



**John K. Wanderi t/a J.K Wanderi Auctioneers v London Distillers
(K) Ltd & another (Miscellaneous Civil Application 11 of 2021)
[2023] KEHC 24425 (KLR) (30 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24425 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS CIVIL APPLICATION 11 OF 2021
HM NYAGA, J
OCTOBER 30, 2023
IN THE MATTER OF TAXATION OF THE AUCTIONEERS CHARGES**

BETWEEN

JOHN K. WANDERI T/A J.K WANDERI AUCTIONEERS APPLICANT

AND

LONDON DISTILLERS (K) LTD 1ST RESPONDENT

JAIDEEP IMPORT & EXPORT 2ND RESPONDENT

RULING

1. Before Court is Chamber summons dated 19th May, 2021 by which Jaideep Import & Export the 2nd Respondent/Applicant seeks for orders: -
 - a. That the decision of the Learned Taxing Officer Hon. M. Kyalo delivered on 11th May, 2021 with respect to the Auctioneer's Bill of costs dated 21st January, 2021 be reviewed and set aside.
 - b. That costs of this Application be provided for.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Kavraj Sagoo who is the Advocate for the Applicant herein. She deposes that sometime in December 2020, she received instructions from the Applicant to come on record on its behalf in place of the firm of Wamaasa Masese & Nyamwange Advocates.
3. She avers that the Applicant had received warrants of attachment together with a proclamation notice dated 29th December, 2020 from Direct "O" Auctioneers and instructed the firm of M/S Waititu & Company Advocates to urgently seek for orders of stay of execution of the judgement delivered on 30th October, 2020 for which notice of entry of proceedings and judgement was never served upon the Applicant.



4. She contends that before the matter came up for inter-partes hearing, she entered appearance by consent on 16th December, 2020 and before the Application was recorded she also recorded a consent with the firm of Murimi Ndumia Mbago and Muchela for the plaintiff to inter alia set aside the judgement delivered on 30th October, 2020 and the Appellant undertook to pay the auctioneers charges.
5. She avers they were informed about “Direct O” Auctioneers by the firm of Murimi Ndumia Mbago and Muchela Advocate and at no point did they disclose that there were other auctioneers.
6. That Direct “O” auctioneer’s charges amounting to Kshs. 100,000/= were paid on 18th December, 2020 to M-pesa Number 0719829661 on 5th February, 2021 to Bank of Baroda via Cheque Number 019 and on 15th January, 2021 to DTB Bank via Cheque Number 629 and the same was conclusively settled.
7. She avers that the appellant is not privy to the Applicant/Respondent herein and were surprised when they were served with the auctioneer’s bill dated 21st January, 2021 and taxation notice for 23rd March, 2021.
8. She contends that when the matter was mentioned on 20th April, 2021, they informed the court that they were in the process of filing their grounds of objection and the court directed them to do so and gave a ruling date.
9. She avers that on 29th April, 2021 before a ruling was delivered they filed their grounds of objection as directed and on 11th May, 2021 they informed court that they had successfully filed their grounds of objection but the honourable taxing master proceeded to tax the auctioneers bill of costs without considering the Applicant’s grounds of objection and without according it an opportunity to put in its written submissions to ventilate important issues raised in its objection.
10. She deposes that in the event the bill relates to the execution proceedings purported to have been carried out in May 2019, court records show and are clear that the same were stayed since the judgement which the applicant or respondent allege to have executed was illegal, irregular and improper for want of service of summons to enter appearance.
11. She states that the bill of costs as filed is null and void ab initio for the reason that the judgement the applicant/respondent herein purports to have executed was prematurely and irregularly obtained and therefore a nullity for all purposes.
12. She contends that without prejudice to the foregoing, some of the items listed on the respondent’s bill of costs are not provided by the fourth schedule of the auctioneer’s rules and the same were not supported by any evidence.
13. She prayed that the orders sought be issued and for the court to make an order directing that any costs payable (if any) to the auctioneers should be on account of the 1st respondent herein.
14. The Application is opposed. Daniel Njuguna Kamanga, an advocate for the Applicant/Respondent swore a replying affidavit on 25th September, 2021.
15. He deposes that he was instructed by the Applicant/Respondent herein to file bill of costs against the Applicant herein and the 1st respondent in respect of warrants of attachment issued vide CMCC NO. 583 of 2018 on 17th May, 2019.
16. That the applicant/respondent carried out the execution and proclaimed the Applicant’s good but his charges were not paid subjecting him to file the Bill of costs to recover the same.



17. He avers that it was the duty of the applicant herein and the 1st Respondent to see that the auctioneer's charges were paid after the judgement was set aside and the defence filed which was not done to date.
18. He contends that during taxation of the bill of costs he was not served with the alleged preliminary objection and that the counsel for the 1st respondent informed him that they had entered into a consent with the counsel for the applicant herein for the auctioneer charges in CMCC NO.583 OF 2018 to be paid by the Applicant herein which made him withdraw the said bill of costs against the 1st respondent on 23rd March, 2021.
19. It is his averment that the auctioneer's charges must be paid in any event as the warrants of attachment were fully executed as per the instructions given to him.
20. He prayed that the application be dismissed with costs or directions given on who should pay the Applicant's /respondent's auctioneers taxed costs.

Submissions

2nd Respondent's/Appellant's Submissions

21. The Applicant submitted that the decision of the taxing officer with respect to the auctioneer's bill of costs dated 21st January,2021 should be reviewed and or set aside for two reasons. Namely;
 - a. That the taxing officer fell in error of principle when she disregarded its grounds of objection.
 - b. The taxing officer fell in error in allowing items that are not prescribed by the Auctioneers Rules.
22. In support of the first ground, the Applicant relied on the cases of;
 - i. *Sinohydro Corporation Limited v Samson Itonde Tumbo t/a Dominion Yards Auctioneers* [2021] eKLR where the court set out the instances when taxation may be set aside;
 - ii. *Ishamael & Co Associates v Bajaj Electricals Limited & Wayne Homes* [2020] eKLR for the proposition that it is imperative for the Taxing master to evaluate all the evidence and the submissions presented by the parties;
 - iii. *Stephen Mwallyo Mbondo v County Government of Kilifi* [2021] eKLR for the proposition that a party will not be responsible to settle auctioneer's costs arising out of an irregular attachment;
 - iv. *Nyangito & Co. Advocates v Doinyo Lessos Creameries Ltd* [2014] eKLR where the court set out the circumstances under which a judge of the High Court interferes with the taxing officer's exercise of discretion.
23. In support of the second ground, the Applicant relied on Rule 55(1) of the *Auctioneers rules* and submitted that items number 6-13 of the auctioneer's bill of costs are not provided by the Fourth Schedule of the *Auctioneers rules* and should be disallowed and taxed off.

Respondent's Submissions

24. The Respondent submitted that the auctioneer's charges must be paid in any event as the warrants were fully executed as per the instructions given to him.



Analysis & Determination

25. The only issue for determination is whether the decision of the taxing officer should be reviewed and or set aside.

26. The principles of setting aside the decisions of Taxing Master were well established. Ogwang Ag J. (as he then was) in the *Housing Finance Company of Kenya Ltd v Embakasi Youth Development Project* (2004) 2 KLR 548 is quite clear to this end:

“It is recognised that the taxation of costs is the responsibility of the taxing master and not of the judge. There will, however, be those instances in which the taxing master is seen to have departed from governing principles of law, in the course of taxation. In such a case an appeal lies to a judge who will consider the relevant issues of law and make appropriate orders.”

27. In the cases of *Premchand Raichand Ltd & Another v Quarry Services of East Africa Limited and Another* [1972] EA 162, *First American Bank of Kenya v Shah and Others* (2002) EA 64 and *Joreth Ltd v Kigano and Associates* (2002) 1 EA 92 the court set out the principles of setting aside the decision of the taxing master as follows;

- a. That there was an error of principle
- b. The fee awarded was manifestly excessive or is so high as to confine access to the court to the wealthy
- c. That the successful litigant ought to be fairly reimbursed for the costs he has incurred
- d. That so far as practicable there should be consistency in the award.

28. In *Republic v Ministry of Agriculture & 2 others Ex parte Muchiri W'njuguna & 6 Others 6 others* (2006) eKLR), Ojwang, J (as he then was) expressed himself *inter alia* as follows:

“The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A Court will not, therefore, interfere with the award of a taxing officer, particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low; it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other.... The court cannot interfere with the taxing officer’s decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an interference that it was based on an error of principle. Of course it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors. And according to the *Advocates (Remuneration) Order* itself, some of the relevant factors to take into account include the nature and importance of the case or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge. Needless to state not all the above factors may exist in any given case and it is therefore open to the taxing officer to consider only such factors as may exist in the actual case before him. If the court considers that the decision of the taxing officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment... A taxing officer does not arrive at a figure by multiplying the scale fee, but places what he considers a fair value upon the work and responsibility involved... Since costs are the ultimate expression of essential liabilities attendant on the litigation event, they



cannot be served out without either a specific statement of the authorising clause in the law, or a particularised justification of the mode of exercise of any discretion provided for.... The complex elements in the proceedings which guide the exercise of the taxing officer's discretion, must be specified cogently and with conviction. The nature of the forensic responsibility placed upon counsel, when they prosecute the substantive proceedings, must be described with specificity. If novelty is involved in the main proceedings, the nature of it must be identified and set out in a conscientious mode. If the conduct of the proceedings necessitated the deployment of a considerable amount of industry and was inordinately time-consuming, the details of such a situation must be set out in a clear manner. If large volumes of documentation had to be classified, assessed and simplified, the details of such initiative by counsel must be specifically indicated – apart, of course, from the need to show if such works have not already been provided for under a different head of costs.....”

29. In *Sinohydro Corporation Limited v Samson Itonde Tumbo t/a Dominion Yards Auctioneers* (*supra*) the court with regard to what constitutes an improper exercise of discretion held as follows: -

“It is well settled that when the taxing master is shown to have exercised his discretion improperly, the court would be entitled to set aside the decision of the said taxing master.

Examples of what constitutes an improper exercise of discretion are:

- a. When factors which ought to have been considered were disregarded;
- b. When irrelevant matters were given consideration;
- c. When the taxing master acted on a wrong principle;
- d. When the sum awarded was either inordinately high or so inordinately low that it must be deemed to have been arrived at through an erroneous process of assessment.”

30. The Applicant's main contention is that its grounds of objection were not considered by the taxing officer before rendering her decision. The applicant contends that when the matter came up for mention on 20th April, 2021 it informed the court that it was in the process of filing its grounds of objection and on 29th April 2021 it filed the same. That on 11th May, 2021 it informed the court that it had filed the grounds of objection but the court proceeded to tax the auctioneer's bill of costs without considering its grounds of objection and without according it an opportunity to file their submissions on issues raised in the said grounds of objection.

31. The Applicant in buttressing its submissions that it was denied an opportunity to be heard by the taxing officer when she ignored its grounds of objection referred this court to the decision of *Ishamael & Co Associates v Bajaj Electricals Limited & Wayne Homes* [2020] eKLR where the court in regards to failure to evaluate evidence and submissions by the parties stated as follows: -

“It is imperative for the Taxing Master to evaluate all the evidence and the submissions presented by the parties. A court cannot afford to be seen to be selective in determining what submissions to consider. However, some of the submissions might be found to be irrelevant or of little value. The best indication that a court has applied its mind in the proper manner to all the material presented before it is to be found in its reasons for judgment.

However, requiring the trial court to consider and weigh all the submissions is not meant that the judgment of the trial court must also include a complete embodiment of all the submissions made, as if it comprises a transcript of the proceedings. The duty of the High



Court is to determine whether the trial court applied the law or applicable legal principles correctly to the facts in coming to its decision. In other words, in order to determine the merit of the applicants' contention, this court must consider their submissions in the lower court, and, juxtapose it against the decision, and finally determine whether there is any basis for interfering with the decision....”

32. I have perused the record and I confirm on 20th April,2021 the advocate for the applicant herein prayed for more time to put in their response. The court allowed the same and directed the applicant to file its response and submissions within 14 days and gave a ruling date of 11th May,2021. On 29th April,2021, the Applicant filed its grounds of opposition. That was before lapse of 14 days granted by the court however it did not file submissions.
33. On 11th May,2021 the court delivered its ruling. A perusal of the ruling shows that the court did not factor in the Applicant's grounds of objection and reasons for the same is not provided.
34. The Applicant's Submissions that it was not accorded an opportunity to file its submissions is misleading. The court granted it a chance to file the same but it failed to comply. The reason thereof has not been disclosed by the Applicant. Be that as it may, the taxing master ought to have considered the grounds of objection by the Applicant. Delivering the ruling without factoring in the said grounds of objection was tantamount to condemning the Applicant's unheard which is contrary the principles of natural justice. This is a plausible ground therefore for setting aside the impugned taxing officer's decision.
35. *Sinohydro Corporation Limited v Samson Itonde Tumbo t/a Dominion Yards Auctioneers* (*supra*) the court stated as follows: -

“Having conducted the re-evaluation, I find that the parties made very elaborate submissions during taxation. However, the learned taxing officer did not make any reference to the said submissions, in his Ruling. Therefore, there is no verifiable means of ascertaining that the taxing officer had exercised his discretion judiciously.

Accordingly, I find that it cannot be “seen” that justice was done. And when it cannot be “seen” that justice has been done, the decision must be set aside, so that justice could then be done in a manner that was verifiable.”

36. Guided by the precedents above, I proceed to set aside the decision of the taxing officer delivered on 11th May,2015 and direct that the Auctioneer's Bill of Costs be taxed afresh before a different taxing officer.
37. The other issues raised in regards to the validity of the said auctioneers' costs can be ventilated before the taxing officer.
38. On costs, I find that the taxing master erred in its decision in not considering the grounds of opposition. None of the parties was at fault and as such I order each party to bear their own costs.
39. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 30TH DAY OF OCTOBER, 2023.

H. M. NYAGA

JUDGE

In the presence of;

C/A Jeniffer



Ms Kimuge for Applicant

N/A for Respondent

