David Senema t/a Senema Africa Auctioneers v G4S Kenya Limited (Civil Appeal E095 of 2023) [2025] KEHC 6290 (KLR) (26 March 2025) (Judgment)

Neutral citation: [2025] KEHC 6290 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E095 OF 2023

DKN MAGARE, J

MARCH 26, 2025

BETWEEN

DAVID SENEMA T/A SENEMA AFRICA AUCTIONEERS ..... APPELLANT

AND

G4S KENYA LIMITED ..... RESPONDENT

JUDGMENT

1. This Appeal arises from the Ruling and Order of the lower court delivered on 2.8.2023 by Hon. P.K. Mutai, Principal Magistrate in Kisii Cmc Misc Application No. 4 of 2023. The court allowed an application for release of a vehicle. The auctioneer was aggrieved. They filed a Memorandum of Appeal dated 10.8.2023 raised the following grounds of appeal:

    i. The learned magistrate erred in law and fact in failing to properly consider the issues before her and arriving at unjust decision.

    ii. The learned magistrate erred in law and fact in granting prayers beyond the scope of what was pleaded.

    iii. The learned magistrate erred in law and fact in failing to find that there were stay orders barring execution by the Appellant

    iv. The learned magistrate erred in law and fact in failing to take into account the consent between the Appellant and the Respondent

    v. The learned magistrate erred in law and fact in failing to scrutinize and consider the evidence on record

    vi. The learned magistrate erred in law and fact in issuing orders which had been overtaken by the events and so impractical to be complied with

vii. The learned magistrate erred in law and fact in failing to consider the response and submissions by the Appellant.

2. The impugned Ruling was in respect of two Applications one filed by the Appellant and the other by the Respondent. The Notice of Motion dated 16.1.2023 by the Appellant sought the following prayers:

   a. The Honourable Taxing Officer be pleaded to tax the annexed Bill of Costs.

   b. The Honorable taxing officer upon prayer 1, be pleased to issue a certificate if taxation.

   c. The Honourable Taxing Officer be pleaded to issue a judgement in terms of the certificate of taxation.

   d. Costs.

3. The Appellant's said Application was premised because the orders were obtained on material nondisclosure and that the proceedings were stayed on 15.9.2022 in Civil Suit No. 775B. The warrants of attachment were as such irregular null and void.

4. The Application by the Respondent was dated 12.5.2023 and sought the following prayers:

   i. Spent

   ii. The Applicant and Ben Obayi t/a Blegif Auctioneers be committed to prison for a term not exceeding 6 months for failing to comply with the directions of this court made on 3.5.2023.

   iii. The Applicant to pay for loss of use and earnings from the motor vehicle from 4.5.2023 until date of determination of the Application.

   iv. Costs

5. The Appellant opposed the Application dated 12.5.2023 by the Replying Affidavit of David Senema dated 2.6.2023 on the grounds inter alia as follows:

   i. The warrants for the assessed bill of costs were issued on 38.3.2023, and the sale was to take place on 3.5.2023 per the Standard Newspaper Advertisement dated 22.4.2023.

   ii. Upon attachment, the parties executed a consent on 18.4.2023, by which the consignment in the motor vehicle was released.

   iii. There was no order dated 3.5.2023 for the release of the motor vehicle. No Application for stay was pending or determined. The orders sought were overtaken by events as the motor vehicle had already been sold.

6. The Interested Party, Ben Obanyi, also swore a replying affidavit dated 3.7.2023 opposing the Application on the ground that his Blegif Auctioneers were duly instructed by the Appellant and due process was followed during execution.

7. The lower court considered the Applications. It rendered its ruling in finding the execution irregular and directed the motor vehicle registration number KBB 732 M to be released to the Respondent and any amount paid to the Respondent to be refunded to the Applicant. The court also dismissed the Application to commit the interested party, Ben Obanyi to civil jail.

Submissions

8. In his submissions dated 10.11.2024, the Appellant reiterated the averments in the affidavits filed in the lower court and part of the record of appeal. It was submitted that the lower court erred in its finding that the execution process and the bill of costs were irregular, null, and void. The issue of execution was put to rest when the said vehicle was lawfully sold, and it was settled that no motor vehicle was to be released.

9. The Appellant also relied on Raila Amollo Odinga & Another v IEBC & 2 Others (2017) eKLR to submit that the Respondent was bound by its pleadings. The Respondent did not pray for refund of monies that the lower court directed.

10. It was also submitted that the consent as signed was valid between the parties and amounted to a contract. That the lower court ruled contrary to the dictum in Stephen Mukiri Ndegwa v Kenya Commercial Bank Limited (2020) eKLR.

11. The Respondent also filed submissions dated 5.12.2024, in which it was submitted that the lower court's decision was correct. Reliance was placed on Rule 12 of the Auctioneers Rules. It was submitted that the execution was marred by procedural irregularities. They relied on the case of National Industrial Credit Bank Limited v SK Ndegwa Auctioneer (2005) eKLR. It was further submitted that the Appellant was guilty of noncompliance with court orders.

Analysis

12. This being a first appeal, this court is under a duty to reevaluate and assess the evidence and make its own conclusions. It must, however, remember that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence firsthand.

13. The Court is to bear in mind that it had neither seen nor heard the witnesses. The lower court has observed the demeanor and truthfulness of those witnesses. However, the documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them. In Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017) eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth;-

> " Courts adopt the objective theory of contract interpretation, and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it.

14. In Prudential Assurance Company of Kenya Limited V Sukhwender Singh Jutney and Another, Civil Appeal No. 23 of 2005 the Court citing a passage in Odgers Construction of Deeds and Statutes (5th edn.) at p.106 emphasized that in construing the terms of a written contract;

> " It is a familiar rule of law that no parole evidence is admissible to contradict, vary or alter the terms of the deed or any written instrument. The rule applies as well to deeds as to contracts in writing. Although the rule is expressed to relate to parole evidence, it does in fact apply to all forms of extrinsic evidence."

15. It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses. In the case of Peters v Sunday Post Limited [1958] EA 424, court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

16. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya v Republic [1957] EA 336 is as follows:-

> " On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. 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 different."

17. However, where the parties proceeded by way of affidavits, then the view of evidence is the same. In the case of Sugut v Jemutai & 3 others (civil appeal 110 of 2018) [2023] KECA 202 (KLR) (17 February 2023) (Judgment) Neutral citation: [2023] KECA 202 (KLR), Kiage JA stated as doth: -

> " I have carefully considered those rival submissions by counsel in light of the record and the bundles of authorities placed before us. I have done so mindful of our role as a first appellate court to proceed by way of re-hearing and to subject the entire evidence to a fresh and exhaustive re-evaluation so as to arrive at our own independent conclusions. See Rule 29(1) of the Court of Appeal Rules 2010; Selle v Associated Motor Boat Co [1968] EA 123). I do accord due respect to the factual findings of the trial court out of an appreciation that it had the advantage, which we do not, of having seen and heard the witnesses as they testified. I am, however, not bound to accept any such findings if it appears that the judge failed to take any particular circumstance into account or they were based on no evidence or were otherwise plainly wrong. I note from the record before us that the learned Judge may not have been in a fully advantageous position in that regard having taken up the case when it was already half-way heard. Her conclusions on the evidence and findings of fact were therefore from a reading of what was recorded by the previous judge."

18. The court cannot set aside the lower court's discretion at whims in a case where the issues in this appeal are factual. This Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself. In the case of Mbogo and another v. Shah [1968] EA 93 where the Court stated:

> " ...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself

or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

19. By the ruling of the lower court dated 3.5.2023 in Kisii CMCC no. 775B of 2021, the court set aside the warrant of attachment dated 9.9.2022 and the default judgment dated 20.6.2022. The court also allowed the Respondent, as a defendant in the lower court, to file a defence so that the matter could be heard and determined on merits.

20. Before this Application, the Appellant had filed the Application dated 16.1.2023 seeking to tax his bill of costs. The bill of costs related to the auctioneer's charges in respect of the work done in execution of the decree resulting from the default judgement that was set aside on 3.5.3023.

21. Subsequently, the Respondent, as Defendant with leave to file defence and defend the suit, knowing that the execution process had since been set aside, filed the Application dated 12.5.2023 on the same date by which he sought to set aside the warrants that had already been issued and release the motor vehicle. The motor vehicle is, however, said to have been sold on 3.5.2023 at Ksh. 500,000.

22. This court has to establish whether the proclamation and sale were proper. The auctioneer did not seek costs from the Plaintiff in Civil Suit No. 775B of 2021. It is deemed that to execute, the Appellant must have obtained instructions from the said Plaintiff. Like all contracts, once instructions are issued, the auctioneer must accept them. The steps the auctioneer is required to take are set out in rule 15 of the Auctioneers Rules: -

> " 15. Immovable property Upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of immovable property
>
> (a) record the court warrant or letter of instruction in the register;
>
> (b) prepare a notification of sale in the form prescribed in Sale Form 4 set out in the Second Schedule indicating the value of each property to be sold;
>
> c) locate the property and serve the notification of sale of the property on the registered owner or an adult member of his family residing or working with him or where a person refuses to sign such notification, the auctioneer shall sign a certificate to that effect;
>
> (d) give in writing to the owner of the property a notice of not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction;
>
> (e) on expiry of the period of notice without payment arrange sale of the property not earlier than fourteen days after the first newspaper advertisement.

23. The Bill of Costs is dated 16.1.2023 and charged instruction fees and other Applicable fees. In the absence of instructions from the Plaintiff in the civil suit no 775B of 2021, the Auctioneer could only be taken to have acted without instructions. It was wrong for the auctioneer to move against a defendant for cost. Costs were to be borne by the Plaintiff in the main suit. For this reason only, the

bill was irregular and unfounded. This is particularly, because the default judgment and the resultant execution process were set aside.

24. The question turns on the interpretation of the *auctioneers Act* and Rules. Rule 6 of the auctioneer rules requires that the auctioneer keeps a record of letters of instructions and warrants. It states:

    An auctioneer shall keep a register of all warrants and letters of instruction passed to him by a client, and shall record in it

    a. the number of the case under which the warrant was issued and the name of the court that issued it;

    b. the name and address of the creditor and the advocate (if any) who issued the letter of instruction;

    c. the date he received each warrant or letter of instruction;

    d. the amount he is required by the warrant or letter of instruction to recover;

    e. the date of return endorsed upon the warrant;

    f. an itemised inventory of the property to be sold showing the value to be placed on each lot;

    g. the amount realised in respect of each item sold;

    h. the date the warrant was returned to the court;

    i. the date and amount of the proceeds of any sale forwarded to the court, or to the creditor, or his advocate; and

    j. the charges levied by the auctioneer.

25. In this case, there is no evidence that the auctioneer received instructions. He did not acknowledge instructions or even remit the proceeds of the sale. The presumption is, however, that the Plaintiff instructed the auctioneer. The contents of the letter of instructions are set out in rule 11 as follows:

    (b) movable property

    i. The decretal amount, date of decree, date of return to court or where there is no decree, the exact amount to be recovered as at a date not later than the date of the letter of instruction plus the estimated daily or monthly interest or rent to accrue thereafter;

    ii. The person amongst whom the decree is to be executed;

    iii. The exact location of goods;

    iv. The person to point out the goods;

    v. Where ascertainable, a list of the goods to be attached or repossessed;

    vi. Where appropriate, reserve prices or where there are to be no reserves prices, a record of the reasons for not selling subject to such reserve prices;

26. Regardless of the instruction, the execution cannot be said to be lawful in light of the stay order dated 3.5.2023. In this context, the action by the Appellant was null and void. Such an action cannot be

a basis for anything. In Macfoy v. United Africa Co. Ltd [1961] 3 All E.R. 1169, Lord Denning, delivering the opinion of the Privy Council at page 1172 (1) said;

> "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

27. The purported sale was null and void. It is of no consequence whatsoever. Nevertheless, the court cannot allow the Appellant to unjustly enrich himself. In Samuel Kamau Macharia v Kenya Commercial Bank Limited, Kenya Commercial Finance Company Limited [2003] eKLR, R. Kuloba,J as he then was, posited as follows:

As Lord Goff of Chieveley and Professor Gareth Jones state in their monumental treatise, The Law of Restitution, 5th edn [1998], at pp 11-12:

"Most mature systems of law have found it necessary to provide, outside the fields of contract and civil wrongs, for the restoration of benefits on grounds of unjust enrichment."

This statement is founded on the observation of Lord Wright in the English case of Fibrosa Spolka Akeyjna v Fairbairn Lawson Combe Barbour, Ltd, [1943] AC 32, at p 61 where he said:

"It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit ..... Such remedies ..... are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi - contract or restitution."

28. Any amount obtained from the execution could be unjust enrichment. This was earlier addressed by the court of Appeal [Madan, Wambuzi & Law JJ A] in Chase International Investment Corporation and Another v Laxman Keshra and 3 others [1978] eKLR as doth:

In Fibrosa Spolka, Lord Wright ([1943] AC at page 61):

It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution.

It seems to me that upon a fine analysis the first category, ie the contract of guarantee which I have discussed above, blends into the theory of restitution which gives it the foundation to justify it. Goff and Jones in their treatise, Law of Restitution, state (page 11):

Most mature systems of law have found it necessary to provide, outside the fields of contract and civil wrongs, for the restoration of benefits on grounds of unjust enrichment. There are many circumstances in which a defendant may find himself in possession of a benefit which, in justice, he should restore to the plaintiff.

Obvious examples are where the plaintiff has himself conferred the benefit on the defendant through mistake or compulsion. To allow the defendant to retain such a benefit would result in his being unjustly enriched at the plaintiff's expense, and this, subject to certain defined limits, the law will not allow ... The principle of unjust enrichment presupposes three things: first, that the defendant has been enriched by the receipt of a benefit; secondly, that he has been so enriched at the plaintiff's expense; and thirdly, that it would be unjust to allow him to retain the benefit.

All the three foregoing conditions are satisfied in this case: the appellants have been enriched by the receipt of benefit at the expense of Laxmanbhai, and, so obviously, it would be unjust to allow the appellants to retain the benefit of it to the full extent of Laxmanbhai's claim

29. The conditions for unjust enrichment to work are that:

    i. The have been enriched by the receipt of benefit.;

    ii. The benefit is at the expense of the 1st respondent

    iii. So obviously, it would be unjust to allow the appellants to retain its benefits to the fullest extent.

30. To make matters worse, the instructions were passed to another auctioneer, Blegif. An auctioneer cannot attach attached goods or steal instructions from another auctioneer. Further, they must remit proceeds of sale within 15 days. The rule 18(4) of the Auctioneers' Rules provides as doth:

    The auctioneer shall remit the proceeds of the sale less his charges to the court or the instructing party, as the case may be, accompanied by an itemized account in the case of movable property within fifteen days of the sale and in the case of immovable property as provided under Order 22, rule 70 of Civil Procedure Rules

31. There was thus no sale in the eyes of the law. The Appellant would not have passed proper instructions to Blegif in light of the order setting aside default judgement. I dismiss the assertion by the Appellant that events overtook the stay order dated 3.5.2023. There were interim orders on the Application dated 14.9.2022 that stayed with the execution, and the Appellant stole a match with the Respondent and the lower court. The charges of the Appellant, if applicable, could only be paid by the instructing party as the execution was not lawfully completed. In the case of Kenya Oil Company Limited v Jovan H. Kariuki T/A Moran Auctioneers [2020] eKLR in an application which addressed the pertinent issue of who is liable to meet the auctioneer's fees and costs, Okwany J. Held as follows:-

> " 14. Be that as it may, this court is still minded, in the interest of justice, to address the pertinent question of who should pay the auctioneers fees in this case. The answer to this question could have been found in the ruling in respect to the application dated 25th March 2015 which was however withdrawn by the Auctioneer on 28th May 2018.
>
> 15. In the impugned ruling of 25th May 2019, the Taxing Officer stated as follows on the subject of the party liable to pay the auctioneers costs: "From the proceedings the auctioneer could have recovered he fees from the debtor if the sale went through. He is entitled to fees for work done. The sale was called off meaning that the instructing party was to pay for the instructions given out."
>
> 16. Having regard to the above extract of the ruling, this court finds that the party liable to settle the auctioneers costs is instructing party in the suit that gave rise to the execution which was West Mont Power (K) Ltd..."

32. Similarly, Rule 7 of the Auctioneers Rules clearly defines who shall bear the costs. It provides that a debtor shall pay the auctioneer's charges unless the debtor cannot be found, he has no goods upon which execution can be levied, or the sale proceeds are insufficient to cover the charges.

33. It is understood that the principle of Nemo dat quod non habet, posits that no one can give what they do not have. The Appellant had nothing to offer, and Belgif had nothing to receive. In Daniel Kiprugut Maiywa v Rebecca Chepkurgat Maina [2019] KEELC 842 (KLR) Onyango J posited as follows:

> " The nemo dat principle means one cannot give what he does not have. This principle is intended to protect the title of the true owner. The rationale behind this principle is that whoever owns the legal title to property holds the title thereto until he or she decides to transfer it to someone else. Accordingly, an unauthorized transfer of the title by any person other than the owner generally has no legal effect, which means the owner continues to hold the title to the property while the person who received the invalid title owns nothing. However, the law provides some exceptions to this rule in the following certain circumstances; For example where a person buys the property in good faith believing that the person who sold it to him was the owner or authorized agent of the owner; where the property is sold by a mercantile agent who is in possession of the goods or documents of title; sale by a joint owner who sells the property with the permission of the co-owner or sale by a person in possession of goods or property under a voidable contract. This principle was applied in the case of Haul Mart Kenya limited v Tata Africa Kenya limited [2017] eKLR and Katana Kalume v Municipal Council of Mombasa [2019] eKLR."

34. Consequently, the court was correct in holding the Appellant liable. The Appellant was to release the motor vehicle and all funds if any received. The upshot of the forging is that the appeal is hopeless and must be saved from its own ignominy. It must give way.

35. The record shows that by Mpesa, the Respondent paid Kshs. 50,000/- to the Appellant on 18.4.2023 and there was a further payment of Ksh. 270,463.00 paid to the Appellant vide Standard Chartered Bank on 4.5.2023. The amount is 320,463/- and the same must be refunded to the Respondent.

36. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

> (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
>
> (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

37. The Court of Appeal in the case of Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR) had this to say:

> " It is our finding that the position in law if that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

38. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

39. The costs follow the event. The Respondents shall have costs of Ksh. 95,000/=.

Determination

40. The upshot of the foregoing is that I make the following orders:

    i. The Appeal is dismissed for lack of merit.

    ii. The Appellant shall refund Ksh. 320,463/- received from the Respondent within 30 days from the date hereof in default of which execution shall proceed in the lower court.

    iii. The Appellant shall forthwith release Motor Vehicle Registration Number KBB 732M to the Respondent.

    iv. If the motor vehicle was sold, the sale was unlawful. Consequently, the Respondent is at liberty to institute recovery proceedings against the Appellant.

    v. Costs of Ksh 95,000/= to the Respondent.

    vi. 30 days stay of execution.

    vii. 14 days right of Appeal.

    viii. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI, VIRTUALLY ON THIS 26TH DAY OF MARCH,2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Atisi for the Appellant

Ms. Muthiani for the Respondent

Court Assistant - Michael