



REPUBLIC OF KENYA



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**Rafiki Microfinance Bank Limited v Omonde t/a Dimonde Agencies
and Auctioneer & another (Miscellaneous Application E074 of 2023)
[2024] KEHC 11455 (KLR) (30 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11455 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
MISCELLANEOUS APPLICATION E074 OF 2023
DK KEMEL, J
SEPTEMBER 30, 2024**

BETWEEN

RAFIKI MICROFINANCE BANK LIMITED APPELLANT

AND

**DICKSON OMONDE T/A DIMONDE AGENCIES AND
AUCTIONEER 1ST RESPONDENT**

ANNE KIVIU MUTISYA MUTHANYA 2ND RESPONDENT

*(Being an appeal against the Ruling of CAS Mutai-SPM Bungoma
dated and delivered on the 18th October 2022 in Bungoma Chief
Magistrate's Court Misc. Civil Application No. 584 of 2021)*

RULING

1. This is an appeal by the Appellant brought by the way of Chamber Summons dated 28th August 2023 filed on 5th September 2023, seeking to set aside the ruling and order of the Taxing Master delivered on 18th October 2022 and the extracted certificate of costs dated 27th October 2022. The Appellant as well prayed that this Court be pleased to refer the matter back to a different Taxing Master to dispense with the same and that the Appellant be granted costs of the application.
2. The Chamber Summons was filed in accordance with Rule 55 (3) & (4) of the Auctioneers Rules 1997, Section 1A, 1B, 3A, 75, 79G and 95 of the *Civil Procedure Act* CAP 21, Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules 2010, and Article 50 of *the Constitution* of Kenya.
3. The appeal is supported by the grounds premised on the face of the Chamber Summons and the annexed affidavit of Daniel Ogola, Assistant Manager-Debt Recovery Unit of the Appellant, wherein he deponed inter alia; that the Taxing Master erred in law and in fact when he proceeded to tax the 1st



Respondent's Bill of Costs dated 4th August 2022 and awarding them a sum of Kshs. 194,654.00/= which was beyond the reasonable limits and manifestly excessive; that the Taxing Master proceeded to tax the 1st Respondent's Bill of Costs dated 4th August 2022 without considering the items No. 4 and 6 ought to have been taxed off in their entirety vide the subject ruling in grounds that the said award was erroneously drawn, inordinately high, manifestly excessive and grossly inflated; that the Taxing Master misdirected himself and acted contrary to the established dints on taxation as set out in the case of Truth Justice & Reconciliation Commission vs Chief Justice of the Republic of Kenya & Another (2014) eKLR.

4. Opposing the reference, the 1st Respondent swore a replying affidavit on 28th June 2024 vide Dickson Omonde, wherein he averred inter alia: that the contents of the Appellant's Chamber Summons and Supporting Affidavit dated 28th August 2023 and filed on 5th September 2023 do not dispute that the 1st Respondent was instructed by the Appellant to recover money from its several defaulters and that instructions letters were duly issued as per annexure marked D.O.2; that the Appellant failed to settle the fees arising from the repossession exercise prompting the 1st Respondent to move to Court pursuant to Rule 55(3) of the Auctioneers Rules to have the Taxing Master determine what was due to it; that the reference before this Court is an afterthought and that the Appellant has failed to point out the errors in principal; that the Appellant's reference fails to appreciate the fact that the Auctioneers fees is charged based on the value of the property under attachment thus its assertions lack legal foundation and justification.
5. Vide directions issued on 5th February 2024, parties were ordered to canvass this appeal by way of written submissions. Upon perusal of the Court record, only the 1st Respondent complied with this directive.
6. I have duly considered the appeal before me. A synopsis of that rule shows that the fees payable to an auctioneer for the attachment, repossession and sale of movable and immovable property shall be charged in accordance with the Auctioneers Rules, 1997. Rule 55 of the Auctioneer's Rules provides as follows:

“ 5 where a dispute arises as to the amount of fees payable to an auctioneer –
(2) 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

4. An appeal from a decision of a registrar or a magistrate or Board under sub rules (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”
7. It is clear from the above provision and in particular Rule 55(5) that an appeal from a decision of a Registrar or a Magistrate or the Board under sub-rules (2) and (3) shall be to a judge in chambers and that the Memorandum of Appeal, by way of Chamber Summons setting the grounds of the appeal shall be filed within 7 days of the decision of the Registrar or Magistrate. This provision clearly prescribes the procedure to be followed where one challenges the decision of the Taxing Officer. That is, the only prescribed way is through a memorandum of appeal by way of Chambers Summons. This



procedure was termed mandatory by the Court in *Ezekiel Kiminza t/a Auto Land Auctioneers v Mistry Valji Naran Mulji* [2017] eKLR.

8. Subject to the Order of this Court issued on 5th February 2024, the Appellant was granted leave to lodge its Reference against the Taxing Master's decision out of time. This simply means that the appeal by way of Chamber Summons before this Court is properly filed rendering the same competent for this Court to deliberate on it.
9. The only issue for determination is whether I should set aside the ruling delivered on 18th October 2022 by the Taxing Master.
10. On setting aside the Taxing Officer's assessment, case-law is the first point of reference. It was held in the case of *Oscar Otieno Odongo T/A Odongo Investment Auctioneers versus Sukari Industries Limited* [2019] eKLR that the Taxing Officer's assessment or taxation can only be interfered with when it is demonstrable that the decision was based on an error of principle or the fee awarded was manifestly high as to justify an interference.
11. I have perused the availed grounds, supporting affidavit sworn by the Assistant Manager-Debt Recovery Unit of the Appellant and the ruling of the Taxing Master, the subject of this Reference. The core issue of the Appellant is the fact that the Taxing Master awarded the 1st Respondent costs beyond reasonable limits thus manifestly excessive.
12. Upon perusal of the Court record, it is noted that the Appellant herein vide a correspondence dated 28th February 2018, issued instructions to the 1st Respondent for repossession of motor vehicle registration No. KCB 223Q to recover a loan balance of Kshs. 684,938.52/=. The enclosed letter of instruction was duly completed and executed. The 1st Respondent was instructed to expeditiously effect the instruction and deliver the repossessed motor vehicle to Tango Storage Yard. The same is marked as marked D.O.2. Subsequently, the Appellant agreed to pay the 1st Respondent's charges as per fees agreed/as specified in the Auctioneers Rules.
13. At this juncture, it is essential to note that only a licensed auctioneer can be used to recover outstanding debt. Failure to do so, the debtor shall have valid grounds to pursue a Court action against the secured creditor for wrongful disposal of the security property, as the conduct of seizure and sale of security assets falls under auctioneers' business as stipulated under the *Auctioneers Act* of Kenya and it is unlawful for a person other than a licensed auctioneer to engage in auctioneering business.
14. The *Auctioneers Act* was enacted to, "consolidate and amend the law relating to auctioneers, to provide for licensing and regulation of the business and practice of auctioneers, and for connected purposes." Under Section 2(1) of the Act, "an auctioneer" means a person licensed under Section 10". Section 10 of the Act provides for who may be eligible for a licence while Section 12 provides for the manner of application for a licence to the Auctioneers Licensing Board ("the Board") established under section 3 of the Act. The Board's functions include licensing and regulating the business and practice of auctioneers and supervision and discipline of auctioneers.
15. The nature of the business of an auctioneer is set out in Section 2(3) of the *Auctioneers Act* which deems any person who does the following to be an auctioneer:
 - a. attaches for sale any movable or immovable property in execution of a Court order made pursuant to the provisions of any written law or contract;
 - b. sells or offers for sale any movable or immovable property or any interest therein by auction or by any other mode of sale by competition;



- c. levies distress for rent or distrains under the provisions of any written law;
 - d. carries out evictions under an order of a Court;
 - e. repossesses goods from any person pursuant to the provisions of any written law or contract.
16. From my perusal of the Court record, it is evident that the 1st Respondent herein was a licensed auctioneer but it is imperative to also note that a secured creditor can hire a licensed auctioneer who practices in his own name or in a firm of auctioneers and provides services to secured creditors. Once the secured creditor has settled on hiring a particular auctioneer, the secured creditor shall issue a letter of instruction to the auctioneer in the statutory form under the [Auctioneers Act](#).
17. Therefore, in drawing a bill of costs, the auctioneer is confined to only what is provided for in the Auctioneers Rules. The actual fees due to an auctioneer are provided for in Part II of the Fourth Schedule. The impugned bill of costs was drawn as follows: -



No.	Particulars	Amount Charged	Amount Taxed
1.	Upon receipt of instructions	1,000	
2.	Fees before repossession	4,000	
3.	Taking Inventory	6,300	
4.	Auctioneers commission-amount Kshs. 684,938.52/=	39,246.926	
5.	Insurance	Nil	
6.	Transport upon proclamation to Nairobi-Kirinyaga road	190,433.40	
7.	Security	Nil	
8.	Storage charges	Nil	
9.	Sale commission	Nil	
10.	Other disbursements- printing, accommodation, food	3,400	
11.	Filing- a) Bill of costs b) Notice of appointment c) Submissions d) Advocates fees/Costs	325 75 75	
12.	Process server fees	10,000	
13.	Investigation- Bungoma-Kisumu County	8,800	
14.	V.A.T	Nil	
	Total	263,654.92	
No.	Particulars	Amount Charged	Amount Taxed



15.	Upon receipt of instructions	1,000	
16.	Fees before repossession	4,000	
17.	Taking Inventory	6,300	
18.	Auctioneers commission-amount Kshs. 684,938.52/=	39,246.926	
19.	Insurance	Nil	
20.	Transport upon proclamation to Nairobi-Kirinyaga road	190,433.40	
21.	Security	Nil	
22.	Storage charges	Nil	
23.	Sale commission	Nil	
24.	Other disbursements- printing, accommodation, food	3,400	
25.	Filing- a) Bill of costs b) Notice of appointment c) Submissions d) Advocates fees/Costs	325 75 75	
26.	Process server fees	10,000	
27.	Investigation- Bungoma-Kisumu County	8,800	
28.	V.A.T	Nil	
	Total	263,654.92	



18. The manner in which an auctioneer's charges are assessed was settled by the Court of Appeal in the case of *National Industrial Credit Bank Limited v S. K. Ndegwa Auctioneer* [2005] eKLR where the Court held: -

“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 construction of statutes, that if possible a statute should be construed in a manner which makes it operative and that where a statutory 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 auctioneers 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. This is the meaning we give to paragraph 4 of Part II of the Fourth Schedule in order to make it operative.....”

19. That aside, just as the law relating to taxation, the segments of the bill of costs as pleaded must be assessed by the taxing master. The bill of costs is never read and granted as a whole without giving reasons for each of the items upon reliance of the *Auctioneers Act* and Rules. Clearly, in this case the Taxing Master never gave reasons for the decision of granting the application as prayed being the hallmark of good administration of justice. Indeed, to fail to give reasons in any ruling or judgment threatens or infringes the fundamentals requirement of fairness. I consider reasons as the link between the decision and the mind of the decision maker. As stated in the case of *Flannery v Halifax Estate Agencies Ltd* (2000) 1 W.L.R. 337 at 381, Henry LJ stated that “The duty is a function of due process, and therefore justice.” Constitutional justice imposes a requirement of procedural fairness and consequentially this necessitates a duty to give reasons in the very essence of arbitrariness as one's status could be redefined without adequate explanation as to why this was done. Secrecy creates suspicion, justly or unjustly. This secrecy may also be described as the hallmark of inefficient and corrupt administration. Reasons must therefore be disclosed. Besides, the giving of good reasons would inevitably earn respect for the decision maker. Further in *R. v Civil Service Appeal Board, exp. Cunningham* (1991) 4 All E.R 310. “There is a principle of natural justice that a public law authority should always or even usually give reasons for decision. The giving of reasons is necessary to ensure fairness.”
20. In the matter before this Court, all the Appellant's complaints and criticism of the Taxing Master is on what was done to the application on assessment of auctioneer's bill of costs presented by the 1st Respondent to warrant an award that is manifestly excessive. Under the sub-heading of the bill of costs, the catch word include assessment on the question referred to the Taxing Master. There may be a good



reason for the Court to grant the application as prayed but to the aggrieved party who intends to appeal or review, is left in a precarious situation in absence of the reasons for the decision.

21. More fundamental to this Court however, is the proposed quantum of Kshs. 263,654.92/= stated to have been incurred by the auctioneer. I am quite clear in my mind that the Taxing Master had a duty to give considerable thought on the evidence in support of taxing the bill of costs at Kshs. 194,654.00/=. It is noteworthy that in the instant case there exists no means of ascertaining the rationality of the decision in absence of the reasons the taxing master used to arrive at a conclusion that the bill of costs should be granted as drawn. That decision on costs was so important to the Appellant because it deals with a substantial money decree capable of being enforced and executed as a judgment of the Court. It is therefore well entrenched that any decision by a judicial officer must be such that it enables both the winner and the aggrieved party to understand the reasons for the decision in sufficient details. It was therefore quite erroneous for the Taxing Master to fail to give reasons for his decision. It was strange for the Taxing Master to just order that the bill is assessed at Kshs. 194,654.00/=. The Taxing Master ought to have gone item by item so as to give credence to his determination. Clearly, the decision by the Taxing Master was arrived at in error and must be interfered with.
22. The sum total of the foregoing observations is that the ruling of the learned Taxing Master cannot be sustained in law. The result is that the Appellant's appeal is allowed. As far as the bill of costs is concerned, it is only fair that it be remitted to another Taxing Master for assessment and determination. The costs of the appeal are awarded to the Appellant.

It so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 30TH DAY OF SEPTEMBER 2024.

D. KEMEI

JUDGE

In the presence of:

Macharia for Appellant

Oriko for Otsyula for 1st Respondent

No appearance for 2nd Respondent

Kizito Court Assistant

