

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT NAIROBI**

**APPEAL NUMBER E091 OF 2025**

**FRIGOKEN LIMITED.....APPELLANT**

**-VERSUS**

**MARY AJELO MUNALA.....RESPONDENT**

*(Being an Appeal from the Ruling and Orders of the Hon. R. L. Musiega (SRM) delivered on 17<sup>th</sup> February 2025 in MCELRC 110/2020)*

**CORAM**

*Before Lady Justice J.W. Keli*

*C/A Otieno*

**JUDGMENT**

1. The Appellant herein, dissatisfied with the Ruling and Orders of the Hon. R. L. Musiega (SRM) delivered on 17<sup>th</sup> February 2025 in MCELRC 110/2020 between the parties filed a memorandum of appeal dated the 17<sup>th</sup> of March 2025 seeking the following orders:-
  - a) That this Appeal be allowed.
  - b) That the proceedings in the lower court be stayed pending the hearing and determination of this Appeal.
  - c) That this Honourable Court be pleased to vary the Ruling by Honourable Rawlings Liluma Musiega dated 17<sup>th</sup> February 2025 and allow that the Appellant files additional documents as presented in the Further Affidavit dated 18<sup>th</sup> December 2024

- d) That this Honourable Court be pleased to set aside the order in the Ruling by Honourable Rawlings Musiega dated 17th February 2025 directing the Appellant to pay the Auctioneer's costs.
- e) That the matter at the trial court be determined by a Judicial Officer other than Hon. Rawlings Liluma Musiega.
- f) That the costs of the Appeal be awarded to the Appellant.
- g) Any other alternative order/relief that this Honourable Court may deem fit to grant.

#### GROUND OF THE APPEAL

2. The Honourable Magistrate erred in fact and law by failing to appreciate the Appellant's evidence indicative that the Auctioneer did not conduct the proclamation of KBZ 051W procedurally and in step with the provisions of the Auctioneer's Act.
3. The Honourable Magistrate erred in fact and law by largely relying on the demeanour of the Auctioneer to make a determination while failing to acknowledge the contradictions in his evidence particularly details about his visit to the Appellant's premises.
4. The Honourable Magistrate erred in fact and law by failing to set aside the attachment and proceeding to order that the Auctioneer's costs ought to be borne by the Appellant.
5. The Honourable Magistrate erred in fact and law by ordering that the Auctioneer's costs ought to be borne by the Appellant despite the glaring irregularities in the process of the proclamation and attachment of the Appellant's property namely, motor vehicle KBZ 051W.

6. The Honourable Magistrate erred in fact and law by barring the filing of additional documents by the Appellant on account that it will prejudice the Respondent. The circumstances in which the Appellant sought to adduce the additional evidence is directly relevant to the matter before the court and is in the interest of justice to be adduced in order to ventilate the Appellant's case to disprove the allegations levelled by the Respondent.
7. The Honourable Magistrate erred in law in failing to appreciate principles to be considered when granting and denying a party an application to adduce further documents and ended up employing the wrong basis and principle in denying the Appellant leave to file further documents.
8. The Honourable Magistrate erred in law and in fact in failing to appreciate that the additional documents sought to be filed were critical to the Appellant as they formed the basis of its Defence and it would be prejudicial to deny the Appellant leave to file the same and this amounted to a court denying a party a constitutionally protected right to be heard.
9. The Honourable Magistrate erred in fact and law by failing to demonstrate the prejudice that would be occasioned on the Respondent that will not be compensated by costs should the Appellant adduce additional evidence yet in reopening the case, the matter was set down undergo pre-trials.
10. The Honourable Magistrate erred in law and in fact in failing to appreciate that the law imposes a duty on the court to further the overriding objectives and grant parties a fair hearing.

## BACKGROUND TO THE APPEAL

14. The Respondent filed a memorandum of claim against the Appellant dated the 16<sup>th</sup> of January 2020 seeking the following orders:-

- i. A declaration that the claimant's dismissal from his employment was wrong, unfair and unlawful
- ii. A declaration that the claimant is entitled to payment of his terminal dues and compensatory damages as pleaded
- iii. Terminal dues amounting to Kshs. 220, 376.00
- iv. Interest on iii above from the date of filing suit till payment thereof
- v. Costs of this suit
- vi. Certificate of service

15. Vide a judgment delivered on 23<sup>rd</sup> October 2023, the trial Magistrate allowed the Claimant/Respondent's claim as prayed, noting that the Appellant had failed to prosecute the defence case (pages 47-49 of Appellant's ROA dated 19<sup>th</sup> May 2025).

16. The Appellant sought to set aside the judgment delivered on 23<sup>rd</sup> October 2023 vide a Notice of Motion dated 27<sup>th</sup> November 2023 brought under certificate of urgency. It was the Appellant's prayer in the said Notice of Motion application, that the case be re-opened and they be heard substantively. The Notice of Motion was supported by the Affidavit of one ELIZABETH KANAKE sworn on 27<sup>th</sup> November 2023 with attachments thereto (pages 34-49 of ROA).

17. In a Ruling delivered by the trial Magistrate on 3<sup>rd</sup> May 2024, the Court declined to substantively determine the application dated 27<sup>th</sup> November 2023 for the reason that the Advocate for the Appellant has not properly come on record pursuant to Order 9 Rule 9 of the Civil Procedure Rules.
18. The Ruling delivered on 3<sup>rd</sup> May 2024 prompted the filing of the Notice of Motion application dated 6<sup>th</sup> May 2024 seeking stay of execution of the judgment delivered on 23<sup>rd</sup> October 2023; a review of the ruling delivered on 3<sup>rd</sup> May 2024; and reinstatement of the application dated 27<sup>th</sup> November 2023 which the Appellant prayed should be allowed. The Notice of Motion dated 6<sup>th</sup> May 2024 was supported by the affidavit of ELIZABETH KANAKE of even date (pages 27-33 of ROA).
19. On 29<sup>th</sup> May 2024, the Appellant herein, filed yet another application vide a Notice of Motion dated 29<sup>th</sup> May 2024 seeking stay of any execution, sale or attachment initiated by the Respondent in reliance upon the judgment of 23<sup>rd</sup> October 2023; and an order of injunction against the execution, sale or transfer of registration of motor vehicle registration number KBZ 061W belonging to the Appellant, which had been seized by Valley Auctioneers and stored in their yard at Membley, Ruiru. The Appellant further sought for an injunction against the registration of any sale, transfer or other dealings with the subject motor vehicle by the NTSA; and for an order for storage of the subject motor vehicle at the Appellant/Applicant's yard or Kilimani Police Station. The application dated 29<sup>th</sup> May 2024 was supported by an affidavit of ELIZABETH KANAKE sworn on 29<sup>th</sup> May 2024 (pages 16-26 of ROA).

20. Following the filing of a supplementary affidavit dated 28<sup>th</sup> June 2024 sworn by one PETER MWANGI GATHOGO in response to the Appellant's application dated 29<sup>th</sup> May 2024, the Appellant filed a final application vide a Notice of Motion dated 15<sup>th</sup> August 2024 seeking that PETER MWANGI GATHOGO be availed for cross-examination on paragraphs 3,4, and 5 of his supplementary affidavit (pages 8-15 of ROA).
21. All the above stated application were opposed by the Respondent vide a Replying Affidavit to application dated 29<sup>th</sup> May 2024 sworn by the Respondent on 28<sup>th</sup> June 2024 (pages 126-128 of ROA); Supplementary Replying Affidavit sworn by one PETER MWANGI GATHOGO on 28<sup>th</sup> June 2024 (pages 129-131 of ROA); Further Affidavit to application dated 29<sup>th</sup> May 2024, sworn by one DICKENS OUMA on 15<sup>th</sup> August 2024 (pages 113-114 of ROA)
22. The Appellant, to counter matters raised in the responses to the applications filed: a Further Affidavit sworn on 17<sup>th</sup> January 2024 by ELIZABETH KANAKE (pages 132-134 of ROA); Further Affidavit to application dated 29<sup>th</sup> May 2024, sworn on 13<sup>th</sup> August 2024 by ELIZABETH KANAKE (pages 115-116 of ROA); Supplementary Affidavit to application dated 29<sup>th</sup> May 2024, sworn on 13<sup>th</sup> August 2024 by PAUL WAWERU (pages 117-125 of ROA); Further Affidavit to application dated 29<sup>th</sup> May 2024, sworn on 9<sup>th</sup> December 2024 by ELIZABETH KANAKE (pages 107-112 of ROA); Further Affidavit to application dated 29<sup>th</sup> May 2024, sworn on 11<sup>th</sup> December 2024 by ELIZABETH KANAKE (pages 101-106 of ROA); and a Further Affidavit to application dated 6<sup>th</sup> May 2024, sworn on 18<sup>th</sup> December 2024 by ELIZABETH KANAKE (pages 135-146 of ROA).

23. The court allowed the application dated 15<sup>th</sup> August 2024 for cross-examination of the auctioneer, PETER MWANGI GACHOGO, and he was cross examined on 7<sup>th</sup> November 2024 (pages 278-281 of ROA).
24. The court issued directions that the Notice of Motion application be disposed of by way of written submissions. The parties complied.
25. The Trial Magistrate Court delivered its ruling on the 17<sup>th</sup> of February 2025, where it held that the proclamation of the Appellant's motor vehicle was done in compliance with the Auctioneers Act No. 5 of 1996; set aside the judgment delivered on 23<sup>rd</sup> October 2023 and re-opened the Appellant's case, with the caveat that they will not be allowed to file additional documents since the Claimant/Respondent had already testified and been cross-examined, save for a substituted witness statement as previously ordered by the Court. The trial magistrate also held that the Appellant shall pay the auctioneers' costs, upon determination of the main suit (ruling at pages 4-7 of ROA).

#### DETERMINATION

26. The appeal was canvassed by way of written submissions. Both parties filed.

#### Issues for determination

27. In their submissions dated the 22<sup>nd</sup> of October 2025, the Appellant identified the following issues for determination:-

- i. The learned magistrate, while allowing the substitution of the Appellant's witness and reopening the case refused to admit the supporting documents for that witness's testimony and yet the matter was to go through Pre-Trials.
- ii. The court's finding on the circumstances surrounding the proclamation of the Appellant's motor vehicle KBZ 051W and subsequent order directing the Appellant to bear the Auctioneer's costs.

28. On her part, the Respondent identified the following issues for determination in her submissions dated the 31<sup>st</sup> of October 2025.

- i. Whether the trial court was right in reviewing the ruling dated 3rd May 2024 by reinstating the application dated 27<sup>th</sup> November 2023.
- ii. Whether the appellant should pay the auctioneer's costs.
- iii. Whether the appellant should be granted leave to file additional documents.

29. The court, having considered the impugned ruling and grounds of the appeal, was of the considered opinion that the issues placed before the court by the parties for determination in the appeal were-

- a. Whether the trial erred in fact and law in failing to allow additional evidence to be filed after closure of the claimant's case.
- b. Whether the trial court erred in finding that the appellant should pay the auctioneer's costs.
- c. Whether the trial erred in fact and law in failing to allow additional evidence to be filed after closure of the claimant's case

30. The grounds of appeal were-

- a. The Honourable Magistrate erred in fact and law by barring the filing of additional documents by the Appellant on account that it will prejudice the Respondent. The circumstances in which the Appellant sought to adduce the additional evidence is directly relevant to the matter before the court and is in the interest of justice to be adduced in order to ventilate the Appellant's case to disprove the allegations levelled by the Respondent.
- b. The Honourable Magistrate erred in law in failing to appreciate principles to be considered when granting and denying a party an application to adduce further documents and ended up employing the wrong basis and principle in denying the Appellant leave to file further documents.
- c. The Honourable Magistrate erred in law and in fact in failing to appreciate that the additional documents sought to be filed were critical to the Appellant as they formed the basis of its Defence and it would be prejudicial to deny the Appellant leave to file the same and this amounted to a court denying a party a constitutionally protected right to be heard.
- d. The Honourable Magistrate erred in fact and law by failing to demonstrate the prejudice that would be occasioned on the Respondent that will not be compensated by costs should the Appellant adduce additional evidence yet in reopening the case, the matter was set down undergo pre-trials.
- e. The Honourable Magistrate erred in law and in fact in failing to appreciate that the law imposes a duty on the court to further the overriding objectives and grant parties a fair hearing.

## The appellant's submissions

31. The refusal to admit the additional documents offended Article 50(1) of the Constitution, which guarantees the right to a fair hearing. Further, Sections 1A and 1B of the Civil Procedure Act impose on courts the duty to further the overriding objectives namely the just, expeditious, proportionate, and affordable resolution of disputes. The Appellant reiterates that the court's primary duty is to dispense substantive justice and to ensure that both parties are accorded a full opportunity to present their respective cases. In *Wachira Karani v Bildad Wachira* (2016) eKLR, the court held: "The fundamental duty of the Court is to do justice between the parties. It is in turn, fundamental that to that duty, those parties should each be allowed a proper opportunity to put their cases upon the merits of the matter." The Court of Appeal in *Patriotic Guards Ltd v James Kipchirchir Sambu* [2018] eKLR reinforced this principle when it cited with approval *Tana & Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 Others* [2015] eKLR and held: "In determining whether to exercise the discretion in a party's favour, the court pays regard to the damage sought to be forestalled vis-à-vis the prejudice to be visited on the opposing party. Our take is that the respondent stood to suffer no prejudice by the claim proceeding on merit. None has been alleged or inferred. On the other hand, the appellant was locked out of the seat of justice and possibly penalized in damages for a claim it maintains has a good defence to." Guided by the above decisions, the Appellant submits that by reopening the case and setting a pre-trial date, it was unjust for the learned magistrate to deny the filing of additional documents. The Appellant merely sought to place on record materials already pleaded in the defence and relevant to the issues before the court. The admission of the said documents would not have occasioned any prejudice to the Claimant. We make reference to the decision in *Johana Kipkemei Too v Hellen Tum* (2014) eKLR where court held: "This however is not to say, that the Court can never under any circumstances, permit a party to adduce additional evidence,

that was not furnished to the other party as provided under the rules. The Court as a shrine of justice, has a mandate to do justice to all parties and not to be too strictly bound by procedural technicalities. This flows from the provisions of Article 159(2)(d) of the Constitution. Where such evidence can be adduced, without causing undue prejudice to the other party, the Court ought to allow the application, so as to allow such party, the opportunity to present his case in full." Applying that reasoning to the present case, the Claimant was not being deprived of the opportunity to challenge or respond to the evidence and she was simply being invited back to do so at the Appellant's cost. The Appellant was seeking to have his case heard wholesomely. Any inconvenience was curable through costs and not by denying the Appellant its right to a full hearing. The documents needed to be produced to enable the Appellant clearly demonstrate to the court the nature of the employment relationship between the parties before it which was a matter for determination. The that judgment was entered on 23rd October 2023 ex parte due to the mistake of counsel, who failed to notify the Appellant of the defence hearing date. Upon being served with judgment, the Appellant moved the court promptly through its applications dated 23rd November 2023, 6th May 2024, and 29th May 2024, consistently seeking to reopen the case and adduce the necessary documents. This demonstrates diligence, a party who is keen on having it's case heard on merits and good faith, as opposed to delay or ambush. 38. The Further Affidavit dated 18th December 2024 (See pages 135-146 of the Record of Appeal) expressly demonstrated why the additional documents were critical to the substituted witness's testimony and its defense. The credibility of the documents to be adduced is not in question. They are official records maintained by the Appellant in the ordinary course of business and pleaded in the Statement of Defence. Once the court made a finding that substitution of the witness was permissible, it was only logical and fair to also admit the evidence necessary for that

witness to effectively testify. The refusal to admit critical defence documents effectively condemned the Appellant without a hearing, undermining the integrity of the trial process.

### Respondent's submissions

32. The judgment in the lower court file was delivered on 23rd October 2023. The appellant was then represented by the Federation of Kenya Employers as their advocates who had not only filed the memorandum of appearance, the statement of defence, witness statements, as well as a bundle of documents. The Federation of Kenya Employers had participated in the proceedings when the respondent testified and even cross examined her. The Federation of Kenya Employers filed the appellant's written submissions and were on record when the judgment was delivered on 23rd October 2023. The firm of Ricar Advocates LLP filed the first documents which was the application dated 27th November 2023 after judgment had been delivered in this matter without seeking leave of the court to come on record and/or without filing a consent from the previous advocates. Order 9 Rule 9 of the Civil Procedure Rules 2010 provides as follows: - When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court - (a) Upon an application with notice to all the parties; or (b) Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be the filing of the application dated 27th November 2023 by the firm of RICAR ADVOCATES LLP post judgment without the leave of the court and/or a consent signed by the Federation of Kenya Employers was irregular and void ab initio. The said application was dead on arrival. The trial court was therefore right when it dismissed the said the application through its ruling dated 3rd May 2024. Your ladyship it is not in dispute that the firm of Ricar Advocates LLP regularized its position by filing the consent

dated 6th May 2024. The said consent could not act retrospectively. It could only become proper and in order as from the date it was filed. The application dated 27th November 2023 was null and void and could not be resurrected through the consent dated 6th May 2024. The consent could not revive what was already dead. What the appellant's advocates should have done was to file a fresh application seeking similar orders to the application dated 27th November 2023. By reinstating the application dated 27th November 2023 after reviewing the ruling dated 3rd May 2024, the trial court erred in law by giving life to an application that had already died. The firm of Ricar Advocates LLP properly came on record on 6th May 2024 and anything that the said firm of advocates had done prior to 6th May 2024 was null and void ab initio. The application dated 27th November 2023 had been filed prior to the consent of 6th May 2024. It was therefore filed by an advocate who was not properly on record for the appellant. The application was by a stranger and could not therefore be reinstated. It is our submissions therefore that the order reviewing the ruling dated 3rd May 2024 which was delivered on 17th February 2025 should be set aside. The application dated 27th November 2023 should continue standing dismissed. On the said issue we are relying on the following case:- ELC at THIKA APPEAL NO. E006 OF 2022 John Michuki Gitau -Vs- Mary Njeri Githinji & Another where the court dismissed an application filed by an advocate who had not sought for leave to come on record post judgment. The court made the following findings:- "Although the foregoing objections appears like a technical procedural issue, this court finds that the default by the applicant goes to the jurisdiction of the court to entertain the motion. The reason for the foregoing reasoning is that the court has no jurisdiction to preside over incompetence proceedings filed by the counsel who lacks locus standi." Your ladyship the same findings and which the court in the above matter relied on were also made in the court of appeal decision in the case of Symposia Consult Limited - Vs- John Gikere Kaburu & 2 Others (2019) e KLR.

## Decision

33. The appellant in support of their application relied on the decision in Johana Kipkemei Too v Hellen Tum(2014)e KLR to effect that the evidence may be allowed without causing undue prejudice to the other party so as to allow the applicant present his case in full. The court perused the said decision cited as Too v Tum [2014] KEELC 512 (KLR) and found in the ratio decidendi the court held – *‘The Plaintiffs have already closed their case and will not have an opportunity to rebut the new evidence. It will be unfair to the plaintiffs, if I am to allow the Defendant, at this late stage of the proceedings, to fundamentally alter the character of her case, to one that the Plaintiffs never contemplated when tabling their evidence. In essence, the trial will end up being unfair to the Plaintiffs and will violate the provisions of article 50(1) of the Constitution..For the above reasons, I am inclined to disallow the Application by the Defendant to avail three more witnesses and to introduce the engagement document. The Defendant will proceed on the basis of the evidence she had proposed to tender when she filed her defence.’* The facts in the foregoing case were similar to the instant appeal. The claimant closed its case. The respondent had cross-examined the claimant in the absence for the documents sought to be adduced. Obviously, the claimant would be prejudiced as they had no opportunity to file any further documents or affidavits to controvert the documents or even comment on the same at trial. The court perused the application before the lower court found there was reference a judgment which had been set aside. In the set aside judgment the court had held the respondent had not produced evidence to controvert the claimant’s case. This led the court to believe that the intention of the filing of new documents was to fill in gaps in the defence. This is improper as held by the Supreme Court in Mohammed Abdi Mohamud vs. Ahmed Abdullahi Mohamed & 3 Others [2018] eKLR. The Supreme Court laid the principles to be considered in allowing

additional evidence as follows:“79...We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya as follows: a.the additional evidence must be directly relevant to the matter before the court and be in the interest of justice;b.it must be such that, if given, it would influence or impact upon the result of the verdict although it need not be decisive;c.it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;d.Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;e.the evidence must be credible in the sense that it is capable of belief;f.the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;g.whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;h.where the additional evidence discloses a strong prima facie case of willful deception of the Court;i.The Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful;j.A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case;k.The court will consider proportionality and prejudice when allowing additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.”

34. The documents sought to be introduced were information on the claimant's last day of work, employment contracts, and an updated NSSF statement (page 135 of the ROA was the application). The court found the respondent had filed its list of documents, the respondent was a casual worker (page 161 of ROA). The introduction of the contracts post closure of claims at the case and the information on the last day of work is held to be an afterthought to fill in gaps in the defence case identified in the set aside judgment. The appellant did not state why it could not have filed the contracts being employment records in its possession at the time of filing the respondent and documents. The court found no reason to bar the introduction of the NSSF statement, which is a document that belongs to a government agency and could also have been produced by the claimant.



35. In the upshot, the court allows the appeal, limited to the NSSF statement, as no prejudice can be caused to the claimant in its production. There was no cross-appeal and thus the court limited itself to grounds of appeal. The issue of whether the consent between advocates for the appellant and former advocates was valid to restate the application as relates Order 9 rule 9 of the Civil Procedure Rules, I find the issues was not before the trial court as per the record of appeal and is not mentioned in the impugned ruling. The court applied section 20 of Employment and Labour Relations Court Act to find that the mischief of Order 9 rule 9 Civil Procedure Rules was addressed by the filing of the consent. I say no more on the issue.

Whether the appellant is liable for auctioneer costs on the proclamation

Appellant's submissions

36. The Application dated 29th May 2024 specifically sought to stop the attachment of KBZ 051W and challenged the Auctioneer's conduct. This was not merely an allegation but one supported by

sworn affidavits and records. The affidavits of Elizabeth Kanake, the Human Resource Manager, and Paul Waweru, the driver of the vehicle on the material day, were filed in support of the application (See pages 107-125 of the Record of Appeal). In addition, the Appellant produced the visitor entry logs for 21st May 2024 (See pages 110-111 of the Record of Appeal), which clearly contradicted the Auctioneer's claim that he served a proclamation notice at 7:55 a.m. The log showed that the first visitor to enter the premises was recorded at 8:12 a.m., and the Auctioneer's name did not appear in the log at all. Despite this documentary evidence, the learned magistrate failed to critically analyze a substantive evaluation of the records and instead placed sole reliance on the demeanor of the Auctioneer. The Appellant legitimately expected that the contradictions exposed in cross-examination would be objectively evaluated alongside the documentary exhibits. Instead, the ruling glossed over them, reducing the analysis to a simple observation that the Auctioneer "remained firm and consistent" in cross-examination. The attendance book showed that the first person at the premises was at 8:12 A.M. The court failed to address this issue, as was raised in the affidavits. Reference is made to the case of Mghanga v Said (Civil Appeal E018 of 2024) [2025] KEHC 3830 (KLR) which quoted the Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 which held: "When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen." The Appellant also tendered evidence that the proclamation notice bore a forged signature of its driver, Mr. Paul Waweru, which matter was formally reported to Kasarani Police Station under OB No. 19/05/08/24. This was a serious

allegation of criminal conduct yet the ruling of 17th February 2025 made no mention of it, amounting to objective evaluation of evidence. The Appellant submits that the learned magistrate erred both in law and in fact by upholding the Auctioneer's account of the proclamation of KBZ 051W, while disregarding material evidence that cast grave doubt on the regularity of the process. The magistrate's finding that the Auctioneer "was well versed with the premises...firm and consistent in cross-examination" was reached in disregard of the Appellant's Further Affidavit sworn on 9th December 2024, which squarely rebutted the Auctioneer's account. Further, under Sections 107-109 of the Evidence Act, the burden lay squarely on the Auctioneer to prove compliance with the Auctioneers Act and Rules. Given the contradictions exposed, that burden was not discharged. By disregarding critical documentary evidence in favor of a subjective aspect of demeanor, which by virtual court one is not able to appreciate, the learned magistrate failed to properly evaluate the evidence before him, thereby arriving at an unjust conclusion. It is therefore submitted that the finding that the Auctioneer lawfully proclaimed and attached KBZ 051W cannot stand and ought to be set aside.

37. Whether the order condemning the appellant to pay auctioneer's costs was proper in light of the circumstances- The learned magistrate erred in condemning the Appellant to pay the Auctioneer's costs, notwithstanding the glaring irregularities and disputed nature of the proclamation process. The Appellant had placed before the court concrete evidence showing that the Auctioneer did not enter its premises on the date and time alleged, that no valid proclamation was served, and that the signature on the alleged proclamation was the subject of a police complaint for forgery. The Appellant submits that in light of the irregularities raised, this was not a proper case to award Auctioneer's costs against the Appellant yet the Proclamation Notice was not served. The order condemning the Appellant to bear the Auctioneer's costs was therefore an

abuse of discretion, inconsistent with Section 27 of the Civil Procedure Act, and should be set aside.

### Respondent's submissions

38. On the 21st May 2024 Mr. Peter Mwangi Gathogo trading as Daystar Auctioneers visited the appellant's premises and proclaimed 2 motor vehicles i.e. motor vehicle registration number KBZ 061W and motor vehicle registration number KCL 834X. The said proclamation was done in the presence of one Paul Waweru of identity card number 11594582. He was the driver of motor vehicle registration number KBZ 061W at the time of the said proclamation. The proclamation notice was duly signed by the said Paul Waweru who was not only left with a copy of the said proclamation notice but he also wrote his name, his identity card number and signed on the said proclamation notice. The proclamation notice was annexed to the supplementary replying affidavit of Peter Mwangi Gathogo sworn on 28th June 2024 as annexure "PMG1". Your ladyship the appellant then made an application to have the said Peter Mwangi Gathogo T/A Daystar Auctioneers summoned to court for purposes of cross examination on the contents of the supplementary replying affidavit sworn on 28th June 2024. On 18th September 2024 Peter Mwangi Gathogo T/A Daystar Auctioneers appeared in court and was cross-examined at length by the appellant's advocates. The said auctioneer was able to stand by his averment in the supplementary replying affidavit dated 28th June 2024. The trial magistrate was thus satisfied that the auctioneer had indeed proclaimed the appellant's 2 motor vehicles and was thus entitled to costs. Your ladyship paragraphs 6 of the ruling dated 17th February 2025 the trial court had this to say."Another issue that is pending for this court's determination will be the issue of costs of the application and the auctioneer's costs. The auctioneer was called to this court and cross examined on the process of proclamation and attachment of the goods of the respondent. It is my opinion that he was well versed with the premises of the respondent and he properly took this

court through the process he undertook in proclaiming and attaching the respondent's goods. He was firm and consistent in cross examination. It is notable that when a witness is taken through cross examination and he remains firm and consistent the court is likely to believe him. Equally, his evidence, having been tested, carries more weight than evidence that has not been tested through cross examination. It is for this reason that I find no fault in the auctioneer and how he conducted his work and I am entitled to award him costs". As rightly pointed out by the trial magistrate, the auctioneer was cross examined on the process of proclamation. He explained how he gained access to the appellant's premises, the time he entered the appellant's premises, the people he found at the premises and the proclamation that he undertook. If you look at the proclamation notice which was annexure "PMG1" in the supplementary replying affidavit dated 28th June 2024. The said proclamation notice has information that the auctioneer would not have come across if he had not been to the appellant's premises and met with Mr. Paul Waweru. The auctioneer would not have known that the appellant had in their employment a driver by the name Paul Waweru. The auctioneer would not have known the identity card number of the said Mr. Paul Waweru. The said information was obtained from Mr. Paul Waweru and was duly written on the proclamation notice which the auctioneer carried with him and filed before the trial court. Your ladyship it should be noted that the appellant filed a further affidavit by one Elizabeth Kanake sworn on 13th August 2024. In the said further affidavit Elizabeth Kanake confirmed that indeed the appellant had in its employment a driver by the name Paul Waweru. She also confirmed through documents that the identity card number indicated in the proclamation notice was the same identity card number belonging to Paul Waweru its employee. The appellant was not able to prove how else the auctioneer would have accessed the said information unless he had come into contact with the said Paul Waweru. Your ladyship the issue of making a police report for forgery was an afterthought and could not be independently

substantiated since there was no hand writing expert report. The court should also take notice that no action had been taken against the auctioneer by the police. The cross-examination of the auctioneer was done on 7th November 2024 and after the said cross-examination the trial court gave directions on parties filing written submissions and the ruling date. However, in a strange turn of events and in order to seal loop holes in its case the appellant through Elizabeth Kanake filed a further affidavit dated 9th December 2024 annexing what she called visitors entry record of 21st May 2024. Your ladyship the said record had a number of issues as follows:- Firstly, it was filed after the auctioneer had been cross examined. The cross examination was done on 7th November 2024 yet the further affidavit was sworn on 9th December 2024 and filed on 10th December 2024 and as such the auctioneer was not confronted with the said record so that he could inform the court whether he was asked to sign the visitors book or not. It is very possible that such a visitors book was not in existence as at that time. Secondly the alleged visitors entry record annexed to the affidavit dated 9th December 2024 had no stamp of the appellant. The affidavit dated 9th December 2024 and the annexure was promptly withdrawn after the appellant realized it had not been stamped and another affidavit dated 11th December 2024 was quickly filed. The new affidavit had visitors entry record that had a stamp of the appellant. It is the same visitors entry record but now appearing with the appellant's stamp meaning it had been doctored to suit the appellant's case. Your ladyship it is our submission that the trial magistrate correctly analyzed the contents of the auctioneer's affidavit as well as the cross examination and in a well-reasoned ruling correctly indicated why he believed the auctioneer had properly proclaimed the appellant's properties on 21st May 2024 even after the intense cross-examination. It is our submissions that this Honorable do uphold the trial court's finding that the appellant do pay the auctioneer's costs.

## Decision

39. The issue in contention was whether or not the proclamation notice was in compliance with rule 12(1) (b) of the Auctioneer Rules 1997 to wit-‘12. *Movable other than perishable goods and livestock*

(1) 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— prepare a proclamation in Sale Form 2 of the Schedule indicating the value of specific items and the 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 the auctioneer shall sign a certificate to that effect;’ The notice was alleged to have been signed by the driver, employee of judgment debtor/appellant who filed affidavit and denied having signed the same and further stated he had reported to the police and produced OB report. The trial court said cross-examination carried more evidence than untested evidence. The trial court did not address its mind on the produced visitors' book. The respondent submits that the book having not been subject of the cross-examination and submitted as follows- ‘The cross examination was done on 7th November 2024 yet the further affidavit was sworn on 9th December 2024 and filed on 10th December 2024 and as such the auctioneer was not confronted with the said record so that he could inform the court whether he was asked to sign the visitors book or not. It is very possible that such a visitors book was not in existence as at that time. Secondly the alleged visitors entry record annexed to the affidavit dated 9th December 2024 had no stamp of the appellant. The affidavit dated 9th December 2024 and the annexure was promptly withdrawn after the appellant realized it had not been stamped and another affidavit dated 11th December 2024 was quickly filed. The new affidavit had visitors entry record that had a stamp of the appellant. It is the same visitors entry record but now appearing with the

appellant's stamp meaning it had been doctored to suit the appellant's case'(emphasis given). The court on perusal of proceedings finds that the Auctioneer told the court he was at the Respondent's premises to proclaim at 7.55am . That the soldiers,( read security guards), at the gate allowed him in . He identified himself, he signed in a book that he was entering. The record of entry for the material date of 21<sup>st</sup> May 2024, was placed before the trial court and evidenced the first visitor on the said date signed at 08.12 hrs and no record of the auctioneer's name at the material time(page 111 of ROA) The first entry date was 20<sup>th</sup> May and on same page next 21<sup>st</sup> May eliminating doubt of forgery. Taking into account that the motor vehicle was attached while on the road and the driver had to view details for storage purposes, the driver having denied signing the proclamation notice and having reported to the police, it is more probable than not that the proclamation notice of 21st May 2024 was not valid. The trial court erred by not taking into account the documentary evidence of the appellant and the totality of evidence by the parties. The award of costs for auctioneer is set aside.

### Conclusion

39. The appeal is allowed partially to the extent that the appellant is allowed to file additional document of only the NSSF statement. The appeal is allowed on the costs of the auctioneer, which are set aside against the respondent, the court having held that the proclamation notice was not regular.
40. The default position is that in litigation costs follow the event . However, taking into account the circumstances of the appeal being that the judgment was set aside on account of the appellant, and the case is still pending for hearing, I make no order as to costs in the appeal. The matter should proceed for hearing of the defence case as ordered by the trial court subject to the

appellant being allowed to file additional evidence being the NSSF statement and the substituted witness statement as ordered by the trial court.

41. It so ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 23<sup>RD</sup> DAY  
OF JANUARY, 2026.**

**J.W. KELI,  
JUDGE.**

**IN THE PRESENCE OF:**

**Court Assistant: Otieno**

**Appellant – Ms. Kariuki Owesi**

**Respondent: Mr. Kamau**

ORIGINAL