



Shikuku t/a Eshikhoni Auctioneers v Chandai (Miscellaneous Application E007 of 2023) [2023] KEELRC 3165 (KLR) (30 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 3165 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
MISCELLANEOUS APPLICATION E007 OF 2023**

**JW KELI, J
NOVEMBER 30, 2023**

**BETWEEN
KENNEDY SHIKUKU T/A ESHIKHONI AUCTIONEERS APPELLANT
AND
KELLUM ALUHA CHANDAI RESPONDENT**

JUDGMENT

1. The Applicant being dissatisfied with the taxing master's order dismissing its Bill of costs dated 2/3/2023 issued on 25th April 2023, filed the instant Chamber summons application dated 2nd May 2023 and filed on even date, seeking the following orders:-
 - a. That the Honourable Judge be pleased to set aside the orders dismissing the applicant's Bill of cost dated 2/3/2023.
 - b. That the Honourable Judge be pleased to assess the said Bill.
 - c. That the Honourable Judge do issue a certificate of costs after assessment of the said bill of costs.
 - d. That this Honourable Judge do enter judgement in favour of the Appellant in terms of the certificate of assessment issued.
 - e. That the Respondent do shoulder the costs of this appeal.
 - f. That the Honourable Judge be pleased to grant such further and/or other orders the court may deem fit and expenditure.
2. The Application was premised on the following grounds:-
3. The taxing master failed to appreciate that there was no consent on the bill entered between the appellant and Respondent.



4. The consent entered was between different Auctioneer and the Respondent.
5. The taxing master did not peruse the file entirely hence missed some important information.
6. The taxing master made a ruling haphazardly without considering the law.

Background to the Application

7. The Applicant through the Supporting affidavit sworn by the applicant on 2nd May 2023 states that on 30th August 2021, it was assigned warrants of attachment and sale(KS1) by the court in Bungoma ELC Misc. Appl (JR NO. 2 of 2020) to levy against the Respondent.
8. That on 13 October 2021, he proclaimed against the respondent's property at his home in Milimani Area Tongaren Sub-county(KS2-Proclamation) and on 15th October 2021 was served with an order of stay(KS3-Stay Order).
9. On 16th December 2021, he was reassigned the warrants of attachment to levy against the Respondent(KS4), and on proclamation, the Respondent paid the entire decretal sum to the decree holders and issued a cheque of Kshs. 30,000 to the Applicant and directed the applicant to tax the same if he was dissatisfied.
10. The Applicant filed his bill of costs and the same was assessed at Kshs. 103,922(KS4-Bill of costs & KS5- Certificate of costs).
11. The applicant states that it instructed the firm of Samson Tumbo T/A Dominion Yard to execute and recover the taxed costs and the said firm of Samson Tumbo was unable to recover the taxed costs but agreed with the Applicant on their costs and consent was filed and adopted in court.
12. The Applicant states that a warrant of arrest was issued against the respondent(KS6) and upon execution the Respondent settled the taxed costs as per the warrant of arrest.
13. The Applicant states that on 19th October 2022, they were assigned warrants of sale to levy against the Respondent herein, and on 21st October 2022 they proclaimed the Respondent's property(KS7-Proclamation).
14. The Applicant states that on proclamation the debtor sought more time to settle the decretal sum and in default, the Applicant was re-assigned the warrants of attachment and sale to levy execution against the respondent (KS8 & KS8a).
15. The applicant states that on 15/2/2023 they proceeded to the Respondent's home and proclaimed his property (KS-9) and before the expiry of seven days, the Respondent paid the decretal sum to the Claimant's Advocate M/S Omundi BW' Onchiri and Co. Advocates and paid the applicant's fees at Kshs. 20,000 being part of their costs for the subsequent execution.
16. That the Respondent failed to give a proposal on settlement of the balance of the auctioneer's fees leading to the filing of the auctioneer's bill of costs(KS10) on 2/3/2023 which was dismissed on 25/04/2023 by the taxing master on grounds that the applicant had entered into a consent with the Respondent for settlement of the taxed costs; whereas there was no such consent between the applicant's firm and the Respondent.
17. The applicant stated that the Taxing master erred when she misapprehended the facts and also did not look at the applicant's submission nor verify the authors and signatories of the alleged consent leading to a miscarriage of justice.



Respondent's Response

18. The Respondent filed a Replying affidavit sworn on 20th June 2023 and received in court on 22nd June 2023 in response to the Applicant's application. The Respondent argues that the applicant's application is bad in law, incompetent having been filed out of time, and should be struck out.
19. That the said application is fatally defective in form and devoid of conformity with the law and should be struck.
20. The Respondent argues that the Applicant continued to multiply the warrant to fleece him without considering that the Respondent had paid him. The consent on the file was clear that the Appellant's costs had been settled in full and hence cannot be deemed that the agent he sent recorded a consent without his instructions. The Respondent stated that the applicant was fully paid as per records from Safaricom and extracted copies from Phone No. 0723278386 (KAC 1A & 1B).
21. The Respondent stated that the taxing master arrived at the proper decision by dismissing the applicant's bill which could not allow the applicant to enrich himself by abusing the court process.
22. The Respondent states that the appellant kept duplicating instructions from himself and making it appear that there were pending bills to be settled yet the same had already been paid and prays that the application be dismissed with costs.

Written Submissions

23. The court directed that the application be canvassed by way of written submissions. The Applicant's written submissions drawn by Robert Wamalwa and Co. Advocates were dated 11th September 2023 and filed on 18th September 2023. The Respondent did not file his submissions despite having the court's leave to file.

Issues for determination

24. The Applicant in his submissions identified the following issue for determination:-
 - a. Whether the court arrived at the right and sound decision.
25. The court finds that the issues placed by the parties for determination in this application are as follows:-
 - a. Whether the Applicant's application is properly before the court in form and timelines ;
 - b. Whether the Applicant is entitled to reliefs sought.

Whether the Applicant's application is properly before the court in form and timelines

26. The Respondent contends that the applicant's application is defective in form and filed out of time and should be struck out.
27. Rule 55(4) and (5) of the Auctioneer Rules, 199 provides as follows:-
 - (4) An appeal from a decision of a registrar or a magistrate or the Board under subrule (2) and (3) shall be to a judge in chambers.
 - (5) The memorandum of appeal, by way of chamber summons setting out the grounds of the appeal, shall be filed within 7 days of the decision of the registrar or magistrate.



28. The Applicant filed the Chamber Summons under Rule 55(4) as an appeal to a Judge in Chambers as contemplated Under Rule 55(5) the memorandum of appeal is a Chamber Summons setting out the grounds of the appeal.
29. The chamber summons were filed on 2 May 2023 after the decision of the Taxing Master of 25th April 2023, although a copy of the said decision was not provided. This was within seven days as contemplated under Rule 55(5) and within the proper timeline. The Respondent did not provide particulars on the delay alleged for the comparison thereof.
30. That the court should be guided by Article 159(2)(d) of *the Constitution* to ignore arguments relating to form and procedural issues and administer substantive justice and thus the Respondent's objection cannot stand. (see. *scar Otieno Odongo t/a Odongo Investment Auctioneers v Sukari Industries Limited [2019] eKLR*)

Whether the Applicant is entitled to reliefs sought.

31. The applicant's application relates to the instructions to execute arising from the decree issued on 18th July 2022(KS 8(a) relating to the balance of Kshs. Kshs. 27,305

Analysis and decision

32. The Applicant submits that he was assigned warrants of attachment and sale by the Honourable court on four occasions i.e. 13/10/2021, 15/10/2021, 19/10/2022, and 14/2/2023, and proclaimed against the Respondent. The applicant states that on the 2nd occasion, the Respondent had paid Kshs. 30,000 and directed the Applicant to tax his costs to wit the Applicant's costs were taxed at Ksh. 109,922. The Applicant had instructed Dominion Yard Auctioneers who failed to recover the costs but entered a consent on their costs. The Applicant then obtained warrants of arrest against the respondent who complied and paid the full auctioneers fees.
33. The Applicant contends that he was assigned warrants of attachment and sale to execute for costs of the dismissed application in the suit, which the applicant states the Respondent sought for more time to settle but on failure, a proclamation was undertaken and the Respondent paid to the applicant Kshs. 20,000.00 leaving out a balance on the auctioneer fees, but settled the decree holder's sum. The Applicant filed a bill of costs on 2/3/2023 which he alleged was dismissed erroneously by the taxing master on the ground that a consent had already been entered relating to the auctioneer's costs.
34. The respondent stated that he paid all fees payable and the Applicant was out to fleece him. He acknowledged that he had paid the Applicant for the first proclamation of Kshs. 10, 800, and that the Applicant stated that the same was marked as closed and that he paid Kshs. 20,000(KAC 1A) on the second proclamation. The Applicant objected to the Respondent's allegations as per the text messages with the Respondent and stated he would tax his costs from the two warrants of attachment. (KAC 1B).
35. The Applicant in his supporting affidavit confirmed that the debtor-Respondent herein had paid the entire decretal sum directly to the decree-holder relating to Judicial Review No. 2 of 2020, and only the Applicant's fees were pending unpaid but the same were eventually settled after warrants of arrest were issued against the Respondent.
36. The Proclamation of 21 October 2022(KS7) and the decree(KS8a) required the Respondent to pay a balance of Kshs. 27,305 and interest of 2,000, totaling to Kshs. 29,305/= relating to the same application Judicial No. 2 of 2020 that the Applicant already acknowledged had already been settled in full.



37. As of 10th August 2022 when the Applicant obtained the Warrant of Arrest (KS6) to execute his auctioneers fees, the Decretal amount was Nil, and as to how the balance of Ksh. 29,305 remained unsettled is not clear. However, the Respondent did proceed to pay the said sum of Kshs. 29,305 to a Mr. Joseph Onchiri to show that the same had been pending despite the position that the full decretal sum had been settled.
38. What is in dispute is that the Taxing master failed to consider the auctioneer's bill of costs for the execution of the Kshs. 29,305, although no party provided a copy of the said decision by the taxing master.
39. The court observed that under item 1 of the bill of costs, the Applicant seeks 4000 for warrants of attachment dated 19/10/2022, warrants of sale of 19/10/2022; warrants of sale dated 15/02/2023, and warrants of sale dated 14/02/2023. Part II of the Fourth Schedule of the Auctioneer Rules states that 4000 is payable on receipt of a court warrant or letter of instructions.
40. The court observes that there was no warrant produced by the Applicant to show on what basis the proclamation of 21 October 2022(KS7) was pegged. The Auctioneer cannot proclaim without warrants of attachment and in their absence the item I ought to be disallowed together with the transport costs claimed for that trip under item f.
41. In the upshot the Court holds that the Taxing Master erred in holding there was a consent on the auctioneer fees for the warrant of attachment for outstanding decretal amount of Kshs. 29,305/-
42. The Auctioneer's bill of costs dated 19th January 2022 is returned to the Taxing Master for taxation taking into account the observations of the Court.
43. Each party to bear own costs in the appeal.
44. It is so Ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 30TH NOVEMBER 2023.

JEMIMAH KELI,

JUDGE.

