



**Nduati v Kioko (Civil Appeal E039 of 2023)  
[2023] KEHC 27290 (KLR) (13 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 27290 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAJIADO  
CIVIL APPEAL E039 OF 2023  
SN MUTUKU, J  
DECEMBER 13, 2023**

**BETWEEN**

**JULIUS PHARES NDUATI ..... APPELLANT**

**AND**

**JAMESON MUSAU KIOKO ..... RESPONDENT**

*(Being an appeal from the Ruling of Hon E. Kagoni PM delivered on 29th June 2023 in CMCC NO E125 of 2021, Julius Phares Nduati – vs- Jameson Musau)*

**JUDGMENT**

**Background**

1. Julius Phares Nduati, the Appellant herein, filed a Plaintiff in CMCC No. E125 of 2021, against the Respondent seeking special damages arising from damages caused to his motor vehicle No. KBN 710W after a collision with the Defendants motor vehicle No. KBP 359W. The Respondent failed to enter appearance and file defence after service of Summons to Enter Appearance. The Appellant requested and obtained a judgment for the claim on 20<sup>th</sup> September 2021. The Appellant commenced execution proceedings for Kshs 249,359.
2. The Respondent filed an application to stay the execution. The said judgment was set aside through a Ruling delivered on 22<sup>nd</sup> September 2021 and the Respondent ordered to pay throw away costs in the some of Kshs 20,000. The Respondent filed another application seeking review of the orders of 22<sup>nd</sup> September 2021. The court ordered, inter alia, that the motor vehicle registration number KBP 359G seized under execution by Betabase Auctioneers be released upon payment of the auctioneer's fees and storage charges.
3. The Respondent filed another application dated 30<sup>th</sup> January 2023 seeking an order that the Appellant be ordered to pay auctioneer's fees and storage charges. The court, in a Ruling delivered on 29<sup>th</sup> June



2023 ruled that the Appellant being the instructing party ought to bear the auctioneers fees and storage charges. It is this ruling that has necessitated this appeal.

### **Memorandum of Appeal**

4. The Appellant has raised the following grounds of Appeal:
  - a. That the Learned Magistrate erred in law and fact in finding that both the Auctioneers fees and storage charges are to be borne by the Appellant.
  - b. That the Learned Magistrate erred in law and in fact in failing to consider the provisions of the Auctioneer's Rules 1997 on who is liable to pay Auctioneer's fees.
  - c. That the Learned Magistrate erred in law and in fact in failing to appreciate that costs follow the event and that having found the judgement to be regular, and awarded throw-away costs to the Appellant, the Respondent herein ought to have settled both the storage charges and the Auctioneer's fees as per the Auctioneers Rules 1996.
  - d. That the Learned Magistrate erred in law and in fact in failing to consider the Appellant's submissions and the authorities cited and thereby arrived at an erroneous conclusion.
5. The appeal was canvassed by way of written submissions.

### **Appellant's submissions**

6. The Appellant filed his submissions dated 12<sup>th</sup> September, 2023 and submitted on two issues. The first issue was whether the learned magistrate erred in law and fact in finding that both the Auctioneer's fees and storage charges are to be borne by the Appellant. He submitted that Rule 7 of the Auctioneers Rules 1997 provides that a judgment debtor shall pay the charges of the auctioneer unless:
  - a. that the debtor cannot be found.
  - b. or he has no goods upon which execution can be levied, or
  - c. the sale proceeds are insufficient to cover the charges in which cases the creditor shall pay the charges or the deficiency thereof.
7. The Appellant cited various decisions to support his case including Mombasa Civil 335 of 2001 *E.J Austin & 2others -vs- Chon Jeum Suk Kim* [2017] eKLR where the court stated that:

“The law as embodied in the rules is that it is the judgement debtor to pay the auctioneer costs unless the three conditions set under the rule were met. In this case, none of the conditions were met hence it remains that it is the judgement debtor to pay.”
8. He also on *Kenya Power & Lighting Company Ltd -vs- David Obare Omwonyo t/a Omwonyo Auctioneers* [2019] eKLR, where it was stated that:

“Whereas it is correct that Rule 7 of the *Auctioneers Rules, 1997* places the burden of payment of auctioneer's charges upon the judgement debtor and does not make provision for exceptions, I am of the view that it would be unjust to expect a defendant to do so in certain circumstances. This case is a classic example of such cases. In this case the judgement giving rise to the auctioneer's charges was set aside on account of irregular service. That judgement was therefore annulled the moment the defendant, now the appellant, met the conditions that were imposed by the court for setting aside the judgement. It would



therefore be unjust to, for now, order the appellant to meet the costs of those proceedings given that no blame was placed upon it for the irregular service and it is not yet possible to determine whether the case against the appellant will succeed.”

9. The second issue for determination was whether the trial court considered the law. It was submitted that the court failed to consider the provisions of the *Auctioneer's Rules 1997*. That further Rule 55 prescribes the fees and disbursements payable to an auctioneer. That failure by the trial court to use these provisions and relying on its discretion was a failure on its part. That from the foregoing the appeal should be allowed.

### **Respondent's submissions**

10. The Respondents filed his submissions dated 25<sup>th</sup> September, 2023. He has submitted that Rule 7 of the *Auctioneers Rules* 1997 provides for who shall settle the auctioneer's fees. That, however, in the present scenario the debtor had goods upon which execution could be levied but the attached Motor Vehicle upon the setting aside of the ex-parte judgement, staying the execution and on order for release of the Motor vehicle could not be sold to enable the auctioneer to recover his fees plus storage charges. That no sale took place from orders of the Honourable Court.
11. The Respondent relied on the following authorities: HC ELRC Miscellaneous Case No. E072 of 2021 *Endmor steel Millers Limited -vs- Vincent Ondari Onyang'o & Geoffrey Kange'the t/a Kangethe Enterprises Auctioneers*; High Court Misc App No 47 of 2017 *Francis Mwatha Macharia t/a Freeman Auctioneers -vs- Tata Africa Holdings (k) Ltd* (2019) eKLR and HC Misc App No 80 of 2018 *Kenya Oil Company Ltd -vs- Joram H. Kariuki t/a Moran Auctioneers* (2020) eKLR, where the courts were of the view that:

“The Auctioneer could have recovered his 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 instruction given out.”
12. He submitted that, by the court setting aside the ex-parte judgment, there was no longer any judgment which could enable the Appellant to proceed with execution proceedings. Further, it is yet to be determined who the successful party is upon inter-parte hearing which would give effect to provisions of section 27(1) of the *Civil Procedure Act*. That no where did the trial court make a finding that the interlocutory judgement was regular. That had the court found that the same was regular it would not have set it aside. That per the wording of section 27 of the *Civil Procedure Act* the court is granted discretion to award costs and therefore the same is not cast on stone.
13. It was submitted that the throw away costs are only meant to cater for substantial indemnity costs to reflect the time wasted and would be duplicated when the trial is rescheduled.

### **Determination**

14. I have considered the record of the lower court, the memorandum of appeal and the grounds relied on in this appeal. I have understood the case in the lower court. It is clear to me that the court did not specify which party was to pay the auctioneers fees and motor vehicle storage charges when it delivered its Ruling on 22<sup>nd</sup> December 2022 necessitating another application whose ruling that the Appellant ought to pay the fees and charges gave rise to this appeal.
15. Rule 7 of the *Auctioneers Rules* 1997 provides that: 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,

In which cases the creditor shall pay the charges or the deficiency thereof.

16. The lower court in addressing the issue as to who should pay auctioneers fees and storage charges reasoned, after citing cases supporting that reasoning, that the instructing party. The court reasoned that an auctioneer must be moved by instructions from a party to a suit where there is no sale of the seized property from which the auctioneer could recover his fees.
17. I agree with the lower court that the Betabase Auctioneers were instructed by the Appellant. The only divergence is that the Appellant was in possession of a judgment in his favour. He moved to execute it. Execution of a judgment is a legal process and the Appellant cannot be blamed for instructing the auctioneers to attach and sale the motor vehicle. He was acting on the strength of a legal judgment which was later set aside. The Appellant cannot be faulted for that. The setting aside of the judgment resulted after the Respondent, the judgment debtor at the time moved the court to set the judgment aside.

18. Rule 7 of the [Auctioneers Rules](#) is clear in its provisions that:

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,

In which cases the creditor shall pay the charges or the deficiency thereof.

19. At all material times when the motor vehicle in question was attached, the Respondent was the judgment debtor. The law required him as such to pay the charges as provided under Rule 7 above. This changed after the judgment was set aside and the lower court directed that the Appellant pays the auctioneers charges. In my view, the Appellant is being punished for no mistakes on his part. Justice would demand that the auctioneers fees and storage charges be met by the Respondent.
20. Consequently, I find in favour of the Appellant that the trial magistrate went into error in ordering the Appellant to pay auctioneers fees and storage charges. I allow the Appeal, set aside the Ruling Delivered on 29<sup>th</sup> June 2023 in Kajiado CMCC No. E125 of 2021 and order that the Respondent is liable to pay auctioneers fees and storage charges of motor vehicle registration number KBP 359G.
21. Costs of this Appeal shall be paid by the Respondent.
22. Orders shall issue accordingly.

**DATED, SIGNED AND DELIVERED THIS 13<sup>TH</sup> DAY OF DECEMBER 2023.**

**S. N. MUTUKU**

**JUDGE**

