



**St. Elizabeth Academy Karen Limited v Joseph Gikonyo t/
a Garam Investments (Miscellaneous Civil Application 488 of 2013)
[2022] KEHC 133 (KLR) (Commercial and Tax) (23 February 2022) (Ruling)**

Neutral citation: [2022] KEHC 133 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CIVIL APPLICATION 488 OF 2013
DAS MAJANJA, J
FEBRUARY 23, 2022**

BETWEEN

ST. ELIZABETH ACADEMY KAREN LIMITED APPLICANT

AND

JOSEPH GIKONYO T/A GARAM INVESTMENTS RESPONDENT

RULING

1. By a letter dated 17th May 2013, the Respondent (“the Auctioneer”) received instructions from National Bank of Kenya Limited (“National Bank”) to sell by public auction the Applicant’s properties LR No. 1159/140 and LR No. 1159/377 on account of an outstanding debt of around KES 380,135,339.70 at the material time. The auction did not take place as the Applicant obtained orders from the court in ML HC COMM No. 333 of 2013 dated 31st July 2013 stopping the auction. In issuing the said orders, the court also directed the Applicant to meet the Auctioneer’s charges to be agreed upon and if not agreed, taxed.
2. As the parties could not agree, the Auctioneer filed a Bill of Costs dated 20th November 2013 as amended on 3rd February 2014 (“the Bill of Costs”) claiming KES 4,344,217.00 with his Commission at Item No. 5 being pegged at KES 4,251,400.00. The Bill of Costs was initially taxed and the amount certified at KES 92,817.00 but was set aside by consent on appeal and referred back for re-taxation. The Deputy Registrar, after considering the parties’ submissions, stated in her decision dated 11th August 2021 that the only issue for determination was whether the Auctioneer was entitled the commission set out in Item No. 5 of the Bill of Costs. The Deputy Registrar then held in part as follows:

The bill of costs will be taxed under paragraph 7 of Part II of the fourth schedule of the Auctioneers Rules 1997. I have considered the stay order that was issued in civil suit 333 of



2013 on 31st July 2013. The valuation of the property had been done and report made in which the forced sale value was estimated to be Kshs. 365,000,000/-

The commission is calculated as follows

0-600,000 @10% Kshs. 60,000/-

600,001 – 3,000,000 @5% Kshs. 120,000/-

Balance 362,000,000 @ 2% Kshs. 7,240,000/-

Total Kshs. 7,420,000/-

Divide by ½ Kshs. 3,710,000/-

The Commission is allowed at Kshs. 3,665,000/-. VAT is at 16% of the commission being Kshs. 586,400/-

The other items are not contested and are allowed

Decision

The bill of costs is allowed as drawn and taxed at Kshs. 4,344,217/-

3. Being dissatisfied with the aforesaid decision, the Applicant has filed the Chamber Summons dated 25th August 2021 under Rule 11 of the *Advocates (Remuneration) Order* and section 3 and 3A of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya (“the appeal”). It seeks to set aside the decision of the Deputy Registrar above and requests the court to assess the appropriate sum due to the Auctioneer.
4. The appeal is supported by grounds set out on its face and the affidavits of Anne W. Wado, a director of the Applicant sworn on 25th August 2021 and 17th September 2021 respectively and that of Amani K. Sheila, an advocate practicing as such in the firm of S. K. Amani & Associates, who have the conduct of this suit on behalf of the Applicant, sworn on 20th September 2021. The appeal is opposed by the Auctioneer through the Grounds of Opposition dated 7th September 2021 and the Auctioneer’s replying affidavit sworn on even date. The parties have also filed written submissions in support of their respective positions

Analysis and Determination

5. I have gone through the parties’ respective pleadings and submissions. Apart from the substance of the Reference, the Auctioneer attacks the appeal on technical grounds. It urges that the appeal was filed out time, that the Applicant cited the wrong provisions of the law and failed to attach the Ruling appealed from. I propose to deal with the technical issues first.

Reference filed out of time

6. It is not disputed that under Rule 55(5) of the Auctioneers Rules, a party who is dissatisfied with the decision of a Deputy Registrar in respect of the fees payable to an auctioneer is to appeal the same within 7 days of the decision. The said Rule is couched in mandatory terms as follows:
 - (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.
7. The Applicant does not deny that it filed its Reference out of time. It states that it did so because of counsel’s illness and that in any event, leave was sought and the same was granted by the court where the Applicant was allowed to file the appeal within 14 days. I have gone through the record and I am



unable to find the instance when the application for leave was applied for by the advocate holding brief for the Applicant and when the same was granted by the court as contended.

8. In the absence of evidence of the application for leave to enlarge time for filing the appeal, the court's jurisdiction to determine the appeal is extinguished as time bar is both a procedural and substantive issue which goes to the jurisdiction of the court (see *Mutia Muindi t/a Mutibra Auctioneers v CFC Stanbic Bank Ltd Garnishee & another MSA ELRC Misc. Application No. 2 of 2015 [2015] eKLR* and *Ann Wairimu Mwangi & another v Nancy Wanjira Waruingi T/A Providence Auctioneers NYR HC Misc. Application No. 7 of 2017 [2017] eKLR*). Thus, for this reason alone, the Applicant's reference ought to be struck out.

Failure to cite the appropriate provision of the law

9. The Applicant filed its appeal and cited that it was under Rule 11 of the Advocates Remuneration Order. The correct provision ought to have been Rule 55(5) of the *Auctioneers Rules*. It is now trite that failure to cite the correct provisions is not necessarily fatal to a party's application (see *Hermanus and Malcolm Bell v Daniel Torotich Arap Moi & Another SCK Appl. No. 1 of 2013 [2013] eKLR* and *Aden Abdi v Abdi Nuru Omar & 2 others NRB CA Civil Appeal No. 190 of 2006 [2007] eKLR*). As long as the other party is aware of the case facing it and no prejudice is occasioned on it by the wrongful citation, then the same is curable as contended by the Applicant. The Auctioneer is aware that what is before the court is an appeal under Rule 55(5) of the Auctioneers Rules and he has filed his opposing arguments on that basis.
10. I also note that the parties have been using the terms "reference" and "appeal" interchangeably with the Applicant insinuating that the two mean one and the same thing. They do not. This court, in *Sinohydro Corporation Limited v Samson Itonde Tumbo t/a Dominion Yards Auctioneers KSM HC Misc E012 of 2020 [2021] eKLR* held as follows:
 16. I hold the considered view that by terming an Appeal as a Reference does not convert the said Appeal to a Reference.
 17. In the case of Joel Titus Musya T/A Makuri Enterprises vs Southern Credit Trading Corporation Misc Civil Application No. 544 of 2004, Njagi J. held that;

"For the failure to file a memorandum of Appeal in place of a reference, I find that the applicant strayed, and renders his application incompetent."
 18. By necessary implication, I understand L. Njagi J. to have been saying that a Reference cannot be transformed into an Appeal.
 19. In that case, the Applicant had lodged a Reference under Paragraph 11 of the Advocates (Remuneration) Order.
 20. The court dismissed the Reference because it was deemed to be incompetent beyond redemption.
 21. In the case of *Ezekiel Kiminza T/A Auto Land Auctioneers vs Mistry Valj. Naran Mulji*, ELC Misc. Application No. 21 of 2016}}(At Mombasa), C. Yano J. struck out the Reference from the decision rendered by the Taxing Master following the taxation of an Auctioneer's Bill of Costs.



22. The learned Judge held that the application was incompetent and a non-starter in limine, for failure to comply with the procedure prescribed by Rule 55 (5) of the Auctioneers Rules.

23. To my mind, that decision constitutes a further affirmation of the legal position that a Reference from Taxation, pursuant to Paragraph 11 of the Advocates (Remuneration) Order is not synonymous with an Appeal pursuant to Rule 55 (5) of the Auctioneers Rules.

24. In *MAchira & Co. Advocates vs Magugu* [2002] 2 EA 428, Ringera J. (as he then was) said;

“As regards the point that the client’s objections to the taxation itself having been overruled, the proper remedy to adopt was an appeal to the High Court and not a reference under paragraph 11 of the Remuneration Order, I have the following to say:

First, the Advocates (Remuneration) Order is a complete code and there is no provision for the invocation of the Civil Procedure Rules. It does not provide for an appeal from any sort of decision by the taxing officer.”

11. In as much as this ground of opposition by the Auctioneer fails, the Applicant should take note of the difference between a Reference under the Advocates Remuneration Order and an Appeal under the Auctioneers Rules.

Failure to attach the Ruling

12. The Auctioneer faulted the Applicant for not attaching the Deputy Registrar’s decision in its appeal. Even though the same was attached in the Applicant’s subsequent deposition, let me just state for purposes of record that under Rule 55(5) of the Auctioneers Rules, it is not mandatory for the Applicant to attach the Deputy Registrar’s ruling with its Chamber Summons and that failure to attach the said Ruling is not fatal to the Applicant’s appeal as all the Rule requires is “the memorandum of appeal, by way of chamber summons setting out the grounds of appeal...” While it is convenient and indeed appropriate to file or attach the ruling, it is not fatal as the ruling is available to the court and the parties have submitted extensively on it.

Whether the Deputy Registrar erred in awarding item no. 5 in the Bill of Costs

13. Turning to the merits of the appeal and assuming that the delay in filing the appeal was condoned by the court, the question for resolution is whether the Deputy Registrar erred awarding the commission sought by the Auctioneer in the Bill of Costs.

14. The Applicant’s grievance is on how the Deputy Registrar exercised her discretion in awarding the commission, an amount that the Applicant claims was manifestly exorbitant and that the decision was based on an error of principle. The Applicant contends that in awarding the Auctioneer KES. 4,344,217.00 as commission fees, she failed to consider other factors including credits already advanced to the Auctioneer by National Bank and the Applicant.

15. A Court dealing with appeal from the assessment or taxation of costs must exercise caution since the assessment or taxation is based on exercise of discretion on the part of the assessing or taxing officer. Such assessment or taxation can only be interfered with when it is demonstrably shown that the decision was based on an error of principle or the fee awarded was manifestly high as to justify an interference. (See *Oscar Otieno Odongo t/a Odongo Investment Auctioneers v Sukari Industries Limited*



MGR HC Misc. Application No. 293 of 2018 [2019] eKLR, *First American Bank of Kenya v Shah & Others* ML HCCC No. 2255 of 2000 and // *Behan and Okero v Pan African Insurance* KSM HC Misc. Case No. 229 of 2003

16. The Deputy Registrar applied Paragraph 7 of Part II of the Fourth Schedule of the Auctioneer's Rules, 1997 to calculate the commission payable to the Auctioneer. This provision is applicable "where requisite notices are served and sale is stayed, or postponed". The Applicant does not deny being served with the notices but claims to have been coerced into receiving them. The Auctioneer, in his list of documents, annexed a certificate of service dated 23rd May 2013 stating that the notices were served upon one of the Applicant's directors. The allegation of coercion was never raised by the Applicant in any of its previous pleadings before the court or Deputy Registrar and I can only conclude that the same is an afterthought that is bereft of proof.
17. The Applicant further averred that the Bill of Costs ought to have been under Paragraph 6 and not under Paragraph 7 above as the Auctioneer did not carry out the sale and that the sale was not stayed as the properties were sold in 2013. It appears to be lost to the Applicant that the ruling giving rise to the Bill of Costs was that of 31st July 2013 where the court issued injunctive orders stopping the sale of the two properties and the Applicant was ordered to foot the Auctioneer's fees in that ruling. Therefore, it is my finding that the requisite notices were issued and served and the sale of the properties was stayed by the court thus the Deputy Registrar applied the correct provision under Paragraph 7 in determining the Auctioneer's commission.
18. I therefore find that the subsequent computation was according to the scales provided and thus the Deputy Registrar arrived at the correct sum, at least mathematically. I do not find any error of principle or whimsical application of discretion by the Deputy Registrar. The next issue is therefore whether the Deputy Registrar failed to consider any credit sums advanced to the Auctioneer by National Bank and the Applicant.
19. The record indicates that the Deputy Registrar considered these submissions by the Applicant and held that the payment by the Bank is a matter that can be determined on full hearing of the suit and not by the Deputy Registrar since the duties in the taxation is limited to assessing costs. The Auctioneer denied receiving any payment whatsoever from the Applicant in respect of the Bill of Costs and further stated that the payment from National Bank related to a completely different set of instructions and has no nexus to the Bill of Costs.
20. In this case, it is the Applicant and not the National Bank that was ordered to pay the Auctioneer's fees and the Applicant cannot claim to have discharged the court's orders in respect of a payment allegedly made by someone else. The burden of paying the costs was imposed on the Applicant by the court in its order dated 31st July 2013 and this has nothing to do with the relationship between National Bank and the Auctioneer.
21. I therefore find and hold that the Deputy Registrar followed the correct principles of law in reaching her decision and that she properly exercised her discretion soundly and judicially and I see no justifiable reason for the court to intervene.

Disposition

22. I uphold the Deputy Registrar's ruling dated 11th August 2022 and dismiss the Applicant's appeal dated 25th August 2021 with costs assessed at KES. 20,000.00 to be paid by the Applicant.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF FEBRUARY 2022.

D.S. MAJANJA



JUDGE

Court Assistant: Mr M. Onyango

Ms Okullo for the Auctioneer.

Ms Amani for the Respondent/Client.

