



Matunda (Fruits) Bus Service v Kamuya t/a Crater View Auctioneers (Miscellaneous Reference Application E052 of 2022) [2023] KEHC 21085 (KLR) (27 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21085 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS REFERENCE APPLICATION E052 OF 2022**

HK CHEMITEI, J

JULY 27, 2023

BETWEEN

MATUNDA (FRUITS) BUS SERVICE APPELLANT

AND

**PHILIP MAKAO KAMUYA T/A CRATER VIEW
AUCTIONEERS RESPONDENT**

JUDGMENT

1. In its chamber summons dated September 26, 2022 the appellant prays for the following orders;
 - (a) That the decision of the taxing master dated September 20, 2022 with respect to items numbers 4 (travelling charges), item 5 (commission), item 6 (investigation and pointing), item 8 (transport), item 9 (labour and time spent while executing), and item 10 (security of proclamation) be set aside and taxed afresh by this court.
 - (b) The ruling delivered on September 20, 2022 on the respondent's Party and Party Bill of costs dated May 25, 2022 be set aside and taxed afresh by this court.
2. The appellant prayed for costs of this reference to be provided.
3. The application or the reference is premised on the sworn affidavit of Samuel Njuguna Mwangi, the appellant's agent.
4. The application basically is a reference emanating from the decision of Honourable N Makau the taxing master and the Deputy Registrar dated September 20, 2022 in Nakuru miscellaneous application number E052 of 2022. The appellant was satisfied with the rest of the items save those stated in the body of the application.



5. The court directed the partes to file written submissions which they have done and the court has perused the same. It shall be worthwhile to address item by item and in line with their submissions and the findings by the taxing master and juxtapose it with the law.
6. It is worthy to note that although the respondent claimed that there was no attachment after proclamation I note that by its letter dated January 20, 2022 the appellant advised m/s Legacy Connection Yard to release motor vehicle registration number KCJ 816X to one Moses Njuguna Mwangi of ID No XXXXXXXX. There is an accompanying release order to that effect.
7. It is therefore true that the proclamation and attachment was effected and the court shall consider the same while looking at the bill. It is necessary also to understand that this court may refer the matter back to the taxing master with instructions to re-tax the bill afresh or proceed to tax it on its own. I think considering that the issues herein are clear this court shall tax the same.
8. The first item is number 4 on the bill, that is” transport costs and or mileage”. The taxing master taxed it at Kshs 77,490.
9. The appellant has submitted that the respondent was not entitled to the said amount since he did not travel from Nairobi as their offices are based in Nakuru town. The traveling was therefore from Nakuru to Molo which is about 47 kilometres.
10. This position was not rebutted by the respondent. The court has perused the correspondences from the respondent and it is apparent that it has two offices, namely in Samima suite, 1st floor in Nairobi and Grey house 2nd floor in Nakuru. Naturally therefore it was the Nakuru office that executed the warrants in this matter unless otherwise shown.
11. To this end it is only logical that the transport charges be based on the 47 kilometres from Nakuru, twice. The charges as rightly submitted by the parties should be based on the Automobile Association of Kenya, (A A). The appellant submits that it is Kshs 35 per kilometre and the respondent states that it is 63 per kilometre.
12. I have perused the attachment to the respondent’s submissions and i find that the same is at Kshs 63.93 which is around kshs64 and not the Kshs 35 by the appellant. Consequently, and applying the above finding the amount under the above heading of transport should be 47km x 64 x2=Kshs 6016.
13. On the issue of commission under item 5 I think this court contrary to the appellant’s submissions shall not be disturbed. This is for the reason that Part II of Schedule 4 rule 4 of the [Auctioneers Rules](#) provides for it. I think the decision by the taxing master under this heading was sound in law and i decline the appellants request.
14. Under item 6 I do not find any supporting evidence under “investigation and pointing” heading. The same is alien and it is therefore declined.
15. Under item 7 on transport charges during attachment I think the findings under item 4 above suffice. The distance is the same and thus the sum of Kshs 6016 is allowed.
16. Under item 9 on labour and time spend I find that the amount of Kshs 50,000 was excessive in the circumstances. I do not see any reason for the auctioneer paying himself a sum of Kshs 20,000 yet he already had his fees taken care of. Neither do I find any provision for an “associate auctioneer” under the law. The rest especially the driver and mechanic can be reasonably provided for.
17. In the premises I find that an amount of Kshs 20,000 is reasonable in the circumstances and I so provide.



18. On the issue of security, under item 10 Rule 9 of the Auctioneers Rules provide as follows;

“Police assistance

- (1) Where an auctioneer has reasonable cause to believe that—
 - (a) he may have to break the door of any premises where goods may be seized or repossessed; or
 - (b) he may be subject to resistance or intimidation by the debtor or other person; or
 - (c) a breach of the peace is likely as a result of seizure, repossession or attempted seizure or repossession of any property, the auctioneer shall request for police escort from the nearest police station in order to carry out his duties peacefully.
- (2) An application under this rule shall be by motion by way of a miscellaneous application supported by an affidavit and may be heard ex parte” (Underlining mine.)

19. This court does not find any evidence that the respondent complied with rule 9(2) above. There is nothing to show that he applied for police services when effecting the attachment or proclamation. This rule is meant to ensure that in the event of any challenges the auctioneer must come to court to seek assistance. To simply pay police officers without the leave of the court is therefore unprocedural. There is no evidence of any resistance by the appellant or at all.

20. This court for that matter cannot assume that the respondent paid for the said security services in the absence of any evidence in form of a court order. I decline this prayer.

21. In the final analysis the bill is therefore taxed as follows;

- (a) Item 1,2 and 3 allowed.
- (b) Item 4 on transport on proclamation taxed at Kshs 6016
- (c) Item 5 on commissions taxed at Kshs 41141.
- (d) Item 6 on investigation and pointing declined.
- (e) Item 7 transport on attachment taxed at Kshs 6016
- (f) Item 8 on labour and time taxed Kshs 20,000
- (g) Item 79 on security disallowed
- (h) VAT on item 1,2 and 5 at 14% taxed at Kshs 7383
- i. Total Kshs 91,556

22. Each party shall meet its own costs in this reference.

DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 27TH DAY OF JULY 2023.

H K CHEMITEI

JUDGE

