



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mabunga v Onyango (Suing as the Administrator of the Estate of Anthony Odhiambo Oyuga) & another (Civil Appeal E027 of 2023) [2025] KEHC 1281 (KLR) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1281 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL APPEAL E027 OF 2023  
REA OUGO, J  
FEBRUARY 27, 2025**

**BETWEEN**

**MOSES WEKESA MABUNGA ..... APPELLANT**

**AND**

**JARED ONYANGO (SUING AS THE ADMINISTRATOR OF THE ESTATE OF ANTHONY ODHIAMBO OYUGA) ..... 1<sup>ST</sup> RESPONDENT**

**SAMSON ITONDE TUMBO T/A DOMINION YARDS AUCTIONEERS ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Ruling delivered on 17th March 2023 in Bungoma CMCC No 19 of 2013 by Hon C.A.S Mutai (SPM))*

**JUDGMENT**

1. In this appeal, the appellant is challenging the ruling of the trial magistrate on their notice of motion dated 31<sup>st</sup> August 2022. The grounds of appeal are as follows:
  1. That the learned magistrate erred in law and fact by failing to appreciate that the execution proceedings as conducted by the Auctioneers was ultra vires the law.
  2. That the learned magistrate erred in law and fact by misapplying the principles of the law relating to the setting aside of ex-parte proceedings where the auctioneer taxed their bill of costs exparte.
2. The appellant seeks that the notice of motion dated 31<sup>st</sup> August 2022 be allowed and the respondent pay for the cost of the appeal.
3. The appellant at the subordinate court filed an application following the taxation of the auctioneer's bill of costs. In his application he sought leave to defend the Auctioneer's Bill of Costs; that the



court lifts the warrants of attachment and sale that had been issued on 18/7/2022; and that the court deduct Kshs 70,000 already paid towards the Auctioneer's fee. The amount of Kshs 70,000 had been received by the auctioneer but he failed to indicate that he received said money. He also claimed that the auctioneer without notice taxed their costs obtained a decree and further extracted warrants of attachment. The appellant averred that they should not be condemned unheard.

4. The respondents in their replying affidavit and supplementary affidavit contend that the appellant was served with the Bill of costs and notice of taxation. It was conceded that Kshs 70,000/- had been paid however, the outstanding balance of Kshs 41,437 was owing. It was also averred that under Rule 55 (4) of the Auctioneer's Rules, the court did not have jurisdiction.
5. The trial court dismissed the appellant's notice of motion in its entirety.
6. The appellant in his submissions argues that the process of execution was marred with falsehood, which was prejudicial to the appellant. The respondent failed to disclose that it had received Kshs 70,000/- to offset their auctioneer's costs. He relied on the case of *Stephen Mukiri Ndegwa v Kenya Commercial Bank Limited (2020) eKLR* where the court observed:

“(25) I find and hold that the Plaintiff/Respondent did obtain issuance of the Warrants of Attachment and sale through perpetration of blatant falsehoods and by material non-disclosure to the trial court. On this basis those warrants are for setting aside. Accordingly, having been satisfied that sufficient reason has been advanced by the Defendant/Applicant, I do hereby set aside the Warrants of Attachment and sale issued in this matter on 2<sup>nd</sup> April 2019.”

7. The record shows that on 9/6/2022, when the Bill of Costs was assessed, the court was not sitting, and there was no representation for the appellant. He submits that the execution proceedings were conducted outside the principles of the law as stipulated under Articles 47 and 50 of *the Constitution* and Order 22 Rule 6 of the Civil Procedure Rules 2010.
8. He argues that for the court to set aside ex-parte orders, it must be satisfied that the appellant was not served or failed to appear in court due to sufficient cause. He maintains that they were not served despite the 2<sup>nd</sup> respondent having the avenue to do so.
9. The respondents in their submissions argue that the appellant's appeal by way of a memorandum of appeal is unknown in law and contravenes Rule 55 of the Auctioneers Rules. The law provides that the appeal must be in the form of a chamber summons. It is submitted that the said purported ruling is indicated to have been delivered on 17.3.2023, the Ruling is not part of the Record of Appeal. No Ruling was delivered on 17.3.2023 and therefore the appeal is unfounded. It was further submitted that the appellant is seeking through the appeal the reinstatement of the application dated 31<sup>st</sup> August 2022, which application was not properly before the court. Filing the application dated 31.8.2022 before the lower court was an error and in contravention of Rules 55 (4) & (5) of the Auctioneers Rules. The Lower Court had rightfully on 5.3.2023 dismissed the appellant's application dated 31.8.2022 but for different reasons yet the application should not have been heard as the court was already functus officio after delivering the ruling on the auctioneer's bill of costs on 9.6.2022. The current appeal was also filed outside the prescribed 7-day period and without leave of the Court therefore, the court does not have the jurisdiction to entertain the matter (see HC ELRC MISC APPL NO 39 of 2023 Between Friends Lugulu Mission Hospital vs Samson Itonde Tumbo, HC ELRC MISC APPL NO. 2 of 2015 Mutia Mundi t/a Mutibra Auctioneers v SFC Stanbic Bank Ltd, Maurice Munyalo & 148 Others and HCCA NO E046 OF 2023, Walter Muyodi v Faulu Microfinance Bank Ltd & Others).



10. The appeal is also against the ruling of 17/3/2023, while the record reveals no such ruling. Although the lower court's ruling is dated 5/5/2023, interestingly, the appellant's appeal was dated 14/4/2023. No chamber summons was filed as provided under the Auctioneers Rule 55 (4) & (5). The " appeal" was filed 18 months before the subject Ruling; the appeal is bad in law, incompetent, and fatally defective.

### **Analysis and Determination**

11. I have carefully considered the grounds of appeal and the rival submissions by the parties. The appeal in question is challenging the lower court's ruling on the appellant's application dated 31/7/2022. From the record, the trial court noted that it would deliver the ruling in respect of the application on 17/3/2023. However, the record does not reveal what took place on 17/3/2023, interestingly what follows is the ruling dated 5/5/2023. The Ruling dated 5.3.2023 is part of the Record of Appeal. Having perused the lower court file, the appellant's advocate on 23/3/2023 requested the court for the typed ruling for the purposes of filing an appeal. Therefore, the date on the ruling seems to have been a typographical error on the part of the trial magistrate.
12. For avoidance of doubt, the appeal is against the lower court's ruling in respect to the appellant's notice of motion dated 31/7/2022 which was brought under section 1A, 1B, 3, 3A and section 63 (e) of the *Civil Procedure Act*, Order 38 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules. In the said application, the appellant sought the following orders;
- i. That the application be certified urgent and be heard ex parte in the first instance.
  - ii. That the Honourable Court be pleased to issue an order of stay of execution of the decree issued in the suit pending the hearing and determination of the application.
  - iii. That the Honourable court be pleased to lift the warrants of attachment and sale issued in the matter on the 18.8.2022 pending the hearing and determination of the application.
  - iv. That the defendant/ applicant be granted leave to defend the Auctioneers bill of costs filed in the court and/or respond to the taxation conducted herein.
  - v. That in the alternative to prayer 4 above the court be pleased to deduct Kshs.70000/- paid to the defendant towards Auctioneers fee from the decree of the costs extracted herein
  - vi. That costs of the application be provided for.
13. Section 3A of the *Civil Procedure Act* reserves the power of the court to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the Court (see *Rose Njoki King'au & Micugu Wagathara v Shaba Trustees Limited & City Council of Nairobi* [2018] KECA 216 (KLR)). The trial court by virtue of the provision of section 3A of the *Civil Procedure Act* considered and determined the application dated 31/7/2022.
14. Therefore, the issue raised in the appeal is whether the trial court considered whether the auctioneer concealed the receipt of Kshs 70,000/- and whether they had served the appellant with the bill of costs. The appeal is therefore proper before the court as the subordinate court correctly applied its discretion.
15. The 1<sup>st</sup> respondent in his replying affidavit dated 5.9.2022 acknowledged receipt of Kshs 70,000/-. At paragraphs 9 and 14 it was averred:

- " 9. That it is within my knowledge that the defendant/applicant have an issue with accepting the payment of Kshs 70,000/- as part of payment of the Auctioneer's fee. It is not against the law to receive part payment of the auctioneer's fee...



14. That it is within my knowledge that the court registry in preparing warrants of attachment and sale. It might be a typographical error that Kshs 70,000/- was not subtracted from the Kshs 117,437/-.”
16. Interestingly, the 1<sup>st</sup> respondent did not bring this to the attention of the court. It applied for the execution of the decree of 9/6/2022 without noting that the amount of Kshs 70,000/- had been paid. This was done deliberately to mislead the court. The auctioneer having confirmed receipt of Kshs 70,000/-, there was need to deduct the amount from the total decretal sum.
17. Although the appellant also sought orders seeking to file a response to the bill of costs, there was no order seeking that the taxed bill of costs be set aside. Ordinarily, this would be done by way of an appeal in accordance with Rule 55 of the Auctioneer’s Rules. The appellant did not seek redress using this route.
18. Therefore, I find that the notice of motion dated 31/7/2022 had merit and the same is allowed to the extent that the lower court does deduct Kshs 70,000/- paid by the appellant towards the auctioneer’s fee from the decree of costs extracted. The appellant is awarded costs.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 27<sup>TH</sup> DAY OF FEBRUARY 2025.**

**R. OUGO**

**JUDGE**

In the presence of:

Appellant - Absent

Mr. Okaka h/b For Mr. Anwar for Respondents

Wilkister -C/A

