



**Wainaina v Joseph Gikonyo t/a GaramInvestments (Miscellaneous Application E115 of 2018) [2022] KEHC 135 (KLR) (Commercial and Tax) (27 January 2022) (Ruling)**

Neutral citation: [2022] KEHC 135 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX**

**MISCELLANEOUS APPLICATION E115 OF 2018**

**JN MULWA, J**

**JANUARY 27, 2022**

**BETWEEN**

**JOHN KIHONGE WAINAINA ..... APPLICANT**

**AND**

**JOSEPH GIKONYO T/A GARAM INVESTMENTS ..... RESPONDENT**

**RULING**

1. By a Chamber Summon dated 29/3/2021 and Rules 55(4) and 5 of the *Auctioneers Rules 1997*, Order 49 of the *Civil Procedure Rules, 2010* and Section 1A, 1B and 3A of the *Civil Procedure Act*, the Applicant John Kihonge Wainaina sought orders that:
  - (1) ....
  - (2) ....
  - (3) that this Honourable court be pleased to enlarge time within which to file a reference against the decision of the Taxing Master delivered on the 15/3/2021.
  - (4) that there be a stay of execution of the Taxing Officer Orders issued on the 15/3/2021 pending hearing and determination of the application and
  - (5) pending hearing and determination of the reference.
  - (6) that the decision of the Taxing Officer delivered on the 15/3/2021 allowing the Bill dated 12/10/2018 as drawn be and is hereby set aside/or vacated.
  - (7) That the reference herewith be deemed to have been properly filed on time.



- (8) that the Auctioneers Bill of Costs dated 12/10/2018 be remitted back for taxation before a different Taxing Master.

Upon grounds stated at the face of the application and supporting affidavit by the Applicant sworn on the 29/3/2021.

2. The application is opposed by a Replying affidavit sworn by the Respondent. Parties proceeded to file written submissions to urge their rival positions.
3. I have considered the parties pleadings and the submissions. What presents itself for determination by the court is:
  - a. Whether the Application dated 29/3/2021 is Res-Judicata, and
  - b. Whether the Hon. Taxing Officer's decision delivered on the 15/3/2021 is a misdirection and a mistake in law by allowing the Bill of Costs as drawn, and
  - c. Whether it should be remitted back for fresh taxation by a different taxing officer.

### **Analysis and Determination**

4. On the 22/3/2019 the Respondents (Auctioneers) Bill of Costs was taxed by the Taxing Officer at Kshs. 635,625/= . Being dissatisfied with the decision, the Respondent filed a Reference to this court. On the 13/2/2020 Hon. Okwany J. upon considering the Reference directed that the Bill of Costs be re-taxed afresh by a different taxing officer, resulting to the ruling of the Hon C. Wanyama DR, on the two disputed items No. 1 and 2, on the 15/3/2021.
5. The Deputy Registrar Hon. Wanyama made a decision that the Bill of Costs is allowed as drawn at Kshs. 1,526,064.50, upon setting out the issues for attention whether the bill of costs was drawn to scale and in particular item No. 2, and upon an analysis of the genesis and earlier court orders on the subject matter, the Auctioneers Bill of Costs and the two disputed items, along with relevant superior Court's decisions. Also considered by the Deputy Registrar are the relevant Rules under the Auctioneer Rules, particularly Paragraph 4 whose intention is to provide values on the basis of which the auctioneers charges should be assessed, for attachment and eventual sale of the attained properties, as well as the totality of the work done by the auctioneer.
6. It is this decision of the 15/3/2021 by the Taxing Officer that the Applicant is once again dissatisfied with and seeks by his application, to be allowed to file another Reference out of time, stay its execution and a further order of remittance for taxation by a different taxing officer.
7. The main issue in the application in my view is whether I should allow the Applicant to file a Reference out of time by seven (7) days or whether the matter is resjudicata, and therefore a matter for appeal as opposed to a Reference.
8. It is not in dispute that the Applicant's then advocate was out of circulation upon being found to have been infected with the Covid-19 virus and was in isolation as per report from Agakhan Hospital – exhibit marked JW-001 and therefore could not have been well to file the reference within the 7 days window.

For that reason, the Applicant had to instruct another Advocate to take over and file the instant application.



For that reason, the delay of 7 days is excusable and explainable, but no leave was applied and obtained to file the defence out of time before filing it.

9. To determine whether prayer No. 8 has merit regard is given to the taxing officer's decisions of the 15/3/2021. I have rendered earlier that it is on record that the Taxing Officer, by her ruling, acted as per the directions given by the Hon. Justice Okwany J. on her ruling dated the 13/2/2020.
10. The taxing officer was mandated to consider only two items No. 1 and 2 on the Auctioneers Bill of costs, which is evidently and demonstrably clear that the said directions were followed, see page 3 of the ruling upon an analysis of the written submissions as filed by the parties. Therefore, the Applicants submission that the Taxing Officer misdirected herself by allowing the Bill as drawn is also misguided and without any merit.
11. I am satisfied that the Taxing Officer restricted herself to Re-taxation of the two items that are justifiably incurred by the Auctioneer.
12. Whether or not the Auctioneer was entitled to two commissions on the two instructions given for the two sales that were stayed by the court elicits different opinions by Judicial Officers. The Hon. Okwany J. ably discussed the issue in her ruling dated 13/2/2020 when at paragraph 17 & 18 she stated:

Para 17 "I therefore find that the Auctioneer received two sets of instructions in May 2018 and September, 2018 to sell the same property..."

para 18 "I find that the property was scheduled for sale on two different occasions and the said sales having been cancelled the Auctioneer was rightly entitled to both the advertising costs as well as commissions for both occasions..."
13. The court came to the above decision and considered the decision on *Ibrahim Hussein Mahadi & Another vs Gulf African Bank Ltd & another, Civil Suit No. 285 of 2017* which Onguto J. wherein the Judge rendered:

"it is not in dispute that the property was advertised for sale and indeed scheduled for sale on two occasions. The sale were subsequently cancelled. The auctioneer would be entitled to the advertising costs for the two occasions as well as commission twice..."
14. Paragraph 7, paragraph 11 of the fourth schedule of the Auctioneers Rules is clear that an auctioneer is entitled to costs for newspaper advertisement so long as evidence of the incurred costs are provided.
15. For this court to attempt to interrogate the above Learned Judge's decisions who are of equal and concurrent jurisdiction with this court would be sitting on appeal on decisions of courts of equal jurisdiction status which is prohibited under the *Judicature Act*, Cap 8 Laws of Kenya.
16. The Learned Judge (Okwany J.) having rendered herself as above, the only option left to the Applicant would be to appeal against the decision of the Taxing Officer. The Court of Appeal in *Peter Ng'ang'a Muiruri vs Credit Bank Ltd & 2 others, Civil Appeal No. 203 of 2006*, rendered that:

"... it would be usurpation of power to push forward such an approach, and whatever decision emanates from a court regarding itself as a constitutional court, with power of review over decision is at best a nullity.



17. See also *Ciricon Ltd v Kenya Revenue Authority & another* [2014] eKLR where the court rendered that:
- “... any other decision cannot surpass any other Superior Court of concurrent jurisdiction or Superior jurisdiction... the aggrieved party must be content with the devices of appeal or review of the decision already delivered by the court but cannot be permitted to re-agitate the matter in other proceedings”
18. I am therefore duty bound to respect the Hon. Judge’s decision in respect of the two instructions and the two commissions of the auctioneer. See paragraph 13 of the Judge’s decision, while citing paragraph 7 of Part II of the 4<sup>th</sup> schedule of the Auctioneers Rules for the argument that every stayed auction a 50% commission ought to be allowed to the Auctioneer.
19. The Taxation officer who was mandated to re-tax the bill ably, and in compliance with the instructions on the re-taxation, as I stated earlier in this ruling analysed clearly what the Auctioneer was entitled to, at page 3 of her ruling dated 15/3/2021, upon evaluating the subject matter being commissions at 50% as the sales were stayed by the court.
- It would therefore be a futility to refer the Bill of Costs to another Taxing Officer in view of the well analysed taxation by the Deputy Registrar.
20. That brings me to the final issue of whether this application is Res-judicata. I have considered the Learned Counsels submissions on the issue. The doctrine of Res judicata is stated under Section 7 of the *Civil Procedure Act*, thus;
- “No court should try any suit or issue in which the matter directly and substantively in issue has been directly and substantively in issue in a former suit between the same parties; or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which sum issue has been subsequently raised and has been heard and finally decided by such court”.
21. Applying the above principle in this application, there is no dispute as to what matter or issues were before the court and the ensuing rulings. The parties were the same. The courts, the Taxing officers as well as the Judge had necessary jurisdiction to deal with the issues that are similar both in nature and substance, see *The Independent Electoral and Boundaries Commission vs Maina Kiai & 5 others*, Nambuye J. CA Civil Appeal No. 105 of 2017 [2017] eKLR.
22. The intentions and aim of the rule was made to bring to finality litigation and provide closure. Without the rule/principle, there would be no end to litigation.
23. By the facts displayed in the application, and the Bill of Costs taxations before the two Deputy Registrars, as well as the Hon. Judge’s (Okwany J). it is evidently demonstrable that this application is Res-Judicata. It has nothing new that any other taxing officer would look at to come to a different decision. That, by its nature, ought to be decided in an appeal to the Court of Appeal but not in this court.
24. On the matter of stay of execution of the taxed Bill of Costs, this court cannot stay the execution process based on the taxed costs. It can however be done in a different litigation wherein the question of stay may be litigated – *Christopher Orina Kenyariri t/a Kenyariri & Associates Advocates vs Salama Beach Hotel Limited & 3 others* [2017] eKLR.



25. The issue of taxation of the Auctioneers Bill of Costs has already been determined by the initial taxation, and by a re-taxation as ordered upon a Reference. To re order for another Reference in my considered opinion, would not only be an abuse of the court process, but also not justifiable.
26. In the circumstances, this court is devoid of jurisdiction, in the absence of a reference, to entertain the Applicant's prayer for setting aside or vacation of the taxed Bill of Costs.
27. I further render that the attached Reference already filed out of time and without leave of court to be incompetently so filed. I cannot sanitize a wrong already done. The Applicant ought to have obtained leave of court to file the reference out of time before filing the Reference. Judicial decisions on these are plenty.
28. The Supreme Court in *Nicholas Kptoo Korir Arap Salt V IEBC & 7 others [2014] eKLR*, the court rendered that (at paragraph 35)  

“...By filing an appeal out of time/before seeking the court to extend time and recognize such “an appeal” is tantamount to moving the court to remedy an illegality. The court cannot do so ... such a filing render the ‘document’ so filed a nullity and of no legal consequence. Consequently, this court will not accept a document filed out of the time without leave of court...”
29. Having dealt with the issues raised in the application and in Respondents Preliminary Objection, I come to the conclusion that the Applicant's application is devoid of merit, and is dismissed with costs to the Respondent
30. Orders accordingly.

**DATED AND SIGNED THIS 27<sup>TH</sup> DAY OF JANUARY 2022**

**HON. J. N. MULWA**

**JUDGE**

