



REPUBLIC OF KENYA



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**Ochanga v Areba t/a Remma Auctioneers (Civil Appeal E048 of 2024)
[2025] KEHC 19205 (KLR) (18 December 2025) (Judgment)**

Neutral citation: [2025] KEHC 19205 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E048 OF 2024
MS SHARIFF, J
DECEMBER 18, 2025**

BETWEEN

ISAAC ONDIPO OCHANGA APPELLANT

AND

ZEPHANIA AMENYA AREBA T/A REMMA AUCTIONEERS RESPONDENT

(Being an appeal from the Judgement and Decree of the Chief Magistrate's Court in Bungoma Civil Case No. E060 of 2024 delivered by Hon. T.M. Olando (PM) on 20th March 2024.)

JUDGMENT

A. Background

1. On or about 14th November 2023, the Respondent herein was duly allocated warrants to execute a decree in Bungoma CMCC No. E011 of 2023, against the Appellant herein. On 16th November 2023, the Respondent commenced execution by serving the Appellant with a proclamation notice upon which the Appellant was able to secure stay of execution and the Respondent proceeded to file Bungoma Civil Miscellaneous Suit E060 of 2024, seeking to have his Bill of Costs assessed.
2. Upon been served with the application, the Appellant herein opposed the same vide a Notice of Preliminary Objection dated 28th February 2024, on the following grounds that: -
 - i. The Court lack jurisdiction to entertain the Respondent's application as the decree executed was in Bungoma Chief Magistrate's Court Civil Case No. E011 of 2023;
 - ii. The Respondent's application offends the provisions of Section 34 of the *Civil Procedure Act*
 - iii. The prayers sought were res judicata; the application defeats the orders of stay issued in Bungoma Chief Magistrate's Court Civil Case No. E011 of 2023;



- iv. There is no requirement under law for the Respondent herein to file a miscellaneous application to tax his bill when the decree executed is instructive on who is to pay charges;
 - v. The application discloses no triable issues.
 - vi. The applicant is forum shopping as his application is an abuse of court process.
3. On 29th February 2024, the Notice of Preliminary Objection was set down for hearing.
 4. The trial Court over ruled the objection vide a ruling delivered on 20th March 2024. The said court held that the Respondent herein was not a party to the Bungoma Chief Magistrate's Court Civil Case No. E011 of 2023 suit, but only an agent appointed by the one of the parties and that there exists no law that requires the Respondent to file his Bill of Costs under same civil suit. Further, the Court held that the Respondent was required to only file the Bill of Costs by way of miscellaneous application.

B. The Duty Of A First Appellate Court

5. A first appellate Court is mandated to re-evaluate the evidence before the trial Court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate Court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. (See *Selle & another v Associated Motor Boat Co. Ltd. & others* {1968} EA 123). As was held by the Court of Appeal for East Africa in *Peters v Sunday Post Limited* {1958} E.A. page 424: -

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.”

6. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate Court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate Court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial Court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate Court had discharged the duty expected of it. (See *Santosh Hazari vs. Purushottam Tiwari (Deceased)* by L. Rs {2001} 3 SCC 179).

C. Appeal

7. The Appellant seeks to overturn the judgment citing the following grounds: -
 - a. The Learned Trial Magistrate erred in fact and in law by not appreciating the import and purport of Section 34 of the *Civil Procedure Act*.
 - b. The Learned Trial Magistrate erred in fact and in law in not considering the submissions made by the Appellant and the authorities furnished to the Court and which authorities were binding to the Court.



- c. The Learned Trial Magistrate erred in fact and in law in failing to appreciate that all issues regarding execution of decrees must be addressed in the same suit and not by a separate suit.
 - d. The Learned Trial Magistrate erred in fact and in law in failing to appreciate that assessment of auctioneers charges and costs in execution of warrants of attachment and sale can only be done in the same suit where the decree was being executed from
8. The Appellant prayed that this Court do set aside the ruling of the subordinate Court dated and delivered on 20th March 2024 and substitute the same with an appropriate ruling upholding the Appellant's Notice of Preliminary Objection dated 28th February 2024. Subsequently, that the Respondent be condemned to pay the Appellant costs of this appeal.
 9. Vide Court directions issued on 25th March 2025, this Court directed the parties to canvass the appeal by way of written submissions. Both parties complied with the Court directive.

D. Analysis And Determination

10. It is clear that the determination of the appeal revolves around the question whether the trial Court had jurisdiction to hear and determine the Respondent Bill of Costs and therefore that is the issue that I shall determine here since the miscellaneous application did not proceed to full hearing.
11. Section 34 of the *Civil Procedure Act* provides that all questions arising out of or relating to execution shall be determined in the same suit and not by a separate suit. The Section is reproduced below.
 34. Questions to be determined by court executing decree
 - (1) 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.
 - (2) The Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional Court fees.
 - (3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.
Explanation. — For the purposes of this section, a Plaintiff whose suit has been dismissed, and a Defendant against whom a suit has been dismissed, are parties to the suit.
12. It is imperative to note that the Respondent herein was not a party to the Bungoma Chief Magistrate's Court Civil Case No. E011 of 2023 suit and as the trial magistrate noted the auctioneer was only an agent appointed by the one of the parties. Subsequently, I concur with the sentiments of the trial magistrate that, there exists no law that requires the Respondent to file his Bill of Costs under same civil suit as the only available required is that of the parties to the suit as elucidated under Section 34 of the *Civil Procedure Act*.
13. Section 34 only contemplates situations where parties are the same, as was in the case of *Governors Balloon Safaris Limited v Attorney General & 2 Others (2014) eKLR* and not a case like the present one where the party suing is different, the cause of action different and the prayers sought by the Respondent are different from the earlier suit giving rise to the cause of action.



A. CONCLUSION

14. Premised upon the foregoing reasons, I uphold the trial Court's decision by finding the Appellant's Notice of Preliminary Objection dated 28th February 2024, to have been devoid of any merit and hold that the trial Court did not err in dismissing the same. I uphold the ruling of the trial magistrate and dismiss this appeal with costs to the Respondent.

Orders accordingly.

DELIVERED, SIGNED AND DATED AT BUNGOMA THIS 18TH DAY OF DECEMBER 2025.

MWANAISHA.S. SHARIFF

JUDGE

In the presence of:

N/A by Anwar & Company Advocates for the appellant

N/A by Paul Juma for Respondent

Peter Machoni – Court Assistant

