



**Transmara Sugar Co. Ltd v J.N. Marwa t/a Ikimwanya Auctioneers & another;
Kennedy Ooko Jacob t/a Ssebo Intel Co. Auctioneer (Interested Party) (Miscellaneous
Appeal 40 of 2021) [2024] KEHC 4183 (KLR) (25 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4183 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
MISCELLANEOUS APPEAL 40 OF 2021
RPV WENDOH, J
APRIL 25, 2024**

BETWEEN

TRANSAMARA SUGAR CO. LTD APPELLANT

AND

J.N. MARWA T/A IKIMWANYA AUCTIONEERS 1ST RESPONDENT

DEVIAS ODENI OGISA 2ND RESPONDENT

AND

**KENNEDY OOKO JACOB T/A SSEBO INTEL CO.
AUCTIONEER INTERESTED PARTY**

RULING

1. Before me, is an application dated 2/11/2023 filed by Kennedy Ooko Jacob T/A Ssebo Intel Co. Auctioneer (the applicant) seeking the following orders:-
 - a. Spent.
 - b. That the court be pleased to grant leave to the interested party/applicant to be joined in the instant proceedings, to enable him to tax his costs.
 - c. The court be pleased to tax the Auctioneer's costs attached herein and issue certificate of costs for Kshs. 68, 360/=
 - d. The court be pleased to enter judgement in terms of Certificate of Auctioneer's costs in favour of the interested party/applicant as against the respondent/appellant/ judgement debtor.
 - e. Costs of the application be provided for.



2. The application is premised on the grounds on its face and the supporting affidavit of Kennedy Ooko Jacob. He deposed that he was issued with warrants of attachment dated 27 /10/2023 and a certificate of costs; that he proclaimed the respondent's property on 30/10/2023; that the applicant will not be allowed to participate in these proceedings unless he is formally joined in the suit; that the judgment debtor has paid the amount on warrant less the auctioneer's costs; that the auctioneer's costs be taxed as per the attached bill of cost and the judgement debtor be compelled to pay the same.
3. The application was opposed. Samuel Kalu the Corporate and Legal Manager of Transmara Sugar Company (the judgement debtor) filed a replying affidavit sworn and dated on 17/11/2023. He deposed that this court lacks jurisdiction to hear and determine the instant application noting that the suit challenging the 1st respondent's bill of costs was finalised; that the applicant has not met the threshold of being joined as an interested party; that the applicant had no stake in the outcome of the suit challenging the 1st respondent's bill of costs; that the applicant should have filed a separate miscellaneous application seeking assessment of costs before the Deputy Registrar; that there is no legal basis for the assessment of the applicant's costs in this suit; that the application has no merit and it should be dismissed with costs.
4. Both parties complied with filing of written submissions. The applicant filed undated written submissions on 23/11/2023 while the judgement debtor filed written submissions dated 14/2/2024 on 4/3/2024 which I have duly considered. I have also considered the applicant's application, the judgement debtor's replying affidavit and the rival arguments as put forth by both parties in their submissions.
5. The first issue which has been raised is on the jurisdiction of this court to entertain the present application. The judgement debtor argues on two fronts; that the present application is unmerited on the basis that the suit herein was finalised thus the court is functus officio and the application should have been filed before the Deputy Registrar.
6. It is trite law that a court must possess jurisdiction to enable it to handle a dispute before it. If a court is without the requisite jurisdiction but it proceeds to hear a matter, its decision will amount to a nullity. This was the findings of Nyarangi JA in Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (1989) 14.
7. One of the prayers that the applicant is asking this court to do, is to tax its costs and issue a certificate of costs for Kshs. 68, 360/= as per its bill annexed and marked as "KOJ4." I do note that it is not disputed by the judgement debtor that the applicant received instructions from the decree holder and proceeded to proclaim motor vehicle registration KCK 742W. Annexure "KOJ 2a" confirms that proclamation was done.
8. An auctioneer is entitled to recover his costs per Rule 7 (c) of the Auctioneer Rules which provides as follows:-

Payment of auctioneer's charges

A debtor shall pay the charges of the auctioneer unless-

 - (a) that debtor cannot be found; or
 - (b) he has no goods upon which execution can be levied; or
 - (c) the sale proceeds are insufficient to cover the charges.
9. In which cases the creditor shall pay the chargers or the deficiency thereof.



Further, Rule 55 of the Auctioneer Rules provides:-

55. Fees and disbursements payable to an auctioneer
1. Except as may be provided by any other written law or by contract the fees set out in the Fourth Schedule payable to the auctioneer for the attachment, repossession and sale of movable and immovable property under court warrants or letters of instructions shall be charged in accordance with these Rules.
 2. Where a dispute arises as to the amount of fees payable to an auctioneer-
 - a. in proceedings before the High Court; or
 - b. where the value of the property attached or repossessed would bring any proceedings in connection with it within the monetary jurisdiction of the High Court, a registrar, as defined in the Civil Procedure Rules (Cap. 21, Sub. Leg.), may on the application of any party to the dispute assess the fee payable.
10. The law is clear that an auctioneer who is entitled to his costs but there is a dispute, upon application before the registrar and in this case, the Deputy Registrar, is entitled to apply for assessment of the disputed fees before the Deputy Registrar. Therefore, this court is bereft of jurisdiction assess the applicant's auctioneers' fees. The applicant should file his bill of costs before the Deputy Registrar for assessment.
11. Secondly, the applicant is asking to be joined to these proceedings to be entitled to recover his costs. Order 1 Rule 10 (2) of the *Civil Procedure Rules* provides on the principles to be considered before a party is joined to proceedings as follows: -
- The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added." (emphasis)
12. The Court of Appeal in the case of [*JMK v MWM and MFS \(2015\)*](#) eKLR considered the scope of Order 1 Rule 10 and held as follows: -
- ...that the joinder may be done either before, or during the trial; that it can be done even after judgment where damages are yet to be assessed; that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage"
13. A party, whether on its application or by the court suo moto, may be joined to the proceedings at any stage, if its presence is necessary to determine the issues in controversy. In considering whether a party is necessary to the proceedings before it, the court has to determine whether the issues in question directly affect the party applying to be joined or he has a beneficial interest in the outcome of the proceedings. Further, a matter must be still alive in court for Order 1 Rule 10 to be applicable.
14. In this instance, this court pronounced itself on the dispute between the parties vide a ruling dated 31/3/2022. The matter is no longer alive in court. Hence, it will not make any judicial sense to join the applicant in these proceedings at this stage.



15. As I have observed hereinabove, recovery of costs by the applicant is an automatic right provided for under the law. All the applicant is required to do, is file his bill of costs before the Deputy Registrar for assessment. In the event the applicant is not satisfied with the assessment, this court will assume jurisdiction upon application.
16. It is my finding that the application dated 2/11/2023 is unmerited. The same is hereby dismissed with costs to the judgement debtor.

This ruling shall apply to Misc. Appeal Nos. 33/2021 to Misc. 40/2021.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 25TH DAY OF APRIL 2024.

R. WENDOH

JUDGE

Ruling delivered in presence of;-

Kennedy Ooko Applicant

No appearance Judgement Debtor

Emma - Court Assistants.

