



Kennedy Shikuku t/a Eshikhoni Auctioneers v Kenya Electricity Transmission Company Ltd (KETRACO) (Environment and Land Miscellaneous Application E002 of 2020) [2023] KEELC 17076 (KLR) (27 April 2023) (Judgment)

Neutral citation: [2023] KEELC 17076 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E002 OF 2020
EC CHERONO, J
APRIL 27, 2023

BETWEEN

KENNEDY SHIKUKU T/A ESHIKHONI AUCTIONEERS APPLICANT

AND

**KENYA ELECTRICITY TRANSMISSION COMPANY LTD
(KETRACO) RESPONDENT**

JUDGMENT

1. The Appellant lodged this Appeal by way a Chamber Summons application dated 3rd November 2020 seeking the following orders;
 1. That the Honourable Judge be pleased to set aside the taxing master’s order for striking out the appellant’s bill of Costs dated 17/7/2020.
 2. That upon setting aside the taxing master’s order striking out the appellant’s bill of Costs dated 17/7/2020 the Honourable judge be pleased to remit the appellant’s bill of Costs dated 17/7/2020 to a different taxing master for taxation.
 3. That the respondent to shoulder the Costs of this appeal
 4. That the Honourable judge be pleased to grant such further and/or other orders the Court may deem fit and expedient.
2. The appeal is based on 12 grounds of appeal apparent on the face of the said application and the supporting affidavit of the applicant sworn the same date. The said application is opposed with a replying affidavit sworn by the respondent’s Company Secretary who is also an advocate namely Isack O. Okeyo on 13th December, 2022.



Appellant's Summary of Facts

3. The Appellant in his supporting affidavit deposed that he filed a bill of Costs dated 17/7/2020 which was placed before the Deputy Registrar/taxing master for assessment and that the taxing master/Deputy Registrar directed the parties to file their written submissions. The Appellant further stated that at the time of filing the bill of Costs, he attached his submissions. He stated that the Respondent filed their submissions together with a list of authorities and upon being served with the same, he filed supplementary submissions in response thereto.
4. The Appellant also deposed that the taxing master delivered his ruling on 29/10/2020 whereby he struck out his bill of costs. He said that he was dissatisfied with the Ruling and preferred this appeal.
5. He further stated that the taxing master erred in law in entertaining the Respondent's prayers declaring his bill of Costs as illegal when there was no affidavit nor application. He said that the taxing master did not have jurisdiction to strike out his bill of Costs. He stated that the taxing master entertained a claim on submissions, an issue that was statutory time barred. He said that the taxing master failed to consider his submissions on record and also erred in law in entertaining the issue of irregularity and illegality of his bill when the respondent had not followed proper procedure in raising those issues of law.
6. In conclusion the appellant stated that as an Auctioneer, it is within his knowledge that the Auctioneer's bill of costs is governed by the Auctioneers' Rules and not any other irrelevant provisions of law.

Respondent's Summary of Facts

7. The Respondent in his replying affidavit sworn on 13th December, 2022 deposed as follows;
 - i. That on 25th June 2018, Hon. Justice Olao adopted a consent Order determining the suit in Environment and Land Court Case NO. 53 of 2016 between *Pascal Wanyonyi Simiyu Suing as the legal representative of Charles Musima Simiyu(deceased) v Kenya Electricity Transmission Company limited*.
 - ii. That soon thereafter, the Decree Holder unilaterally extracted the decree on 2nd November 2018.
 - iii. That the Decree Holder again, unilaterally filed an application for execution on the 6th November 2018 and warrants of attachment were issued on 8th November 2018.
 - iv. That on 10th November 2018, the firm of Eshikoni Auctioneers who are also the Appellants herein proclaimed the Respondent's items.
 - v. That the said Firm of Eshikoni Auctioneers proclaimed goods worth Six million one hundred and Eighty thousand (KSHS. 6, 180,000/= as against a decretal or recoverable sum of Four hundred and eighteen thousand five hundred and twenty-one shillings and zero point five cents (Kshs. 418521.05)
 - vi. That the said worth of items proclaimed forms the basis of the Auctioneers Claim with regards to fees. That it is in excess of the amounts to be recovered as per the decretal sum by Kenya shillings five Million, seven hundred and sixty-one, and four hundred and seventy-eight shillings point nine five cents (Kshs. 5,761,521.95).
 - vii. That the exorbitant and exaggerated proclamation was deliberate and a well- choreographed scheme by the Appellants, the firm of Eshikoni Auctioneers, to weaponized the law as against



the Respondent on the basis that since the Auctioneers fees is based and or predicated upon the amounts as per the attached value and not the decretal sum, then the attachment has to be maximized for high value of fees. This illegality is what was brought before the taxing master.

- viii. That the Appellants are not being candid to this Honourable Court by failing to state that it was their abuse of the law, unjust enrichment scheme that was flagged and brought to the notice of the taxing master as an illegality and since the whole process that resulted into the claimed fees is tainted and/or marred with illegalities, it was bound to topple and collapse as it was the case before the taxing master.
- ix. That the Appellants are not being candid to this Honourable Court by failing to state that what was before the taxing master that led to the striking out of their bill of costs was not a question of jurisdiction or procedure but an illegality brought to the notice of the judicial Officer and a Court of law cannot sanction what is illegal, and illegality once brought to the attention of the Court overrides all questions of pleading.
- x. That the Appellants are well aware that the law cannot be pleaded, thus the call under paragraph 1, 2, 4 and 8 of the grounds of Appeal must fall.
- xi. That an illegality has no time bound within the law and can be flagged or brought to the notice of the Court at any time thus ground 5 of the Appeal is not only unfounded but also bad in law and must crumble.
- xii. That any other Costs and or fees founded on an extremely exaggerated proclamation and/or attachment becomes moot and contra to the laws thereto.
- xiii. That the Appellants in their appeal are not attacking any substantial issues in the ruling but rather the procedural aspects only thus guilty of what the substance holds.
- xiv. That the allegation and/or assertion in the Appeal that the Appellants submissions were not considered is not borne out of the record for the ruling speaks otherwise at paragraph 2.
- xv. That the High Court Case of *Moindi Zaipeline v Karatina University & Another* (2017) KLR was cited for and by the taxing master outlining an illegality where in that Case the attachment amount in excess of Kenya shillings one Million (Kshs. 1,000,000/) was considered unlawful and illegal.
- xvi. That the decision is explicit that the value of the goods attached to be as close as possible to the amount of the decree which was not the case before the taxing master and that was the reason the bill was struck out for being an illegality and fragrant abuse of the law that amounts were more than ten times in excess of the decretal sum, the sum attached was in excess by Kenya Shillings five million, seven Hundred and sixty one, and four Hundred and seventy Eight shillings point nine five cents (Kshs. 5,761,478.95). The taxing must rightfully found that anything founded on this figure was wrong.
- xvii. That the Respondent is a public institution maintained out of public funds and under Article 201 (d) of the *Constitution* of Kenya 2010, it is obligated to uphold the Constitutional principles that shall guide all aspects of public finance that public money shall be used in a prudent and responsible way and Article 201 (e) that public finance management shall be responsible and the continual facilitation of the survey process in perpetuity is contra the provisions of the *Constitution*.
- xviii. That furthermore, the Respondent is obligated under Article 10 of the *Constitution* as to make or implement public policy decisions to uphold the national values and principles



of governance including the rule of law, good governance, integrity, transparency and accountability and sustainable development.

- xix. That it is therefore unconscionable, an attempt at unjust enrichment and an enterprise in violation of the *Constitution* of Kenya for the Appellant/Applicants to seek to benefit from public resources without any basis in the guise of constitutional violations.
- xx. That the Appellants application dated 3rd November 2020 is bad in law, has no merit, it does not meet the threshold set for allowing an appeal and is an abuse of Court process which ought not to be entertained by this Honourable Court.
- xxi. That he is advised by the firm of Wekesa & Simiyu Advocates for the respondent that the Appellant has not demonstrated and established what part of the Ruling where the taxing master was biased and it is clear no such right is at stake to warrant this Court's jurisdiction to be invoked on its behalf of the Appellants in that regard.
- xxii. That granting the orders sought by the Appellant is highly prejudicial to the Respondent as the same will encourage other Auctioneers to go on a proclamation and/or attachment spree in disguise of executing Court orders yet with ulterior motive of attaching higher fees by over attaching and then go filing frivolous claims.
- xxiii. That the Appellants'/Applicants' application does not disclose any grounds that meet the Statutory and Legal threshold upon which this Court can grant the orders sought.
- xxiv. That weighed against public benefits of saving public funds as well as preventing a flurry of litigation, the Appellants/Applicants have not established a prima facie case with any probability of success to warrant issuance of the orders sought.
- xxv. That the Appellants are guilty of material non-disclosure for not telling this Honourable Court the whole truth and or bringing to its attention all the facts about the background of the case in order to put the Honourable Court in a position that would make it arrive at a just and well considered decision or conclusion.
- xxvi. That the remedies sought by the Appellants are equitable in nature and it is trite law that he who comes to equity must do equity.
- xxvii. That if the foregoing averments are anything to go by, then it is evident that the Appellants have not done equity by coming before this Honourable Court with very dirty hands through failure to disclose material facts about the genesis and nature of their claim and in the disclosed circumstances, they are most undeserving of the remedies sought.

Analysis And Decision

8. I have considered the Appellant's/Applicant's Chamber Summons application dated 3rd November 2020, the supporting affidavit and the grounds on the face of the said application. I have also considered the replying affidavit by the respondent in opposition to the said appeal and the rival submissions as well as the annexures to the two affidavits.
9. This appeal arises from the Ruling of the Deputy Officer/Taxing Officer delivered on 29th October, 2020 striking out the Applicant's/Appellant's Bill of Costs dated 17th July 2020. The Applicant/Appellant was dissatisfied with the said Ruling and preferred the present appeal.
10. A brief background to this appeal is traced to the appellant's supporting affidavit where he confirmed filing his bill of costs dated 17/7/2020 for taxation before the Deputy Registrar/Taxing Master. The



Appellant further deposed that the Taxing Master/Deputy Registrar directed the parties to canvass the said bill of costs by way of written submissions. He stated that after complying with the directions given, the Deputy Registrar reserved his Ruling for 29/10/2020 where he struck out the bill of costs.

11. The Appellant set out twelve (12) grounds of appeal as follows;
 1. The learned Taxing Master erred in law and fact in declaring the Appellant's bill of costs irregular and illegal when there was no formal application by the Respondent.
 2. The learned taxing master erred in law and fact in declaring the Appellant's bill of costs was irregular and illegal when there was no basis in law.
 3. The learned trial taxing master erred in law and fact in striking out the Appellant's bill of costs without considering the Appellant's submissions on record.
 4. The learned trial taxing master erred in law and fact in entertaining the issue of the appellant's bill of costs being irregular and illegal when he did not have jurisdiction to entertain the claim.
 5. The learned trial taxing master erred in law and fact in entertaining the issue of the appellant's bill of costs being irregular and illegal when the issue was statutory time barred.
 6. That the learned trial taxing master erred in law and fact by being biased to the appellant hence arriving at a wrong decision.
 7. The learned trial taxing master erred in law and in fact by not considering the appellant's submissions.
 8. The learned trial taxing master erred in law and fact in deviating in law and importing unnecessary provisions of law from other statutes when the *Auctioneers Act* and Rules are self-contained laws in matter involving Auctioneers' Bill of Costs.
 9. The learned trial taxing master erred in law and fact when he contradicted himself as to whether the Respondent had followed the right procedure in challenging the Appellant's bill of costs or not.
 10. The learned trial taxing master erred in law and fact when he struck out the appellant's bill of costs without giving cogent reasons.
 11. The learned trial taxing master erred in law and fact by making a finding that the appellant did not comply with Auctioneers' Rules.
 12. The learned trial taxing master erred in law and in fact by relying on the Respondent's authorities cited which were irrelevant and bad in law.
12. From the extract of the record, it is clear that the Applicant/Appellant filed his bill of Costs dated 17/07/2020 for assessment before the Deputy Registrar/Taxing master. It is also clear from the extract that the said bill of costs was tabled before the taxing master for assessment who directed the parties to canvass the same by way of written submissions and rendered himself on 29/10/2020 by striking out the bill for being irregular unlawful and an abuse of the Court process.
13. One of the Appellant's ground of appeal is that the learned trial taxing master lacked Jurisdiction to strike out his bill of costs. There is no doubt that the jurisdiction of the taxing master in assessing Auctioneers bill of costs is grounded in the *Auctioneers Act*, CAP. 526 and the Rules made thereunder.



14. Rule 55 of the *Auctioneers Rules*, 1997 spell out the powers of a taxing master in assessing the costs payable to an Auctioneer as follows;

“55

- (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 moveable 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, 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 fee payable.
- (4) Any 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.
- (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.

15. Rule 12 of the *Auctioneers Rules* is also instructive on the mandate of the Auctioneer upon receipt of a Court warrant or letter of instruction and provides as follows;

1. Upon receipt of a Court warrant or letter of instruction the auctioneer shall in the case of moveable other than goods of a perishable nature and livestock-
 - a. Record the court warrant or letter of instruction in the register;
 - b. Prepares a proclamation in Sale Form 2 of the schedule indicating the value of specific items and the condition of each item, such inventory to be signed by the owner of the goods or an adult person residing or working at the premises where the goods are attached or repossessed, and where any person refuses to sign a certificate to that effect.
 - c. In writing give to the owner of the goods seven days' notice in Sale Form 3 of the schedule within which the owner may redeem the goods by payment of the amount set forth in the court warrant or letter of introduction.
 - d. On expiry of the period of notice without payment and if the goods are not to be sold in situ, remove the goods to safe premises for auction



- e. Ensure safe storage of the goods pending their auction....
16. Being conscious that his/her fees is begged on the Value of the goods attached and or proclaimed, an Auctioneer is under fiduciary duty and obligation to always act professionally and in good faith while carrying out his execution duties under the *Auctioneers Act* and the Rules made thereunder.
 17. It is not in dispute that the Appellant/Applicant was assigned warrants of attachment and sale to levy execution against the Respondent herein. It is not also in dispute that the warrants indicated the decretal amount the respondent was required to pay before execution was levied in the sum of 418,521.05. It was therefore incumbent upon the appellant/Applicant to proclaim moveable goods equivalent or approximate to the decretal sum of Kshs. 418,521.05.
 18. The Respondent deposed in his Replying affidavit that the appellant proclaimed goods worth six million, one hundred and eighty thousand (Kshs. 6, 180,000/=) as against the decretal or recoverable sum of four hundred and eighteen thousand five hundred and twenty-one shillings and zero point five cents (Kshs. 418,521.05). Those averments given on oath have not been challenged.
 19. The Superior Courts have pronounced themselves where Auctioneers have carried out their mandate outside the *Auctioneers Act* and the Rules made thereunder. In the case of *Lakeland Motors Limited V Harbhajan Singh Sembli* (1998) eKLR the Court of Appeal observed as follows regarding Rule 12(b) of the Auctioneers Rules;

“This part, it does not also appear, and this was not contested by Mr. Kasamani for the respondent at the hearing of this application on 18th February, 1998, that the applicant was involved in the preparation of the decree by the superior Court in the Civil Suit referred to at the beginning of this ruling as is required by the relevant provisions of order xx Rule 7 of the Civil Procedure Rules. Finally, Rule 12(b) of the Auctioneers Rules, 1997 requires that;

“Upon receipt of a Court warrant or letter of instruction the auctioneer shall in case of movables other than goods of a perishable nature and livestock prepare a proclamation in Sale Form 2 of the Schedule indicating the value of specific items and the condition of each item, such inventory to be signed by the owner of the goods or an adult person residing or working at the premises where the goods are attached or repossessed, and where any person refuses to sign such inventory the auctioneer shall sign a certificate to that effect.”

20. There does not appear to be any provision in the *Auctioneers Act*, 1996 nor in the Auctioneers Rules, 1997 for dispensing with the foregoing Rule. Yet the respondent proceeded to execute the decree and physically attach the Applicants moveable goods without complying with the said rule. The flagrant disregard of the provisions of this rule smacks of gross irregularity in the Respondents execution process of the decree of the superior court in civil case NO. 227 of 1997. It would be an abuse of the process of this Court if we were to countenance such an execution. We think that on account of the respondent’s non-compliance with the law in the execution process of the decree as we have indicated in this ruling and to prevent abuse of the process of this Court, in the exercise of our inherent power under rule 1(3) of the aforesaid Rules the said execution process must and is hereby set aside....”



21. The position was reiterated by the High Court in the Case of *Barry Scutt & Another V Hitesh Jethwa & 2 Others* (2000) KLR where it was held as follows;

“Rule 12 of the *Auctioneers Rules* provide; -

“Upon receipt of a Court warrant or letter of instruction the auctioneer shall in case of movables other than goods of a perishable nature and livestock prepare a proclamation in Sale Form 2 of the schedule indicating the value of specific items and the condition of each of each item, such inventory to be signed by the owner of the goods or an adult person residing or working at the premises where the goods are attached or repossessed, and where any person refuses to sign such inventory the auctioneer shall sign a certificate to that effect.”

22. The proclamation prepared by the 3rd defendant was in very general terms and appears to be based more on the 3rd defendant’s imagination rather than what he actually saw. It is for that reason, I think, that he fails to show in the proclamation the value of the specific items listed therein or to indicate the condition of each. The proclamation merely refers to furniture including sofa sets, dining tables, video cassette, video machine, T/V sets and any other attachable items. How the 3rd defendant was able to see and identify all those items of furniture without entering the house, only he can tell. Even then, the 3rd defendant did not attempt to satisfy the Auctioneers Rules with regard to the condition of the proclaimed goods for it was only with reference to the attached motor vehicle that he indicated the value. The condition of the other items was not indicated.

23. In the case of *Lakeland Motors Limited v Harbhajan Singh Sembi*, (Court of Appeal, Civil Application No. 24 of 1998) the Court of Appeal stated; -

“There does not appear to be any provision in the Auctioneers Rules 1997 for dispensing with Rule 12. Yet the respondent proceeded to execute the decree and physically attach the applicant’s movable goods without complying with the said Rule. The fragrant disregard of the provisions of this rule smacks of gross irregularity---”

24. I would adopt those words of the Court of Appeal in this matter. The *Auctioneers Rules* were not made in vain. They are supposed to be obeyed. It is plain that the 3rd defendant did not comply with Rule 12 of the Auctioneers Rules in connection with his proclamation of the plaintiff’s goods. The proclamation was therefore irregular and illegal and the plaintiffs were in those circumstances justified in coming to court to stop the attachment of their property on the basis of that irregular proclamation.”

25. I agree entirely with the two findings and particularly the decision by the Court of Appeal which is binding on me.

26. The upshot of my finding is that this appeal is without merit and the same is hereby dismissed with costs.

Orders accordingly.

READ, SIGNED AND DELIVERED VIRTUALLY/PHYSICALLY IN THE OPEN COURT AT BUNGOMA THIS 27TH APRIL, 2023

HON. E.C CHERONO

ELC JUDGE.



In the presence of;

1. Wamalwa R for Applicant
2. Murunga H/B for Wangila for Respondent
3. Joy C/A

