



**Ayoti Distributors Ltd v Erick Ergine Oduor t/a Health Consult Auctioneer Services
(Civil Appeal E094 of 2021) [2024] KEHC 3880 (KLR) (22 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3880 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E094 OF 2021
RE ABURILI, J
APRIL 22, 2024**

BETWEEN

AYOTI DISTRIBUTORS LTD APPELLANT

AND

**ERICK ERGINE ODUOR T/A HEALTH CONSULT AUCTIONEER
SERVICES RESPONDENT**

(An appeal arising out of the Ruling of the Honourable W.K. Onkunya in the Chief Magistrate's Court at Kisumu delivered on the 7th July 2021 in Kisumu CMCC No. 288 of 2014)

JUDGMENT

Introduction

1. Before I determine this appeal on the merits, I observe that vide Notice of Withdrawal of Appeal dated 25th July, 2022, this appeal was sought to be withdrawn from Court with no orders as to costs. Regrettably, there was no endorsement on the withdrawal and this escaped the attention of the court owing to the fact that there was no Judge for the Court at that time to endorse the Notice of withdrawal. That aside, I will go ahead and determine the merits of the appeal as the appellant successfully had the appeal reinstated after it was dismissed for noncompliance with the court's directions. I will therefore assume that counsel on record, too was not aware of the Notice of withdrawal of the appeal when he took over the conduct of the appeal on behalf of the appellant from the firm of Ashioya & Company Advocates.
2. The appellant moved the lower court vide an application dated 25th February 2021 seeking orders that the bill of costs filed by the respondent be expunged from the court records for being incompetent and unwarranted, the execution having been cancelled by the court and further that the respondent be condemned to pay costs of the said application.



3. It was the appellant's case that the court in its ruling of 18th November 2020 directed that the further court fees be paid for the execution process to be undertaken and thus the extension by the auctioneer before payment of further court fees on 8.12.2020 was void ab initio and thus they ought to have taken out fresh warrants.
4. In response to the said application, the respondent filed a replying affidavit on the 30th March 2021 opposing the said application. It contended that he complied with the court orders of 18.11.2020 before the lapse of the 30 days and consequently, the warrants of sale and attachment were not cancelled by the court.
5. In its ruling, the trial court found that the respondent had complied with its orders of 18.12.2020 as he had paid further court fees within the 30 days and thus proceeded to find that the appellant's application was unmerited. The trial court subsequently dismissed the said application.
6. Aggrieved by the said ruling and order, the appellant filed a memorandum of appeal dated 3rd August 2021 raising the following grounds of appeal:
 - a. The learned magistrate erred in fact and law having approved an execution over a decree whose execution condition had not been met.
 - b. That the learned magistrate erred in law and in fact in allowing an execution while knowing that further court fees had not been paid at all.
 - c. That the learned magistrate erred in law and in fact approving execution proceedings by allowing her orders to apply retrospectively against the principles of law and common practice.
 - d. That the learned magistrate erred in law and in fact in dismissing the appellant's application dated 25th February 2021 without giving valid reasons.
 - e. That the learned trial magistrate erred in law and in fact in arriving at the wrong decision and against the legally acceptance principles.
 - f. The learned trial magistrate misdirected herself in ignoring the law and or applicable principles in the circumstances thereby wrongly applying the law.
7. The parties agreed to file submissions to canvass the appeal.

The Appellant's Submissions

8. The appellant submitted that the warrants of attachment and sale issued were cancelled having been issued without payment of further court fees and as such, the auctioneers ought to have taken out fresh warrants. It was submitted that there was no proof of payment of further court fees within the stipulated timelines issued by the trial court. Reliance was placed on the case of *Mombasa Cement Limited v Speaker National Assembly & Another* (2018) eKLR and that of *Africa Merchant Assurance Co. Ltd v Confas Maranga Ntabo* (2016) eKLR where the court in both instances reinforced the need for payment of court fees as stipulated by the court.
9. The appellant submitted that having proved that the circumstances and grounds upon which it claims the warrants of attachment was irregular and unlawful, the respondent's advocate and/or the respondent himself have to bear the auctioneer's charges for the wrongful execution of the decree.



The Respondent's Submissions

10. It was submitted that the trial magistrate having been satisfied with all the processes undertaken by the respondent, assessed the bill of costs and later issued both the warrants of attachment and proclamation upon failure by the appellant to pay the assessed costs to the respondent.
11. It was further submitted that the respondent complied with the trial court's order by paying the further court fees within the prescribed period of 30 days thus making the warrants earlier issued to it to be deemed to be properly on record.
12. The respondent submitted that the trial magistrate was right in dismissing the appellant's application as demonstrated in the ruling subsequently issued by the court and thus the instant appeal was misconceived and an abuse of the court process and ought to be dismissed with costs.

Analysis and Determination

13. This being a first appeal, this court is under a duty to re-evaluate and re-assess the evidence before the trial court and reach its own conclusions. It must, however, bear in mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the court stated as follows-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

14. In that regard, an appellate court will only interfere with the decision of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in *Mkubee v Nyamuro* [1983] LLR at 403, where Kneller JA & Hancox Ag JJA held that:

“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”

15. I have considered the trial court record where the impugned ruling was as a result of an application supported by affidavit and the respondent filed A Replying affidavit hence no oral evidence was taken. I have also considered the submissions filed by both parties and I conclude that the issue for determination is whether the respondent complied with the trial court's orders of 18.11.2020 and consequently whether the warrants of attachment and sale previously issued to the respondent were valid.
16. From the trial court record, on the 18.11.2020, following an application by the appellant herein seeking to cancel the warrants of attachment and sale issued to the respondent herein for being unlawful, the trial court
 1. That the warrants of attachment and sale in favour of M/S Heath Auctioneers are hereby stayed for a period of 30 days.
 2. That the requisite court fees and further court fees to be paid during the above period of 30 days.



3. That in default of (2) above the warrants of attachment and sale issued in favour of M/s Heath AuctioneerS shall be cancelled.
4. Each party to bear their own costs.
17. It is clear from the above orders that it was upon the respondent paying the further court fees within the 30 days from the date of the ruling after which the stay placed on the warrants of attachment and sale would be lifted. The trial court did not cancel the said warrants but merely stayed them conditional upon the respondent paying further court fees.
18. It was admitted by the appellant herein before the trial court that the respondent indeed paid the further court fees on the 8.12.2020, 20 days after the court had issued its orders. There was thus no reason for the respondent to apply for new warrants of attachment and sale.
19. He who alleges must prove. The Court of Appeal in the case of *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another* [2004] eKLR stated that the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence. That is captured in sections 109 and 112 of the *Evidence Act*, thus:
 - “ 109. The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
 112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”
20. In the instant case the burden of proof lay on the appellant to prove that the respondent failed to pay the further court fees before the lapse of the 30 days prescribed by the trial court in its ruling dated 18.11.2020, which date would have been the 18.12.2020. The appellant failed to prove this and the trial court rightfully held that the respondent had complied with its orders of 18.11.2020.
21. Furthermore, section 96 of the *Civil procedure Act* provides as follows:
 - “ 96. Power to make up deficiency of court fees
Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court fees has not been paid, the court may, in its discretion, at any stage, allow the person by whom such fee is payable to pay the whole or part, as the case may be, of the fee; and upon such payment the document in respect of which such fee is payable shall have the same force and effect as if such fee had been paid in the first instance.”
22. From the above provisions of the law, as read with Article 48 of the *Constitution* on the right to access justice, I find that the moment the respondent paid further court fees, the process of execution of decree as commenced by the auctioneer was validated and therefore the further court fees having been filed within the period or timelines given by the trial court, I find no deficiency in the execution process which was validated by the trial court.
23. Accordingly, I have no reason to differ with the findings of the trial court that the respondent fully complied with its orders. I find and hold that the appellant has not proved that the respondent failed



to comply with the order of the trial court issued on 18.11.2020. I find this appeal devoid of merit. I dismiss it and uphold the ruling of the trial court.

24. I however order that each party bear their own costs of this appeal.

25. This file is closed, the lower court file to be returned forthwith.

26. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 22ND DAY OF APRIL, 2024

R.E. ABURILI

JUDGE

