



**UAP Insurance Company Limited v Alfred Mdeizi t/a Pave Auctioneers & another  
(Civil Appeal 32 of 2018) [2023] KEHC 22683 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22683 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL APPEAL 32 OF 2018  
RE ABURILI, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**UAP INSURANCE COMPANY LIMITED ..... APPELLANT**

**AND**

**ALFRED MDEIZI T/A PAVE AUCTIONEERS ..... 1<sup>ST</sup> RESPONDENT**

**SIGANGA AND COMPANY ADVOCATES ..... 2<sup>ND</sup> RESPONDENT**

*(An appeal from a Ruling and order of the Chief Magistrates Court at Kisumu Hon. Odawo dated the 25th day of April 2018 in Misc. Civil Application No. 168 of 2015)*

**JUDGMENT**

1. This appeal was filed on 18<sup>th</sup> May 2018. Although I have taken my time to write a fairly comprehensive judgment, it is one of the simplest matter or disputes which in my view ought to have been determined the moment the lower court record arrived and the appeal admitted to hearing on 28<sup>th</sup> July 2019. There are reasons for this statement, without any fear of contradiction or apology that this is one of the simplest disputes that I have ever come across in my tour of duty. This will be demonstrated in my analysis.
2. The appeal arises from the Ruling and order of the Chief Magistrate's court at Kisumu Hon. Odawo dated 25<sup>th</sup> April 2018 in Kisumu Chief Magistrates Court Miscellaneous Civil Application No. 168 of 2015.
3. The above file or Miscellaneous suit was in respect of an application filed by the Auctioneer namely Pave Auctioneers whose proprietor is Alfred Mdeizi. The Auctioneer claimed in their application dated 30<sup>th</sup> June 2015 that they had received an application for execution of decree in Kisumu HCC Misc. No. 31 of 2013 from the 2<sup>nd</sup> Respondent herein Siganga & Company Advocates, to execute decree in the



- aforesaid matter which involved the taxed advocate client bill of costs, between Siganga & Company Advocates and UAP Insurance Company Limited, the 1<sup>st</sup> Respondent herein.
4. That upon receipt of the said 'application', they approached the court and obtained warrants of attachment and sale of the 1<sup>st</sup> Respondent's movable property and they proceeded to issue proclamation on 23<sup>rd</sup> April 2013. The warrants of attachment and sale were obtained on 28<sup>th</sup> March 2013 (It is important to note that my perusal of the entire court file does not reveal any application for execution of decree annexed to the supporting affidavit of Alfred Mdeizi sworn on 30<sup>th</sup> June 2015.
  5. According to the Auctioneer, the 1<sup>st</sup> Respondent settled the 2<sup>nd</sup> Respondent's taxed bill of costs before elapse of 7 days hence no taking of possession of the attached property was done.
  6. The Auctioneer therefore filed his application seeking for an order determining/assessing his costs and that the same be paid by the 1<sup>st</sup> Respondent Judgment debtor or in the alternative, the said charges to be assessed be paid by the 2<sup>nd</sup> Respondent decree holder.
  7. The 1<sup>st</sup> Respondent opposed the application by filing an affidavit in reply sworn on 13<sup>th</sup> October 2015 by Brenda Achieng Rao, its Assistant legal manager and filed on 13<sup>th</sup> October 2015 deposing inter alia that the same Auctioneer had filed similar bills of costs in 10 other matters before Kisii Chief Magistrate's court as shown by a bundle of those bills and that objections were raised by the 1<sup>st</sup> Respondent which led to the withdrawal of the said matters from court and the auctioneer directed to apply for transfer of the said bills to Kisumu.
  8. The deponent further deposed that there was no evidence of letter of instruction from the firm of Siganga & Company Advocates to the auctioneers to attach the Appellant's property hence the advocates for the appellant wrote to Siganga & Company Advocates seeking for information on whether they instructed the auctioneer to execute for recovery of taxed costs if any and that the advocate received a response to the effect that they did not instruct Pave Auctioneers to commence execution proceedings as shown by the said letter annexed.
  9. According to the deponent, the taxed costs had already been settled as at the time of the proclamation as shown by annexed EX-U3 payment advise. The appellant contended that the auctioneer had not come to court with clean hands hence he was not entitled to the prayers and costs sought and urged the court to dismiss the application.
  10. Parties canvassed that application as filed and dated 30<sup>th</sup> June 2013 by way of written submissions. In his ruling delivered on 25<sup>th</sup> April 2018 which is now impugned by this appeal, the learned Honourable Magistrate relying on the Auctioneers Rules found that the judgment debtor/appellant herein was liable to pay the auctioneer charges and directed the parties to proceed and fix the date for taxation of the Auctioneers charges.
  11. Aggrieved by that Ruling of 25<sup>th</sup> April 2018, the Appellant herein filed this appeal vide memorandum of appeal dated 16<sup>th</sup> May 2018 on 18<sup>th</sup> May 2018 upon obtaining leave of the lower court to appeal on 9<sup>th</sup> May 2018. The Appellant impugns the Ruling delivered on 25<sup>th</sup> April 2018 on the following five grounds of appeal:-
    - i. That the learned trial magistrate erred in law and fact in not taking into consideration the facts deposed in the affidavit in reply filed by the appellant in opposing the application dated 30<sup>th</sup> June 2015 in arriving at a finding with regard to the 1<sup>st</sup> Respondent Auctioneers bill of costs.
    - ii. That the learned trial magistrate erred in law and fact by not taking into consideration the exhibits annexed to the affidavit in reply filed by the appellant. (repetition of above)



- iii. That the learned trial magistrate erred in not taking into consideration the submissions both oral and written by the appellant in arriving at a finding with regard to the 1<sup>st</sup> Respondent auctioneer's bill of costs.
  - iv. That the learned trial magistrate erred in law by not taking into consideration that the 2<sup>nd</sup> Respondent did not oppose the application dated 30<sup>th</sup> June 2015 in arriving at a finding with regard to the 1<sup>st</sup> Respondent auctioneer's bill of costs.
  - v. That there was misdirection on the part of the trial magistrate in arriving at a finding that the appellant UAP Insurance Company Limited was liable to pay the 1<sup>st</sup> Respondent auctioneer's costs.
12. The Appellant urged this court to allow the appeal, set aside the ruling and finding of the trial court and make a finding on the following 2 issues:
- a. Is the 1<sup>st</sup> Respondent entitled to auctioneers costs as prayed for in the application dated 30<sup>th</sup> June 2015?
  - b. If the answer to issue (a) above is in the affirmative, who as between the appellant and the 2<sup>nd</sup> Respondent is liable to pay the 1<sup>st</sup> Respondent auctioneers costs.
13. The Appellant also urged this court to award it costs of the appeal.

### **Submissions**

14. The appeal was canvassed by way of written submissions. The appellant's submissions were filed on 8<sup>th</sup> February 2022 while the 1<sup>st</sup> Respondent filed submissions on 15<sup>th</sup> March 2022. The 2<sup>nd</sup> Respondent Siganga & Company Advocates did not file any submissions.
15. In the Appellant's submissions, counsel argued grounds 1, 2, 3 and 5 as one saying they are related then ground 4 was argued as the 2<sup>nd</sup> ground of appeal.
16. In arguing ground I as consolidated, it was submitted that the issue for determination before the trial magistrate was, on whose instructions did the 1<sup>st</sup> Respondent act when commencing execution proceedings and whether instructions were issued by the 2<sup>nd</sup> Respondent Siganga & Company Advocates to the 1<sup>st</sup> Respondent auctioneer for recovery of the amount outstanding due and payable by the appellant to the 2<sup>nd</sup> Respondent particularly as there was evidence on record that the amount demanded by the 2<sup>nd</sup> Respondent from the appellant had also been settled.
17. The Appellant argued that the holding by the trial court was in error because the annexed letter from Siganga & Company Advocates was clear that before the warrants could be extracted, the 2<sup>nd</sup> Respondent in the present appeal asked the auctioneer to hold his hands pending negotiations with the Respondent/Appellant herein hence there was no need for the auctioneer to commence execution.
18. Further, that the appellant had demonstrated that the 2<sup>nd</sup> Respondent had not instructed the 1<sup>st</sup> Respondent to execute hence the onus was on the 1<sup>st</sup> Respondent to demonstrate and prove that instructions were issued to the 1<sup>st</sup> Respondent by the 2<sup>nd</sup> Respondent on the strength of which execution was commenced. It was argued that the 1<sup>st</sup> Respondent failed to discharge that burden.
19. On the finding that there was no evidence that instructions were withdrawn, prior to the warrants being extracted as alleged in the letter dated 23<sup>rd</sup> October 2013 and further that it is not substantiated and that therefore that the applicant auctioneer acted on his own motion contrary to the instructions



issued by the 2<sup>nd</sup> Respondent, it was submitted that in so holding, the trial magistrate entered into the arena of litigation in that even though the 1<sup>st</sup> Respondent did not adduce any evidence contrary to what was stated in exhibit EX U2, the trial magistrate demanded that evidence should have been adduced by the appellant that instructions were withdrawn even when there was sufficient evidence that even before the warrants could be extracted, the 1<sup>st</sup> Respondent was notified by the 2<sup>nd</sup> Respondent to hold his hands.

20. It was therefore submitted that there was no evidence that the 1<sup>st</sup> Respondent was acting on instructions of the 2<sup>nd</sup> Respondent.
21. On the ground that the trial court failed to take into consideration the fact that the 2<sup>nd</sup> Respondent did not oppose the application dated 30<sup>th</sup> June 2015 in arriving at the finding with regard to the 1<sup>st</sup> Respondent auctioneer's bill of costs, it was submitted that no evidence was placed before the trial court by the 1<sup>st</sup> Respondent to rebut the contents of EX-U2, to confirm that the 1<sup>st</sup> Respondent received instructions to execute, from the 2<sup>nd</sup> Respondent.
22. The Appellant prayed that the appeal be allowed and this court finds that the 1<sup>st</sup> Respondent was not entitled to costs and that the appellant is not liable to pay the 1<sup>st</sup> Respondent costs.
23. In the submissions filed on behalf of the 1<sup>st</sup> Respondent on 15<sup>th</sup> March 2022, counsel reiterated his submissions filed in the court below and set out the principles that a first appellate court is bound by as set out in the case of *Ndungu Dennis v Anne Wangari Ndirangu & Another* (2018) eKLR, citing with approval the decision in *Mary Wanjiku Gachugi v Ruth Muthoni Kamau* Civil Appeal No. 172 of 2000; *Anne Wambui Nderitu v Joseph Kiprono Ropkoi & Another* Civil Appeal No. 345 of 2000 and *Viviani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Company Limited* Kisumu HCC No. 88 of 2002.
24. The 1<sup>st</sup> Respondent narrated the history of the matter leading to the execution process and contended that before lodging the application for the fees, the 1<sup>st</sup> Respondent had moved the Kisii Chief Magistrates Court for similar fees but the Appellant objected prompting that court to direct the 1<sup>st</sup> Respondent to withdraw the Kisii CM's matters with no orders as to costs in compliance with the order of 5<sup>th</sup> October 2015.
25. The Respondent submitted relying on Rules 55 (3) and 7 of the *Auctioneer Rules* in force and amendments thereto as read with Order 51 Rule 1 of the *Civil Procedure Rules* which empowers the auctioneer to seek for payment of his charges against the judgment debtor or the decree holder. He reproduced the said provisions.
26. It was submitted further that when the 1<sup>st</sup> Respondent moved to court to obtain the warrants of attachment and sale of the appellant's movable property, which warrants have not been challenged or set aside, there was no stay of execution. Further, that even after execution by the 1<sup>st</sup> Respondent, there was no settlement of the 1<sup>st</sup> Respondent's charges even after billing hence a dispute arose under Rule 55 of the Auctioneers Rules warranting the action taken by the auctioneer for reassessment and recovery of the same. The 2<sup>nd</sup> Respondent reproduced the letter dated 16<sup>th</sup> October 2015 written by the Appellant's counsel to the decree holder's counsel inquiring whether the latter had instructed the auctioneers to execute decree for recovery of the assessed Advocate/Client cost and objecting to the auctioneer's charges.
27. The 1<sup>st</sup> Respondent also reproduced the response by Siganga & Company Advocates – decree holders dated 23<sup>rd</sup> October 2013 and argued that the letter above confirmed that the 1<sup>st</sup> Respondent levied executions at the instance of and in favour of the 2<sup>nd</sup> Respondent Siganga & Company Advocates



and that ‘bizarrely’ the appellant’s advocates sought ‘instructing letters’ to execute from Siganga when counsel knew that execution could only be activated through an appropriate formal application for execution under the *Civil Procedure Rules*.

28. That in the response by Siganga & Company Advocates, they neither supplied the appellant’s counsel with the instructing letters nor did they deny that they applied for execution by way of warrants of attachment and sale which they ‘confirm’ as per annexure ‘EX-U3’ dated 23<sup>rd</sup> October 2013. It was further submitted that there was no evidence that Siganga tried to stop the 1<sup>st</sup> Respondent from levying execution which they had applied for.
29. Further submissions was that execution was and continuous to be a judicial process, not a romantic undertaking.
30. The 1<sup>st</sup> Respondent supported the trial court’s findings and urged this court to dismiss the appeal herein with costs.

### **Determination**

31. I have carefully considered the appeal herein as presented in the grounds of appeal, and the submissions for and against the appeal. I have also perused the entire lower court pleadings and proceedings and applied myself to the principles espoused in various judicial pronouncements on the role of the first appellate court as set out in Section 78 of the *Civil Procedure Act*. That role has been interpreted by Superior courts in line with the decisions in the case of *Sielle & Another v Associated Motor Boat Company Limited and Others* [1968]EA 123 where the Court of Appeal enunciated the principles that:

“...the first appellate court is not bound, necessarily to accept the findings of fact by the court below. An appeal to this court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly, that they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it neither saw nor heard the witnesses and should make due allowance in this respect...”

32. In line with the above principle, and considering that the matter before the lower court was an application supported by affidavit, opposed by an affidavit and canvassed by way of written submissions hence no oral evidence or demeanor of witnesses is a relevant factor here; and having already restated what transpired before the trial court giving rise to this appeal, in my view, the main issue for determination in this appeal is as was correctly framed by the Appellant’s counsel in the summary prayers in the memorandum of appeal and that sole question is whether the 1<sup>st</sup> Respondent is entitled to his charges as prayed for in the application dated 30<sup>th</sup> June 2015.
33. The 1<sup>st</sup> Respondent claimed in its application dated 30<sup>th</sup> June 2015 that it was instructed and indeed the 2<sup>nd</sup> Respondent letter of 23<sup>rd</sup> October 2013 confirms that the latter instructed the auctioneer to execute for recover the taxed costs in the matters where the appellant had been ordered to pay to the 2<sup>nd</sup> Respondent the advocate/client costs as taxed.
34. The 2<sup>nd</sup> Respondent nonetheless gives a rider that it asked the auctioneer to hold its hands or to hold on to the execution before warrants of attachment and sale were extracted, to give way for negotiations hence the auctioneer did not have to issue the proclamation or execute.



35. From the payment advises annexed by the Appellant, it is not denied by any of the parties including the 1<sup>st</sup> Respondent that the taxed costs were settled before expiry of seven days of the warrants hence no taking of possession of he proclaimed property.
36. The appellant sought for a letter of instructions to the auctioneer to execute. No such letter was availed by the 2<sup>nd</sup> Respondent or even the auctioneer. The Appellant therefore maintains that as there is no letter of instruction, there was no execution hence the 1<sup>st</sup> Respondent was not entitled to the charges and if any, then the 2<sup>nd</sup> Respondent should shoulder those charges.
37. The above is the dispute between the parties to this appeal. As I was preparing to write this Judgment, I asked myself the question; “where is the original file or files that the 1<sup>st</sup> Respondent claims it executed decree and more importantly, where is the application for execution of decree for costs due to Siganga & Company Advocates? I asked myself this question severally because despite the auctioneer in his supporting affidavit of the application dated 30<sup>th</sup> June 2013 claiming in deposition at paragraph 2 that “the 1<sup>st</sup> Respondent upon application by the 2<sup>nd</sup> Respondent herein” attached please find copies of application for execution, warrant of attachment and sale marked AM 1(a) and (b)”, my perusal of the file did not reveal any “application for execution” annexed. Only the warrants of attachment and sale are annexed as ASM 2 dated 22<sup>nd</sup> April 2023 and ASM 3 being the proclamation dated 23<sup>rd</sup> April 2015.
38. Therefore, out of curiosity, I perused the whole bundle of the affidavit in reply by the appellant and annexures filed on 13<sup>th</sup> October 2015 and therein are many applications and supporting affidavits by the 1<sup>st</sup> Respondent in the matter that were before Kisii Chief Magistrates court and in none of those affidavits is there any deposition of there having been an application for execution. The auctioneer at Paragraph 3 of each Miscellaneous application referred to warrants of attachment and sale marked ASM 1, being the proclamations dated 23<sup>rd</sup> April 2013 and copy of his bill of costs since the dispute giving rise to this appeal emanated from Kisumu HC Misc. Civil Case No. 31 of 2013.
39. I therefore wcalled for the original case file in the above matter to establish what transpired between and among the parties hereto, as far as execution process was concerned. Having done so and having perused that file Misc. Civil Case No. 31 of 2013 between Siganga & Company Advocates and UAP Insurance Company Limited, I have found the following facts:-
- i. That the actual court proceedings are one page covering 2 dates. The first date is 15<sup>th</sup> February 2013 in the High Court Civil Registry where Mr. Antony of Siganga Advocate for the applicant/advocate was present; N/A for the Respondent/client. It was directed that a bill of costs dated 28<sup>th</sup> January 2013 is listed for taxation on 19<sup>th</sup> March 2013. Notices to issue. Signed by the Deputy Registrar.  
  
The next date was on 19<sup>th</sup> March 2013 before T. Obutu (Mr.) PM  
  
Court clerk – Faith  
  
Mr. Siganga for applicant. The bill was served and has not been opposed. The court ordered as follows:-  
  
“As service was done and the bill has not been opposed, I tax the same at Kshs.27,925.80” signed.”
40. Those are the handwritten proceedings in the parent court file where advocate/client bill of costs were taxed on 19<sup>th</sup> March 2013 as drawn. Following the above taxation, on 26<sup>th</sup> March 2013, the Deputy Registrar issued a certificate of costs as taxed.



41. There is ofcourse evidence of service of Notice of taxation as shown by an affidavit of service sworn by David Elvis Ochieng process server on 19<sup>th</sup> February 2013.
42. The notice of taxation is dated 18<sup>th</sup> February 2013. The bill of costs filed in court is dated 28<sup>th</sup> January 2013 drawn by Siganga & Company Advocates who are the advocates against UAP Insurance Company Limited, the client.
43. The only other documents which are available on the court file in question are the warrants of attachment and warrants of sale dated 22<sup>nd</sup> April 2013 issued to Pave Auctioneers for recovery of the taxed advocate's costs all totaling Kshs.28,725.80. the date of decree on the said warrants is shown to be on 19<sup>th</sup> March 2013. That is all that is available from the parent court file.
44. I have reproduced the contents of the court file in HC Misc. Civil Case No. 31 of 2013 in order to establish the following facts.
  - i. That there was taxation of the advocate/client bill of costs which are capable of being recovered by way of execution process.
  - ii. That there was certificate of taxation.
  - iii. That the certificate of taxation was adopted as judgment of the court by the Judge and that a decree was issued capable of being executed.
  - iv. That upon the judgment being entered by the court in terms of the certificate of taxation and decree being issued, there was an application for execution of decree upon which the warrants of attachment and sale could be issued by the court, followed by the auctioneers proclaiming the movable property for the judgment debtor, the appellant herein.
45. The above facts distill the process by which execution can issue and as correctly submitted by the 1<sup>st</sup> Respondent's counsel, "Execution was and continues to be a judicial process; not a romantic undertaking. It has rules, forms and procedures."
46. In addition, the 1<sup>st</sup> Respondent claimed that an application for execution was filed by the 2<sup>nd</sup> Respondent so the question is, where is that application which is an important document in initiating execution of decree processes?
47. I have set out several facts and the question is, what is the law relating to Advocate/Client bill of costs and governing execution of decree?
48. My commencement point is Section 5 Rule 51 of the [Advocates Remuneration Order](#) on 'General Provision as to taxation.

The Rule provides:

- "(1) Every application for an order for the taxation of an advocate's bill or for the delivery of such a bill and the delivery up of any deeds, documents and papers by an advocate shall be made in the matter of that advocate.
- (2) The certificate of the taxing officer whom any bill has been taxed shall, unless it is set aside or altered by the court, be final as to the amount of the costs covered thereby, and the court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs."



49. The above provision has been interpreted by the courts in several decisions, clarifying the procedure following taxation of advocate/client bill of costs where there is no challenge to retainer and to the certificate of taxation by way of a Reference pursuant to paragraph 11 of the [Advocated Remuneration Order](#).
50. In [Musyoka & Wambua Advocates v Rustam Hira Advocates](#) [2006] eKLR, the court stated as follows:-
- “Section 51 of the Act makes general provisions as to taxation, as the marginal note indicates one of those provisions is that the court has discretion to enter judgment on a certificate of taxation which has not been set aside or altered, where there is no dispute as to retainer. This in my view is a mode of recovery of taxed costs provided by law, in addition to filing of suit.”
- The above was cited in [Tom Ojienda & Associates v Nairobi City County](#) [2022] eKLR.
51. The procedure provided in Section 51 (2) of the [Advocates Acts](#) aids expeditious disposal of cases relating to recovery of advocate/client costs as long as:-
- a. the costs have been taxed by and certified under the hand of the taxing master by a certificate of costs;
  - b. the certificate of costs has not been set aside or stayed or appealed against on a reference filed upon it; and
  - c. there is no dispute on retainer.
52. In such case, judgment is ordinarily entered in the sum in the certificate of costs upon application by the advocates.
53. Further reference was made by the court in the above matter to [Lubulellah & Associates v N. K. Brothers Limited](#) (2014) eKLR where the court observed as follows:
- “the law is very clear that once a taxing master has taxed the costs, issued a certificate of costs and there is no reference against the ruling or there has been a ruling and a determination made and not set aside/and or altered, no other action would be required from the court save to enter judgement.
- An applicant is not required to file suit for the recovery of costs. The certificate of costs is final as to the amounts of the costs and the court would be quite in order to enter judgment in favour of the applicant against the Respondent her for the taxed sum indicated in the certificate of taxation that was issue on 25<sup>th</sup> November 2012.”
54. The procedure stated in the above decision is of public notoriety that after taxation of a bill of costs between advocate and client, a certificate of taxation is issued and where there is no challenge to that taxation on account of retainer or by way of Reference or where a reference is determined and the certificate of taxation is not altered or set aside, that certificate of taxation is final as far as the amount of costs is concerned and therefore the next step is for the applicant to file an application for judgment to be entered in his favour in terms of the certificate of taxation upon which a decree is issued and it is only that decree that can be executed for recovery of the taxed costs.
55. In other words, execution for recovery of costs can only be issued or levied after the certificate of taxation has been adopted by the judge as judgment of the court and a decree issued so that it is the decree of the court, for the costs that is being enforced. Nothing short of that procedure which is not just a procedural technicality curable under Article 159 of the [Constitution](#) .



56. Makau J. as he then was had to say in *Shade Manufacturing & Hotel Limits v Serah Mweni Matuu & 3 Others* (2021) eKLR.

“I find that the Respondent did not make a formal application to the court for the certificate of costs to be converted to a judgment.”

...Accordingly to the above Section 51(2) of the *Advocates Act*, the Respondent ought to have made a formal application for the Ruling of the taxing master to be adopted as a judgment by this court.”

57. Similar holding was made in *Union of Kenya Civil Servants v Kenya County Government Workers Union & Another; KCGWU (client); Mbuvi t/a Katunga Mbuvi & Company Advocates (Adv.)* Misc. Application No. E216 of 2021 [2023] eKLR January 2023 where Jacob Gakeri J observed correctly that:

“so typically, after the certificate of costs dated June 13, 2022 was issued by the Deputy Registrar it was the duty of the Respondent/Advocate to have the same adopted as judgment of the court.

51. By letter dated July 9, 2022 the Respondent/Advocate’s counsel applied for warrants of attachment on the ground that the applicant had failed or refused to comply with the orders dated June 27, 2022, the Respondent’s counsel should have at this point sought the adoption of the certificate of costs as an order of the court for purposes of execution. There is no evidence on record that the requisite application was made...”

58. The learned judge held that the certificate of taxation issued by the Deputy Registrar was not executable in the circumstances of the case, without judgment being sought and entered adopting the said certificate of taxation.

59. The learned judge further found and I agree that the warrants of attachment and proclamation were obtained prematurely before the certificate of costs had been adopted as a judgment of the court for purposes of execution proceedings and that neither a judgment nor a decree that was executable was in place. Furthermore, in that case, a reference challenging the certificate of taxation was still pending determination.

60. In the instant case, just as in the cases I have referred to above, the advocate had his advocate/client bill of costs taxed on 19<sup>th</sup> March 2013. The certificate of taxation was issued but no application for adoption of that certificate of costs as judgment of the court and decree drawn or issued for execution was done.

61. In the circumstances, I have no difficulty in finding and holding that the attempt to ‘assist’ the 2<sup>nd</sup> Respondent execute for recovery of the taxed costs was premature and unprocedural in law as there was no judgment or decree of the court on the taxed costs, capable of being executed.

62. The second aspect of there being an unprocedural and premature attempt to execute the non-existent decree is governed by the provisions of the *Civil Procedure Act* and Rules. The 1<sup>st</sup> Respondent claims and this was in his deposition that he acted on an application for execution upon which he was issued by the court with warrants of attachment and sale then he issued a proclamation of the attached movable properties on 23<sup>rd</sup> April 2023.



63. I have already found and held that a certificate of costs was not an executable legal instrument and was therefore not capable of being executed and therefore no warrants of attachment and sale or proclamation could issue on a bare certificate of costs taxed on 19<sup>th</sup> March 2013 as there was no judgment and decree flowing therefrom to warrant and an application by the 2<sup>nd</sup> Respondent for execution.
64. It follows that the 2<sup>nd</sup> Respondent could not expect the auctioneer to assist them undertake an illegal action of execution. The 2<sup>nd</sup> Respondents are officers of the court and so is the auctioneer. Both are expected to adhere to the law and its due processes. They are not expected to undertake short circuiting of court processes. They are not even lay persons who can be excused in one way or the other.
65. Execution is the process of enforcing a decree and or order by a court of law. Therefore, a party in whose favour a judgment has been rendered/ decree holder is entitled to execute decree against the judgment debtor.
66. Execution of decrees or orders is provided for under Part III of the *Civil Procedure Act* and Order 22 of the *Civil Procedure Rules*. Execution of a decree or order of the court can only be permitted upon an application by the decree holder.
67. Under Section 38 of the *Civil Procedure Act*, a court may on the application of the decree holder order execution of the decree; by delivery of any property specifically decreed; by attachment and sale or by sale without attachment, of any property; by attachment of debts; by arrest and detention in prison of any person; by appointing a receiver; or in such other manner as the nature of the relief granted may require.
68. Under Order 22 Rule 6 of the *Civil Procedure Rules*, which provisions echo Section 38 of the *Civil Procedure Act*, a decree holder may apply to court to execute a decree against a judgment debtor either orally or through written application. However, an oral application for execution of a money decree can only be made by the decree holder at the time of making the judgment prior to making and or preparations of warrants of arrest if the Judgment debtor is within the court precincts.
69. Where the mode of execution is for attachment of immovable or movable property or attachment of debts, the law requires that a written application for execution of decree must be made before warrant of attachment and sale of the property is issued by the court.
70. In the instant case, and at the risk of repeating myself severally out of necessity, there was no judgment or decree capable of being executed. Secondly, there is no application on record for execution of decree, upon which the court could have issued warrants of attachment and sale of the appellant's movable property as proclaimed on 23<sup>rd</sup> April 2023 to recover the taxed costs in favour of the 2<sup>nd</sup> respondent.
71. It follows that the 1<sup>st</sup> Respondent was doing his own things in the impugned proceedings. How did he obtain the warrants of attachment and sale? The court issued the same. Yes but upon which application? And upon which judgment and decree as stipulated under Section 51(2) of the *Advocates Act*?
72. Applications for execution of decree are simple and the Civil Procedure Rules have provided for templates or form under Appendix A, Form 14, on attachment and sale of immovable property as stipulated in Order 22 Rule 6 of the Civil Procedure Rules. In the absence of an application for execution, the warrants of attachment and sale issued to the 1<sup>st</sup> Respondent were illegal and invalid.
73. Consequently, the proclamation dated 23<sup>rd</sup> April 2013 was inconsequential with such illegalities and serious procedural flaws on record which cannot be cured by application of Article 159 of the



Constitution . I find and hold that there was no basis upon which the learned trial magistrate ordered that the 1<sup>st</sup> Respondent was entitled to payment of his charges by the Appellant herein.

74. Neither would I find that the 2<sup>nd</sup> Respondent was liable to settle the Auctioneers charges. The 2<sup>nd</sup> Respondent had not filed any application for judgment to be entered adopting the certificate of taxed costs and decree had not been issued by the court.
75. The 2<sup>nd</sup> Respondent had also not filed any application for execution of decree as there is no such decree or application on record in HC Misc. Civil No. 31 of 2013. The auctioneer is an officer of the court and is expected to know that warrants of attachment and sale can and should only be obtained and a proclamation issued where there is a decree and application for execution of that decree.
76. Having acted so ignorantly and the trial court having ‘aided’ the auctioneer to perpetrate the illegality by issuing warrants of attachment and sale without a decree and application of execution of decree, the appropriate order that this court can make in the circumstances is to set aside the warrants of attachment and sale dated 22<sup>nd</sup> April 2013 and the proclamation dated 23<sup>rd</sup> April 2013 and I proceed to equally set aside the Ruling of 25<sup>th</sup> April 2018 in Civil Misc. Application No. 168 of 2015 and substitute the order allowing the application dated 30<sup>th</sup> June 2015 with an order dismissing the application dated 30<sup>th</sup> June, 2015 and striking out the auctioneer – 1<sup>st</sup> Respondent’s untaxed bill of costs in this matter as the auctioneer is not entitled to any costs.
77. As the 1<sup>st</sup> Respondent could not have proceeded to obtaining warrants of attachment and sale and proclaimed the appellant’s goods, had the court acted diligently in ensuring that there was judgment, decree and application for execution of decree and as the appellant did not delve into the issues that I have delved into in my determination of this appeal, I order that each party shall bear their own costs of the appeal herein and of the application dated 30<sup>th</sup> June 2015.
78. I so order and mark this file as closed.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 28<sup>TH</sup> DAY OF SEPTEMBER, 2023**

**R.E. ABURILI**

**JUDGE**

