



**P. M Gachie t/a Regent Auctioneers v Itoga Investments Holdings
Ltd & another (Miscellaneous Application E392 of 2021)
[2023] KEHC 1596 (KLR) (Commercial and Tax) (17 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1596 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E392 OF 2021
DO CHEPKWONY, J
FEBRUARY 17, 2023**

BETWEEN

P. M GACHIE T/A REGENT AUCTIONEERS AUCTIONEER

AND

**ITOGA INVESTMENTS HOLDINGS LTD 1ST RESPONDENT
THE COMPANY FOR HABITAT AND HOUSING IN AFRICA (SHELTER
AFRIQUE) 2ND RESPONDENT**

RULING

1. This ruling is in respect of a Chamber Summons application dated January 19, 2022 filed by the 1st Respondent brought pursuant to the provisions of Rule 55(5) of the [Auctioneers Rules, 1997](#). The application seeks for the following orders: -
 - a. That this Honourable Court be pleased to set aside the determination and award made by the Deputy Registrar on January 12, 2022 on the Bill of costs dated May 23, 2021 and consequential orders flowing therefrom.
 - b. That this Honourable Court be pleased to re-assess the Bill of costs herein dated May 23, 2021 and substitute the award made by the Deputy Registrar on January 12, 2022 in respect thereof with such decision as the justice of the case may require taking into account the evidence placed before the court by the parties and their respective submissions.
 - c. That costs of this appeal be provided for.
2. The application is premised on the grounds on the face of the application. In summary, the grounds that have been relied upon in support of the application are that; -



- a. The learned Deputy Registrar erred in law and in fact in finding that the Applicant who had filed the Bill of costs is the same person as Regent Auctioneers who had been instructed by the 2nd Respondent where there was no evidence to support that finding.
 - b. The learned Deputy Registrar erred in law and in fact in not finding that the notices issued to the 1st Respondent herein were invalid as they were signed by a person who is not a licensed auctioneer and demanded moneys that were not secured by the mortgage as a consequence of which the auctioneer was not entitled to charges.
 - c. The learned Deputy Registrar erred in law and in fact in basing the whole award on the 4th schedule without considering the provisions of Rule 55(1) of the *Auctioneers Rules, 1997* which provides for an alternative basis of assessing the charges.
 - d. The learned Deputy Registrar erred in law and in fact in failing to consider that in this case there was a contract in place for remuneration which had been agreed upon and which ousted the application of 4th Schedule in the assessment of charges payable in accordance with Rule 55(1) of the *Auctioneers Rules, 1997*.
 - e. The learned Deputy Registrar erred in law and in fact and should have considered that under the remuneration contract only a reimbursement of direct costs was payable as the sale process was stopped by the court as contemplated in the contract.
 - f. The learned Deputy Registrar erred in law and in fact in failing to tax the Bill of Costs in accordance with the order of the High Court issued on October 24, 2019 that ordered for the payment of the Auctioneers costs associated with auction' and instead taxed it for the entire costs of auctioneers services thereby arriving at the wrong conclusion.
 - i. The Deputy Registrar failed to consider the totality of the materials placed before her and arrived at the wrong conclusion particularly with respect to Item No. 3 of the Bill of Costs on the issue of commission charged.
3. In objection to the application, the 1st Respondent filed a Replying affidavit sworn by Peter M. Gachie dated June 16, 2022. He deposed that the failure by the Appellant to raise a Preliminary Objection challenging locus standi of the Auctioneers was indeed an afterthought as the court duly noted that the Auctioneer was trading as Regent Auctioneers as evidenced by the Auctioneers Licence produced as "PMG 1".
 4. In his affidavit, Peter Gachie deposed that the learned Deputy Registrar pronounced herself in accordance with the law and the finding was within her discretion. He continues to state that the Applicant is a contemptuous litigant who has failed to obey the court order dated October 24, 2019 that culminated in the filing of the Auctioneers Bill of cost. Lastly, he has sought this Court to dismiss the application with cost.

Analysis and Determination

5. I have carefully considered the application and the response thereof alongside the written submissions and cited authorities by both parties. The Appellant's submissions are dated June 30, 2022 while those of the 1st Respondent are dated July 20, 2022. I have carefully read through the submissions and it is my considered view that the issues for determination are as follows;
 - a. Whether the Applicant's application dated January 19, 2022 has any merit,



- b. Whether the Taxing Master taxed the Applicant's Bill of Costs in line with the Auctioneers Rules.
6. On the first issue of whether the application is merited, it was submitted by the Appellant that the instructions were issued to M/S Regent Auctioneers vide a letter dated August 19, 2019 and nothing was presented to the Taxing Master to show that Regent Auctioneers was the same person who had presented the Bill of Costs for taxation.
 7. I have perused the Auctioneers Licence attached to the Bill of Costs and it shows that the licenced auctioneer is Peter Muchune Gachie, trading as Regent Auctioneers. However, the Certificate of Incorporation is for a Limited Liability Company named as Regent Auctioneers (N) Limited which is a different entity from the applicant who had presented the Bill of Costs or Regent Auctioneers who was instructed to sell the property.
 8. The Appellant has also submitted that nothing was presented to show the legal connection between Regent Auctioneers who was instructed to sell the property and P.M Gachie T/A Regent Auctioneers. This would be evidence such as a Certificate of Registration of Business Names to show that P. M Gachie was the registered proprietor of a firm known as 'Regent Auctioneers'.
 9. Upon perusal of the court record it clearly shows that there is a letter of instructions dated August 19, 2019, which was issued to Regent Auctioneers. The said letter clearly outlines the terms of payment for carrying out the instructions therein. The Auctioneer/Respondent proceeded to execute the instructions as evidenced in this letter dated August 19, 2019. After careful scrutiny of the documents, it is my considered view that the instructions were carried out by the firm that was instructed by the Appellant.
 10. On the second issue of whether the Taxing Master taxed the applicant's Bill of costs in line with the *Auctioneers Rules*. On this issue, this Court is guided by the law as provided for under Rule 55 of the *Auctioneers Rules, 1997* which states as follows:
 - a. 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.
 - b. Where a dispute arises as to the amount of fees payable to an auctioneer—
 - i. In proceedings before the High Court; or
 - ii. 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 (emphasis added).
 - c. 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.
 - d. 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.
 - e. 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.



11. Also, in the case of *First American Bank v Shah & Others* (Nairobi High Court Civil Case No. 2255 of 2000), the court held that;

“The Court cannot interfere with the taxing master’s decision on taxation unless it is known that either the decision was based on error of principle or the fee awarded was manifestly excessive as to justify an interference that it was based on an error of principles”.

12. Therefore, going by the wording of Rule 55(1) of the Auctioneers Rules and the Fourth Schedule thereto, the fees chargeable for Item 1 and 2 in the Bill of Cost was drawn to scale. In regard to Item 3, the Fourth Schedule of the *Rules* provides that

“where requisite notices are served and sale is stayed or postponed, the fees chargeable should be half of fees to which auctioneer would have been entitled to after sale plus expenses”.

It is my humble view that the Item 3 in the Bill of Costs was drawn to scale.

13. I have also glanced through Item 4 and 5 of the said Bill of Costs and find that the same have been proved by the attached invoice relating to the advertisement.

14. In line with the aforementioned decision in *First American Bank vs Shah & Others*, I am convinced that the finding by the learned Taxing Master on January 12, 2022 was within the law, hence there is no justification to warrant interference by this Honourable Court.

15. In the premises, I find that the appellant’s application dated January 19, 2022 has no merit and I proceed to dismiss the same with costs to the Respondent.

Orders accordingly

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 17TH DAY OF FEBRUARY, 2023

D. O. CHEPKWONY

JUDGE

Mr. F. M. Mwaura counsel for Auctioneer/Applicant

Mr. Odundo holding brief for Mr. Munge for 2nd Respondent

