



Vincent Imbwaka Bukhala v Direct O Auctioneers (Miscellaneous Application 12 of 2024) [2024] KEHC 9751 (KLR) (29 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9751 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS APPLICATION 12 OF 2024**

**HM NYAGA, J
JULY 29, 2024**

BETWEEN

VINCENT IMBWAKA BUKHALA APPLICANT

AND

DIRECT O AUCTIONEERS RESPONDENT

RULING

1. The Application before me is the one dated 25th January, 2024, brought under Sections 1A, 1B and 3A of the Civil Procedure Act, Section 11 of the Advocates Remuneration Order (1962), Orders 51 and 21 Rule 9A of the Civil Procedure Rules, Article 159(2) of the Constitution.
2. The Application seeks the following orders;
 - i. Spent
 - ii. Spent
 - iii. That the decision of the Taxing Officer as evidenced in the Ruling dated 1st December 2023 with respect to items 4 to 16 in the Bill of Costs dated 31st May 2023 be set aside and taxed afresh by this Honourable Court with input from both parties.
 - iv. That the costs of the Application be provided for.
3. The Application is propped by the grounds set out on its face and is supported by the Affidavit of one Ann Kagira, Advocate.
4. In a nutshell, the Applicant states that the Respondent served him with their party and party Bill of Costs dated 31st May 2023. That the said Bill is excessive and without justification. That the Applicant had opposed items 4 to 16 of the Bills but the Honourable Court failed to tax the Bill on merits, failed



to be bound by the law of precedent and erred in principle in taxing the Bill at Kshs. 173,925/= which is an exorbitant and punitive award for costs.

5. The Respondent opposed the Applicant through a Replying Affidavit sworn on 8th February 2024.
6. In a nutshell, the Respondent avers that under instructions its advocate filed an Auctioneer Bill of Costs dated 21st May, 2023. That the same was drawn to scale and was duly defended. It is further averred that the bill as drawn is on scale and the trial court's Ruling was sound, legal and lawful and therefore there is no reason to disturb the said Ruling.
7. Parties were directed to file and serve submissions but at the time of writing this Ruling both had not complied with those directions. I will therefore decide the matter on the material before me, as contained in the Application and Replying Affidavit.
8. This is a matter involving an auctioneers costs arising out of CMCC E884 of 2021.
9. From the Bill of Costs drawn, it is said to have been filed under the Advocates Act. The Applicant has also brought this Application under the Advocates' Remuneration Order.
10. In my view, Auctioneers Bill of Costs are brought under the Auctioneers Act and not the Advocates Act. No person who is not qualified as an advocate can purport to charge fees under the Advocates Act.
11. It is apparent that the Ruling in question was based on the Auctioneers Act and not the Advocates Act. Thus, the matter before me is not a reference under the Advocates Act but an appeal under the Auctioneers Act and Rules. Rule 55 of the Auctioneers Rules provide that;

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.
- (3) In any other case where a dispute arises as to the amount of fees payable to an auctioneer a magistrate or the Board may, on the application of any party to the dispute, assess the fees payable.
- (4) An appeal from a decision of a registrar or a magistrate or the Board under subrules (2) and (3) shall be to a judge in chambers.



(5) The memorandum of appeal, by way of chamber summons setting out the grounds of the appeal, shall be filed within 7 days of the decision of the registrar or magistrate.”

12. The Rules provide that the appeal be made by way of Chamber Summons, within 7 days of the decision of the Registrar or Magistrate. However, the Application was brought by way of Notice of Motion.
13. Despite the above, and taking into account the deliberate provisions of Article 159 of *the Constitution* which enjoin this court to deliver substantive justice over technical or procedural issues, I will proceed to deal with the matter. That said, then the court has the duty of looking at the Application as an Appeal and determine whether the decision of the lower court was erroneous as alluded to by the Applicant.
14. There is no dispute that the Respondent carried out instructions in the said case in the lower court. Although not clearly stated by the parties, it emerges from the Ruling by the Learned Magistrate that there was no sale conducted after the attachment/proclamation.
15. The Applicant is aggrieved by the decision of the learned magistrate to award items 4 to 16, which are termed to be excessive and unjustified.
16. Auctioneers’ fees are chargeable under Part II of the Fourth Schedule to the Act. When it comes to attachment distraint, or repossession, the auctioneer has to align his/her bill with the provisions of the schedule.
17. There is indeed an emerging trend where Auctioneers raise outrageous bills, and at times, the same may even exceed the value of goods attached. The consequences of this have been that some attachments do not benefit anyone other than the auctioneer himself. That cannot be the purpose of the Act, which has clearly set out the fees payable. It behoves auctioneers to adhere to the Act. An auctioneer has a duty to draw a bill that is reasonable, given the circumstances of each case he is handling. Looking at this bill it is evident that it was inordinately high.
18. Of course, at times, there are unforeseen situations where an auctioneer expends extra resources in terms of time or money. In such a case, it is upon the auctioneer in question to present proof of the same. Lumping outrageous figures without any explanation cannot be the way out. If any of the items charged cannot be justified, then they are to be taxed off.
19. It is trite law that this court will not interfere with the taxing officer’s decision on taxation unless it is shown that the said officer proceeded on wrong principles or took account of irrelevant factors or the amount taxed is inordinately high. In this regard reference is made to *Co-operative Bank Ltd. vs Jeofrick Munde T/A Kimu Auctioneers (2019) eKLR* where the Court held that;

“The assessment of fees is a matter of the taxing officer’s discretion and this court will not intervene unless there is an error of principle or that the taxing officer took into account irrelevant facts or failed to take into account relevant facts or on the whole the amount is inordinately high or low. In this case, the trial magistrate did not set out the basis for assessment or taxation of the costs. In the circumstances, I set aside the award of taxed costs.”
20. With the above in mind, I will not look at the Bill as drawn to ascertain if it was drawn to scale.
21. The fees chargeable under paragraph 1,2 and 3 are fixed, without room to manoeuvre. Items 1,2, and 3 and were drawn to scale and correctly allowed. I uphold them.



22. Items 4 and 5 were not justified in any way. It is difficult to comprehend what these items entail. Do investigations and labour qualify as actual expenses, disbursements or what? Is there a difference between the two items to warrant them to be charged under different heads?
23. In my view the said items are not provided for by the Act and if they were actually incurred they ought to have been sufficiently explained and proved. In the absence of such explanation or proof, the same are taxed off entirely
24. In regard to item 6, the fee chargeable under it is not based on the decretal sum but on the value of goods attached. This was underlined by the Court of Appeal in *NIC Bank Ltd vs S. K. Ndegwa Auctioneer* (2005) eKLR, a decision that the learned magistrate noted and referred to. It was held that;

“Mr. Namachanja, however, contended, quite correctly in our view, that paragraph 4 of Part II of the Fourth Schedule does not indicate on what value the specified percentages are to be based. He asked rhetorically:

“what value are we talking about? the value of the property attached? or the value in the proclamation? or the value of the decretal sum?”.

Section 30 (f) of the *Auctioneers Act* authorizes the Chief Justice to make rules to provide for, inter alia, the remuneration of licensed auctioneers. Rule 55 (1) of the Auctioneers Rules merely provides that the fees payable to the auctioneer are the fees set out in the Fourth Schedule.

The respondent based his fees on the decretal sum and the Deputy Registrar assessed the fees on the basis of the decretal sum. The wording of paragraph 4 of Part II of the Fourth Schedule does not say that the percentages stated apply to the decretal amount. It would be unjust to base the fee on attachment on the decretal amount because in some cases, the value of the attached goods may be many times less than the decretal amount shown in the warrant of attachment and sale.

The values indicated in paragraph 4 of Part II of the Fourth Schedule on the basis of which the fees for attachment are assessed are no doubt obscure. Nevertheless, it is a canon of the construction of statutes, that, if possible a statute should be construed in a manner which makes it operative and that where a statutory provision has several meanings even though there is little to choose between them, the courts must decide what meaning the statute is to bear, rather than reject the provision as a nullity. (See paragraph 582 Halsbury’s laws of England Vol. 36, 3rd Edition).

The main object of paragraph 4 is clear. It is intended to provide values on the basis of which the auctioneer’s charges should be assessed. We think that it is reasonable that the auctioneer’s charges for attachment should be based on the value of the goods attached and not on the decretal sum. It is to be remembered that the auctioneer is to be remunerated for the actual work done and not on the basis of what he could have done had he attached goods equivalent in value to the decretal sum. That is the meaning we give to paragraph 4 of Part II of the Fourth Schedule in order to make it operative.”

25. Item 6 was correctly taxed off for lack of the values of the goods attached. It was the duty of the auctioneer to have given a reasonable value of the property he attached to enable the court assess this item.



26. For item 7, here was no explanation to justify it. Where was the proclamation done? These are expenses or disbursements that should have been justified with proof. In the absence of such, then the same are taxed off entirely.
27. Items 8 and 9 are taxed off for lack of proof.
28. Item 10 was reasonable and I allow it as taxed by the learned magistrate.
29. Item 12, 13, 14 and 15 are reasonable and are allowed.
30. As regards item 16, the advocate ought to have drawn his fees under the *Advocates Act*, and not include it in the Auctioneers Bill of Costs.
31. Having looked at Bill and take into account of the above factors, I am of the view that the Auctioneers Bill of costs was drawn without sufficient information being given to the court. This was the duty of the Auctioneer to do so. Having failed to justify some items in the Bill, then it could only have led to the same being taxed off completely.
32. So what orders should the court make?
33. Having found the above, I set aside the Ruling by the learned magistrate and substitute it with a taxation of the Bill as follows;
 - a. Items 1, 2 and 3 are taxed at a total of Kshs. 9,000/=
 - b. Item 10 is allowed at Kshs. 10,000/=
 - c. Items 12, 13, 14 and 15 are allowed at a total of Kshs. 4,925/=.
 - d. Item 6 is remitted back to the Deputy Registrar/Magistrate to be retaxed and the same to be based on the value of the property attached, not the decretal sum.

If the value cannot be ascertained, the same is to be based on the reasonable valuation of the same by a reputable valuer, to be agreed between the parties. The costs of the valuation to be added as a disbursement by the Auctioneer.
 - e. For avoidance of doubt, item 6 is to be assessed at one rate, depending on the amount and not graduated as drawn.
 - f. All other items are taxed off entirely.
 - g. Each party shall bear its own costs of this appeal as the Appellant was only party successful.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 29TH DAY OF JULY, 2024.

H. M. NYAGA,

JUDGE.

In the presence of;

Court Assistant Jeniffer

Ms Juma for Respondent

No appearance for Respondent

