated **23rd December 2024**, on **24th December 2024**, seeking the following orders;
 - a. The Application be deemed as an appeal as envisaged by the provisions under Rule 55 (3) and (4) of the Auctioneer’s Rules;
 - b. The court be pleased to set aside the ruling and order of the subordinate Court delivered in **Kimilili PMCC No. E048 of 2021-Mary Chepkosgei & Another vs West Kenya Sugar Company Limited & Dominion**

Yard Auctioneers, wherein the Auctioneer's charges were assessed at Kshs. 348,945.40/=;

c. Spent.

d. The Court be pleased to reconsider the Respondent's Bill of Costs, set aside the assessment of the Auctioneers charges by the learned magistrate dated 19th December 2024, and by way of an appeal, render a decision in respect to the disputed items as shown in the bill of costs and taxed as follows:

- i. Item 1(b)-Kshs.1,000/= on receipt of warrants of sale**
- ii. Item 3(a)-Kshs. 5,000/= on taking inventory**
- iii. Item4(a)-Kshs. 191,985/= on auctioneer's commissions**
- iv. Item 6(a &b)-Kshs. 59,730/= on travelling**
- v. Item7-Kshs. 20,000/= on security**
- vi. Item8-Kshs. 4,500/= on storage charges**
- vii. Item12(a, b &c)-Kshs. 1,100/= on court filing fees**
- viii. Item13-Kshs. 8,000/= on advocate's instruction fees**
- ix. Item14-Kshs. 3,000/= on process server's fees**
- x. Item16-Kshs. 48,130.40/= on V.A.T**

A total of Kshs. 348,945.40/= allowed in the Bill of Costs dated 3rd December 2024 .

5. The costs of this appeal, by way of chamber summons, as prescribed, be provided for.

6. The Application was based on the following grounds;

- a. The learned magistrate erred in law and in fact when she failed to hold that in the Respondent's move to proclaim the Appellant's Eight (8) motor vehicles, valued at Kshs. 8, 300,000/= in order to satisfy a decretal sum of Kshs. 5,349,523.73/= was obviously excessive, offended the law and was unjustified.**
- b. The learned magistrate erred in law and in fact when she failed to award a consolidated sum of Kshs. 1,000/= for receipt of "court warrants or letter of instructions, as the Rules had prescribed.**
- c. The learned magistrate erred in law when she failed to appreciate the fact that only such items as prescribed under the Fourth Schedule Part II of the Auctioneers Rules, can be claimed in an Auctioneers Bill of costs, if and when incurred by an Auctioneer, and awarded on assessment and not otherwise.**
- d. The learned magistrate further erred in fact and in law when she allowed Auctioneers charges on account of taking inventory, traveling for service of proclamation, travelling for collection, Advocates instruction fees and process server's fees, which charges are neither provided for nor prescribed under Fourth Schedule, Part II of the Auctioneers Rules.**
- e. The learned magistrate erred in fact and in law when she allowed Auctioneer charges in the bill of costs on account of travelling for service of proclamation when the said document was prepared at the Appellant/Applicant's premises and left there and was never served again elsewhere,**

- neither was it a requirement of the law that it be served as purported and charged for at the rate and in the amounts claimed and awarded.
- f. The learned magistrate erred in fact and in law when she, despite finding that the Respondent's commission was to be based on the decretal debt of Kshs. 5,349,253/= and not the value of the proclaimed good being Kshs. 8,300,000/=, went ahead to allow a claim of commission based on the value of the proclaimed goods.
- g. The learned magistrate erred in fact and in law when she failed to hold that the claim for commission on attachment was to be taken as a one-off event so that the fees charged should have reflected the percentage used against the sums being executed for. The learned magistrate could only further error when she failed to properly calculate the Respondents claim for commission at Kshs. 53,494.53/=, being $\frac{1}{2}$ of the 2% of the decretal debt of Kshs. 5,349,253/=.
- h. The learned magistrate erred in fact and in law when she allowed Auctioneer's charges on account of security when there was no evidence that any security or Police assistance was sought and paid for.
- i. The learned magistrate fell in error of the both the law and facts when she, against the weight of the evidence, allowed Auctioneer's charges relating to storage fees despite there being proof that the Appellant/Applicant had already paid to the Auctioneer's storage company, a sum of Kshs. 13,990/= towards settlement of storage charges.

- j. **The learned magistrate erred in fact and in law when she allowed a claim for Kshs. 59,730/=, being Auctioneer's charges on account of traveling, whereas, the Auctioneer had actually travelled for less than one (1) hour to merely proclaim goods in Kambi Kwanza Market where the Appellant/Applicant's offices were located.**
- k. **The learned magistrate erred in law then she failed to take into account and to appreciate the fact that the sums which she allowed in the bill of costs as the recovery expenses and/or Auctioneers charges for the specified decretal debt was an all-time high and disproportionate.**
- l. **The Trial Magistrate erred in fact and in law when she failed to consider and ignored the Appellant/Applicant's written submissions, list of documents and further list of documents which had been filed before her.**
- m. **The learned magistrate erred in fact and in law when she held that the Respondent was entitled to fees in the sums and in the amounts awarded as itemized in the Bill of costs.**
7. The Application was equally premised on the Supporting Affidavit of **Eunice Owuor**, the Legal and Insurance Services Manager of the Appellant herein Sworn on **23rd December 2024**. In her Affidavit she deposed that the Appellant (Defendant) in the matter **Kimilili PMCC No. E048 of 2021**, wherein a decree was thereafter issued against it was required to make good a decretal sum of Kshs. 5, 349,253/= as at 18th November 2024, when the decree holder executed warrants of attachment and sale of the Appellant's property. The Respondent herein was nominated by the decree holder

to execute the decree and recover the decretal sum and thereafter, the Respondent filed his Bill of Costs dated 3rd December 2024 not only to tax his charges but also recover the same vide the proceedings in respect of which he had executed.

8. She deposed that the trial magistrate proceeded to tax the auctioneer's charges and allowed the same in the sum of Kshs. 348,945.40/= vide a ruling delivered on **19th December 2024**, and being aggrieved by the said ruling the Appellant lodged this appeal pursuant to Rule 55(4) of the Auctioneer's Rules 1997. She decried that the amounts awarded by the learned magistrate to the Respondent in the assessed bill of costs as being high, excessive and not proportionate to the decretal debt of Kshs. 5, 349, 253/= which was recovered on the basis of the warrants issued to the Respondent.
9. She contended that some of the items listed in the Auctioneer's Bill of Costs and awarded by the learned magistrate and now impugned, are not prescribed under the relevant fourth schedule, Part II of the Auctioneers Rules which prescribes charges applicable. She averred that the learned magistrate erred when she allowed Auctioneers charges on account of taking inventory, travelling for a service of proclamation, travelling for collection, Advocates instruction fees and process server's fees which charges she states were not provided for nor prescribed under fourth schedule, Part II of the Auctioneers Rules.

Respondent's case

10. In response to the Application, the Respondent filed a Replying Affidavit sworn on **21st January 2025**, where he averred that on **18th November 2024**, he was assigned warrants of attachment and sale in the Senior Principal Magistrate's Court at Kimilili, Civil Suit No. E048 of 2021-

Mary Chepkosgei & Patrick Kimokoti Mulati (decree holders) versus West Kenya Sugar Company (Judgement debtor) with instructions to execute the same against the Judgement debtor.

11. He averred that on the **19th November 2024**, he served a proclamation upon the Judgement debtors (Appellant herein) listing eight different motor vehicles as contained in the copies of proclamations to satisfy the decretal sum plus the costs of the execution. Subsequently, on the **26th November 2024**, he attached the Judgement debtor's property and moved it into a storage yard after they failed to redeem the property by payment of both the decretal sum and costs of the execution.

12. The Respondent equally averred that as a consequence to the seizure of the Judgement debtor's (Appellant's) property, they filed a miscellaneous application at the **High Court at Bungoma No. HCCCMISC E201 of 2024** which application was settled by a consent recorded before Justice R.E. Ougo on the **2nd December 2024**, and that at order number eight (8) of the extracted consent order it was consented that the Judgement debtor/Appellant was to bear the Auctioneer's costs. Pursuant to the consent order, the respondent proceeded to file his Auctioneer's Bill of Costs dated **3rd December 2024**, for taxation before the Magistrate in the Senior Principal Magistrate's Court at Kimilili; Civil Suit No. E048 of 2021-Mary Chepkosget & Patrick Kimokoti Mulati (Decree holders) versus West Kenya Sugar Company (Judgement debtor).

13. The Respondent contended that all the items contained in his Bill of Costs are provided for under the fourth schedule, Part II of the Auctioneers Rules and to be precise the items on travelling for proclamation, travelling for collection are directly provided for while Advocates fees and

process server's fees are provided for under Number 4 of Part II of the second schedule under other disbursements.

14. The Respondent averred that the Appellant's actions are simply double standards as, in the one hand they have consented to pay the Auctioneers charges, to which they actively participated in the taxation of the Auctioneers Bill of Costs while on the other hand they have disputed every item awarded by the learned Magistrate in her ruling hence adopting the position that the Respondent is not entitled to the payment of his fees and charges.
15. Finally, it was the Respondent's disposition that the learned magistrate decision on the Auctioneer's Bill of Costs dated **3rd December 2024**, was anchored on law and supported by facts and evidence and as such, the same ought to be upheld by this Honourable Court. He underscored that the Appellant has failed to demonstrate how the learned magistrate assessment was contrary to the dints of the Auctioneers Rules 1997 and how the same was based on wrong principles.
16. During the Inter partes hearing of the application I, with the consent of all parties, directed the application to be canvassed by way of written submission and the Appellant filed its submissions on **14th March 2025**, while the Respondent filed his submissions on **12th June 2025**.

Analysis and determination

17. I have considered the pleadings by the parties and their rival written submissions as filed, and the sole issue for this Court's determination is whether the whether the decision of the lower court was erroneous as alluded to by the Appellant.

18. There is no dispute that the Respondent carried out instructions in the said case in the lower Court. It emerges from the ruling by the learned magistrate that there was a sale conducted after the attachment/proclamation and the Court proceeded to assess the Auctioneer's Bill of Costs dated 3rd December 2024, based on the decretal sum and not the attached good. This is clearly stated on page 56 of the proceedings and page 2 of the ruling delivered on **19th December 2024**, as follows:

“..... I will however assess the Auctioneers Bill of Costs based on the decretal sum and not the attached goods. In doing so, I am guided by the authority of **Julius Mwale t/a Mwal-Mart Supermarket vs Kennedy Shikuku t/a Eshikhoni Auctioneers & Another (Miscellaneous Civil Case E006 of 2023 (2023) KEHC 2386 (KLR).....”**

This clearly dismissed the Appellants grounds of appeal alleging that the Court assessed the Auctioneers Bill of Cost dated 3rd December 2024, using the value of the attached properties and not the decretal sum.

19. The Applicant is aggrieved by the decision of the learned magistrate to award items 1 to 16, which the Appellant termed to not exist under the fourth schedule, Part 11 of the Auctioneers Rules 1997.

20. Auctioneers' fees are chargeable under Part II of the Fourth Schedule to the Act. When it comes to attachment distraint, or repossession, the auctioneer has to align his/her bill with the provisions of the schedule.

21. There is indeed an emerging trend where Auctioneers raise outrageous bills, and at times, the same may even exceed the decretal sum. The consequences of this have

been that some attachments do not benefit anyone other than the auctioneer himself. That cannot be the purpose of the Act, which has clearly set out the fees payable. It behoves Auctioneers to adhere to the Act. An Auctioneer has a duty to draw a bill that is reasonable, given the circumstances of each case he is handling. Looking at this bill it is evident that the same was drawn pursuant to the provisions of Part II of the fourth schedule of the Auctioneers Rules 1997 with each falling under different sections.

22. The scale of fee for auctioneers on attachment and sale of properties is contained in Part II of the Fourth Schedule of the Auctioneers Rules 1997 (Rules). Items 4 and 5 of Part II provides: -

“4. Fees on attachment/repossession distraint and expenses

Kshs.2001 to Kshs.50,000 - 5%

Kshs.50,000 to

100,000 - -3%

Over Kshs.100,000 - 1.5%.”

23. Transport, storage, advertising, insurance and the disbursement expenses where attachment or repossessed is stayed or postponed or money tendered after attachment or possession but before sale-attachment or repossession charges in addition to expenses.

5.Fees of sale of movable property

First, Kshs.2,000 - 10,000 10%

Kshs.2001to Kshs.10,000 - 7.5%

Over Kshs.10,000- 5%

Storage of property - $\frac{1}{4}$ of the value of property

Maximum of 500 per day.

24. **Rule 12** of the Auctioneers Rules provides:

“Upon receipt of a court warrant or letter of instruction the auctioneer shall in case of movables other than goods of a perishable nature and livestock:

(a)record the court warrant or letter of instruction in the register.

(b)Prepare a proclamation in Sale Form 2 of the schedule indicating the value of specific items and condition of each item, such inventory to be signed by the owner of the goods or an adult person residing or working at the premises where the goods are attached or repossessed, and where any person refuses to sign such inventory auctioneer shall sign a certificate to that effect.

(c)In writing give to the owner of the goods seven days notice on Sale Form 3 of the schedule within which the owner may redeem the goods by payment of the amount set forth in the court warrant or letter of instruction.

(d)On expiry of notice without payment and if goods are not to be sold in situ remove the goods to safe premises for auction.

(e) Ensure safe storage of the goods pending their auction.

(f) Arrange advertisement within seven days from date of removal of the goods and arrange sale not earlier than seven days after first newspaper advertisement and not later than fourteen days thereafter.

(g) Not remove any goods under the proclamation until the expiry of the grace period.

25. **Rule 14** prohibits the removal, interference or alienation of any goods comprised in the proclamation.

26. The prescribed Sale Form 2 referred to in the rule is headed **PROCLAMATION OF ATTACHMENT/REPOSSESSION/DISTRAINT OF MOVABLE PROPERTY**. It simply notifies the judgment-debtor, among other things, that the movable goods described in the schedule to the proclamation have been attached and left in his custody for 7 days. I understand that the Appellant view of the manner and the procedure of attachment stipulated is based on the dints of **Order 21 Rule 38** of the **Civil Procedure Rules** and it appears to be in conflict with the procedure prescribed in **Rule 12** of the **Auctioneers Rules**. However, it is clear that the Auctioneers Act is a modern statute and the procedure contained in **Rule 12** of the **Auctioneers Rules** is indeed intended to be a reform of the old procedure contained in **Order 21 Rule 38** of the Civil Procedure Rules.

27. The actual words used in the two rules is not decisive of whether an attachment has taken place. One has to consider the essence and purpose of the attachment. The purpose of the attachment is the execution of the decree. The essence

of the attachment is to remove the goods from the possession of the judgment-debtor and place them in the custody of the law so that they can be sold to satisfy the judgment debt if the judgment-debtor does not pay the debt. To place the goods in the custody of the law it is not necessary and does not mean, that the goods must be carried away from the premises of the judgment-debtor. It is clear from Rule 12 as read with Rule 14 of the Auctioneers Rules and the contents of the prescribed form, that is, Sale Form 2 that the proclamation of the movable goods is legally and effectively an attachment. From the moment the goods are proclaimed, the judgment-debtor is deprived of the legal possession and physical control of the goods and instead the goods are placed in the custody of the law and the court through the Auctioneer. The judgment-debtor can only redeem them by the payment of the debt. If the judgment-debtor fails to pay the Auctioneer moves to the second stage of conducting the sale of the attached goods.

28. It is trite law that this Court will not interfere with the taxing officer's decision on taxation unless it is shown that the said officer proceeded on wrong principles or took account of irrelevant factors or the amount taxed is inordinately high. In this regard reference is made to **Co-operative Bank Ltd. vs Jeofrick Munde T/A Kimu Auctioneers (2019) eKLR** where the Court held that;

“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.”

29. On scrutiny of the lower Court ruling and the Auctioneers Bill of Costs, most of the items as assessed by the trial magistrate were done so as prescribed in in Part II of the Fourth Schedule of the Auctioneers Rules 1997 (Rules) with the trial magistrate correctly taxing off items 5 and 11 in its entirety as the same was not proved by provision of a policy document by the Respondent. Further items 3 and 14 were appropriately found to be on the higher side and the same were taxed off properly Kshs. 2,000/= each to resonate with the Part II of the Fourth Schedule of the Auctioneers Rules 1997 (Rules). As regards item 13, the advocate ought to have drawn his fees under the Advocates Act, and not include it in the Auctioneers Bill of Costs.

30. Having looked at Bill and taking into account the above factors, I am of the view that the Auctioneers Bill of costs was drawn without sufficient information being given to the Court and the taxing officer was prudent and keen enough to note this under the relevant items. This was the duty of the Auctioneer to do so. Having failed to justify some items in the Bill, then it could only have led to the same being taxed off completely.

31. So what orders should the Court make?

32. Having found the above, I set aside the Ruling by the learned magistrate with regards to:

a. Item 14 as the advocate ought to have drawn his fees under the Advocates Act, and not include it in the Auctioneers Bill of Costs.

b. All the other items were assessed properly.

- c. Items 3 and 14 were appropriately found to be on the higher side and the same were properly taxed off Kshs. 2,000/=each.**
- d. Items 5 and 11 were properly taxed off.**
- e. Each party shall bear its own costs of this appeal as the Appellant was only partly successful.**

Orders accordingly.

Delivered, Signed and Dated at Bungoma this 30th day of September 2025.

M.S.Shariff
Judge

In the presence of:

TWENA FOR APPELLANT

ANWAR FOR RESPONDENT

PETER COURT ASSISTANT