



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**MISC. APPLICATION NO.230 OF 2019**

**VICTORIA COMMERCIAL BANK LIMITED.....APPLICANT**

**VERSUS**

**JOVAN KARIUKI T/A MORAN AUCTIONEERS.....RESPONDENT**

**RULING**

**BACKGROUND**

1. The Applicant, Victoria Commercial Bank, filed a Chamber Summons Application dated **22<sup>nd</sup> October 2020** for orders; -

a) The Ruling of the of the **Deputy Registrar Hon. S. A. Opande** dated 09/10/2020 in the matter of Auctioneer's Bill of Costs dated 10/07/2019 between Jovan Kariuki T/A Moran Auctioneers and Victoria Commercial Bank be and is hereby varied and or set aside.

b) That this Court be pleased to order that the Auctioneers Bill of Costs dated 10/07/2019 be and is hereby placed before another taxing officer for taxation.

2. Which application is based on the Grounds and the Supporting Affidavit of **Ruth Muasya** as follows;

That the Learned Taxing Master erred in law in:

- i. Finding that the Respondent was entitled to a commission despite finding that the property was never advertised for sale.
- ii. Placing reliance on documents that were not properly on record and thus arriving at a wrong conclusion that the Respondent went through the sale process.
- iii. Allowing items number 2, 3 and 4 on the Respondent's Bill of Costs when the same was not proved by way of receipts to support the items as strictly proved. There was no evidence of a sale or advertisement for sale of the suit property.
- iv. Failed in adopting a subject matter that was not supported by documentary evidence.
- v. Allowing item Number 5 in applying 16% VAT instead of 14% which is the current applicable rate.
- vi. Relying on facts that were not pleaded by either of the parties and thus arrived at an erroneous decision.
- vii. Failing to apply the correct legal principles applicable while taxing an Auctioneers Bill of Costs.
- viii. Misapprehending the provisions of paragraph 7 of the 4<sup>th</sup> Schedule of the Auctioneers Act when he equated the issuance of redemption notices to a sale and thus arriving at a wrong decision.
- ix. Reducing the taxation of the Bill of Costs into a mathematical exercise and failed to consider the amount of work that the Auctioneer had done *vis a vis* the amount awarded
- x. Exceeding his jurisdiction when at page 5 of the Ruling he stated that '***the law should not be so rigid as to occasion an injustice***' without mentioning which provision of the law he was referring to and or interpreting.

xi. Failed to consider that the sale process starts with an advertisement in a Daily Newspaper and went ahead and made findings that contradicted facts and submissions that the herein cancelled the sale when there was no sale to start with.

xii. Misapprehended provisions of **Paragraph 7 of 4<sup>th</sup> Schedule of Auctioneers Act by equating issuance of redemption notices to a sale.**

### **REPLYING AFFIDAVIT**

3. The Application is opposed vide a Replying Affidavit dated **18<sup>th</sup> January 2021**, sworn by **Jovan Kariuki** who deposed;

a) That the Bill of Costs proceeded *vide* written submissions and a Ruling in favour of the Respondent was delivered.

b) The Learned Taxing Master rightfully upheld the commission entitlement in consideration of execution of the instructions issued by the Applicant and in application of **Paragraph 7, Part II of the 4<sup>th</sup> Schedule of the Auctioneers Rules 1997.**

c) That all documents were properly on record save for the fact that the file was improperly managed as admitted by the Learned Taxing Master in his paragraph 1 of the Ruling, actions that should not be attributed to the Respondent.

d) The Learned Taxing Master rightfully upheld the Tax rate at 16% as the same was the Tax Rate when the cause of action arose. Further, the 14% tax rate cannot operate retrospectively in payment of services rendered before the new rate came into force.

e) That this court in consideration of the circumstances of the case, does see through the Applicants attempt to deny the Respondent of its honest pay, legitimate expectation of being paid upon issuing notices in compliance with the Applicant's instructions and do uphold the ruling of the Learned Taxing Master.

### **APPLICANT'S SUBMISSIONS**

4. The Applicant submits that the 'Replying Affidavit' of Jovan Kariuki dated 18<sup>th</sup> January 2021 is of no effect for the reason that the Affidavit has not been commissioned before filing. The Replying Affidavit is thus defective and ripe to be struck out. It is their humble submission that the Chamber Summons Application is not opposed.

5. In **CMC Motors Group Ltd vs Bengeria Arap Korir T/A Marben School & Anor [2013] eKLR** the High Court that The Plaintiff in submissions stated that the Affidavit should be struck off for not complying with Section 5. [Therefore, in line with] **Regina Munyiva Nthenge vs Kenya Commercial Bank Ltd (2005) eKLR**, that held it [was] irregular and unacceptable and that the Affidavit was fatally defective as it was not sworn in the presence of Commissioner of Oaths.

6. The Supreme Court in a binding decision of **Gideon Sitelu Konchellah versus Julius Lekakeny Ole Sunkuli & 2 Others [2018] eKLR** stated as follows; -

***"Hence, an affidavit must clearly state the place and date where it was made and it must be made before a Magistrate or a Commissioner for Oaths. We have no hesitation in finding that the purported Replying Affidavit is fatally defective as the same contravenes all the legal requirements for the making of an affidavit. Hence it has no legal value in the matter before us, we have checked all 8 copies of Replying Affidavit, none of the copies was signed, commissioned and dated. Consequently, as the same is defective, it is deemed that there is no Replying Affidavit on record filed by the 1<sup>st</sup> Respondent."***

7. It is the Applicant's submission that the Taxing Master was in error in relying on the documents annexed to the Respondent/ Auctioneer's submissions on Preliminary Objection filed on 25<sup>th</sup> November 2019 instead of annexing the said documents to the Bill of Costs filed on 10<sup>th</sup> July 2019. They ought not to have been considered by the Taxing Officer.

See **Directline Assurance Co Ltd vs Wilkinson Mwenda Erastus & 7 Others [2016] eKLR & Mukono Ondieki & Co Advocates vs Unclaimed Financial Assets Authority [2019] eKLR** where it was held annexing of documents to submissions is irregular and alien to the law.

8. The principles for this Court to interfere with the Ruling and decision of the Taxing Master mirrors those of Advocate – Client Bill of Costs taxation.

In **First American Bank of Kenya vs Shah & Others (2002) EALR 64 cited in Anthony Thuo Kanai T/A Thuo Kanai Advocates vs John Ngigi Nganga [2014] eKLR** the Court established twin principles when the Court may/can interfere with Taxing Master's decision;

***a) That there is an error of principle***

***b) The amount is manifestly excessive to justify interference that it was based on an error of principle.***

9. Further, that the Auctioneer did not advertise the property for sale. The Auctioneer claims that he has produced an advertisement invoice which is not proof of advertisement. He ought to have demonstrated by way of a newspaper advertisement extract and/or receipts paid. The Taxing Master fell into error of principle when he held that the process of sale of property in question had commenced.

10. On the amount taxed by the Taxing Master of Kshs.8,535,198.70. the Applicant submits that the amount was excessive as to justify the taxed amount. Items 2, 3 and 4 of Bill of Costs were not supported by any evidence and they ought not to have been allowed. There was an error of principle in the Taxing Master decision wherein the Auctioneer Bill of Costs was taxed as drawn at an amount of Kshs.8,535,198.70. The Applicant submits that the amount was manifestly excessive as to occasion an injustice to the Applicant herein.

### **RESPONDENT'S SUBMISSIONS**

11. The Respondent submitted that the Applicant's application was/is incompetent before Court as it is time-barred by virtue by **Rule 55 (5) of Auctioneers Rules**. In Ezekiel Kiminza T/A Auto Land Auctioneers vs Mistry Valji Naran Mulji[2017] quoted Mutia Muindi ya Matiba Auctioneers vs CFC Stanbic Ltd & Anor (2015) eKLR which held that **Rule 55(5) of the Auctioneers Rules** only allows a window of 7 days within which to file an appeal after the decision appealed from.

12. It is the Respondent's submission that item number 4 and 7 of the Bill of Costs regarding commission, there is no conflict and/or argument that the Applicant herein instructed the Respondent. Again, there is no conflict that the Respondent executed the said instruction by issuing out requisite notices up to the point of the Applicant staying the sale process. In the case of Oscar Otiemo Odongo T/A Odongo Investment Auctioneers versus Sukari Industries Limited [2019] eKLR the Court stated that, *A court dealing with a reference on 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 demonstrable that the decision was based on an error of principle or the fee awarded was manifestly high as to justify an interference.*

13. It was their submission in the same terms that there should not be any question regarding payment of the Respondent for issuing requisite notice as per **Paragraph 7 of Part II of the Fourth Schedule of the Auctioneers Rules**, which provides:

*“Where requisite notices are served and sale is stayed, or postponed the Auctioneer shall be entitled to half (1/2) of fees to which he would have been entitled to after sale plus expenses.”*

### **DETERMINATION**

14. After consideration of submissions and pleadings the issues that emerge for determination are;

a) **Court's jurisdiction to hear and determine the Appeal filed after the timeline.**

b) **Whether the Respondent's Replying Affidavit should be expunged from the record for non- commissioning of the Affidavit.**

c) **Whether there was a sale; when does a sale commence for purposes of payment of Auctioneers services under Auctioneer's Act.**

d) **Who is to pay and how much is paid**

a) **Court's jurisdiction to hear and determine the Appeal filed after the timeline.**

15. The Appellant vide Chamber Summons raised a memorandum of appeal vide **Rule 55(4) & (5) of Auctioneers Rules 1997** and took issue with the following;

i. Items 2, 3 & 4 of the Bill of Costs that no evidence was produced to prove these claims.

ii. The rate of interest at 16% instead of 14% prevailing rate.

iii. Misapprehension of Paragraph 7, 4<sup>th</sup> Schedule of the Auctioneers act and relied on the case of Zacharia Barasa vs Dubai Bank that a sale did not occur due to the fact that advertisement was not done.

16. On the other hand, the Respondent raised the following issues in rebuttal;

a) The appeal vide Chamber Summons is incompetent due to effluxion of time and not in compliance with **Rule 55(4) & (5) of Auctioneers Rules**.

b) With regard to **Items 4 & 7 of Bill of Costs** regarding the Respondent's commission, the Respondent executed instructions by issuing requisite notices upto the point where the Applicant stayed the sale.

c) The Respondent relied on **Paragraph 7 of Part 11 of the 4<sup>th</sup> Schedule of the Auctioneers Rules**

17. **Rule 55 of Auctioneers Rules 1996** on Fees and disbursements payable to an Auctioneer provides;

*(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 movable 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 (Cap. 21, Sub. Leg.), 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 fees payable.*

(4) *An appeal from a decision of a registrar or a magistrate or the Board under subrules (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.*

18. The Court's jurisdiction was brought into question as it was alleged the Chamber Summons was incompetent as it was statutorily time barred. The Ruling by the Taxing Officer was delivered on 9<sup>th</sup> October 2020 as annexed and confirmed by copy of Cause-list. According to the calendar, this was a Friday, the weekend is omitted and the following week the 5 days counted omitting again the weekend. Save for the public holiday of 10<sup>th</sup> October 2020 which is also not counted, the next 2 days of the following week were 20<sup>th</sup> & 21<sup>st</sup> when 7 days elapsed and the Chamber Summons was filed on the 7-working day minus 2 weekends and 1 public holiday. Therefore, the Chamber Summons /Appeal was timely filed and the Court has jurisdiction to hear and determine it.

19. The Appellant questioned validity of the Respondent's Replying Affidavit sworn on 18<sup>th</sup> January 2021 was not commissioned as required by **Section 5 & 8 of Oaths & Statutory Declaration Act**. I have confirmed that the said Affidavit is signed and dated by Deponent but not commissioned. However, a Commissioned Affidavit seems to have been filed thereafter.

20. On setting aside the Taxing Officer's assessment case-law as elucidated in ***First American Bank of Kenya vs Shah & Others (2002) EALR 64 & Oscar Otieno Odongo T/A Odongo Investment Auctioneers versus Sukari Industries Limited [2019] eKLR supra*** that *[Taxing Officer's] assessment or taxation can only be interfered with when it is demonstrable that the decision was based on an error of principle or the fee awarded was manifestly high as to justify an interference.*

21. The Appellant took issue with **Items 2, 3 & 4 of the Bill of Costs** as follows;

- a) **Item 2** transport during service Ksh 5000/= was not proved by any evidence tendered in Court.
- b) **Item 3** Hand Bills Ksh 1,500/- was also not substantiated by evidence.
- c) **Item 4** Commission on the sale of immovable property for Ksh 729,340,404.15/- the decretal sum of outstanding debt.
- d) **Item 5** VAT @ 16% on Commission should be at the current rate of 14%.
- e) **Item 7** is ½ Fee payable as per Auctioneers Rules.

22. From the record, the Appellant & Respondent seemed to have had a tiff and fell out such that during taxation of the Bill of Costs Preliminary Objection was raised that the Appellant did not instruct the Respondent and the issue culminated with the Ruling of 9<sup>th</sup> October 2020. The same is not on appeal as no reference was filed before this Court.

23. However, the correspondence between parties demonstrate that the Respondent was instructed by Counsel for the Appellant. The issue of Fees was raised and the Respondent replied and relied on Auctioneers Rules. Thereafter, instructions were withdrawn after the Respondent prepared the 45 Day Notice and served to the Debtor. The Respondent wrote to bank's advocate then on what documents were required to effect the Auction. These facts are confirmed by following correspondence;

- a) Email of 8<sup>th</sup> March 2019, by one Clement Gitau, Assistant Legal Officer, who wrote to Eddy Orinda Advocate and copied to Ruth Muasya Legal Manager of the Appellant to appoint an Auctioneer for purposes of selling Othaya Villas upon expiry of 30 days.
- b) Letter of 18<sup>th</sup> March 2019 from One Associates Law Firm/Eddy Nocholas Ombudo Orinda Advocate wrote to Moran Auctioneers and instructed them to recover the debt from the debtor on behalf of the firm
- c) On 27<sup>th</sup> March 2019, Moran Auctioneers replied to One & Associates and confirmed their meeting held on 22<sup>nd</sup> March 2019 and requested for documents the required to execute the instructions and Fees would be charged as per the Auctioneer Rules and may be subjected to negotiation by the parties.
- d) On 9<sup>th</sup> April 2019, the Respondent served the Borrower/ Debtor 45 days' Notice of intended Auction.

e) On 9<sup>th</sup> May 2019, the Bank wrote to the Auctioneer to cease undertaking the Auction as they had not instructed the Auctioneer and he had not provided quotation for Fees.

24. It is not denied that the Auctioneer was instructed and prepared and served the Debtor with 45 days' Notice after he attended a meeting with the Advocates. The evidence to confirm transport cost for Ksh 5000/- transport was not availed.

25. With regard to handling Fees, again it is on record, that the Auctioneer communicated with the Advocates and served the Debtor/Borrower 45 days' notice on the impending auction. The evidence to justify the Ksh 1,500/- was not produced.

26. Item 4 Commission on the sale of immovable property for Ksh 729,340,404.15/- the decretal sum of outstanding debt is most contentious. The Appellant objects to payment of commission as no auction or sale took place.

27. The Applicant relied on the case of Zacharia Barasa vs Dubai Bank Ky Ltd [2015] that held;

***“On Item No 4- The Appellant had contended that he had commenced the process of sale of the property in question.***

***From the Attached documents, the Appellant sent out Notice to redeem the Property to the Chargor. There was no evidence of advertisement for sale which is the commencement of sale process. The Deputy Registrar was right in his reasoning as to why he disallowed the amount sought by the Appellant.”***

The Respondent relied on 4<sup>th</sup> Schedule Rule 7 Auctioneers Rules 1996

***“Where requisite notices are served and the sale is stayed as postponed, ½ of fees to which Auctioneer would have been entitled after sale plus expenses.”***

28. From the above circumstances, the Respondent served the debtor with 90 days & 40 days Notices and the Respondent served the Debtor the 45 days' Notice and thereafter instructions were withdrawn. From these facts, 4<sup>th</sup> Schedule Rule 7 of Auctioneers is applicable.

29. The Auctioneer was instructed via Advocates for the Appellant and he carried out instructions as required up to obtaining payment of the Advert to Nation Media Group PLC vide Invoice Order number 0000057488 and advertisement was curtailed by the Appellant's withdrawal of instructions. Secondly, as alluded above, the Auctioneer intimated his Fees would be as per Auctioneers Rules or negotiation. Thirdly, the Auctioneer had carried out instructions as legally required under **Rule 12 of Auctioneer's Rules 1996** revised 2017 save for advertisement which was curtailed by withdrawal of instructions by the Appellant.

30. For these reasons above, this Court concurs with Taxing Officer's finding;

***“I find the content of the Notice of 45 days to have been validly issued but the process of sale was stopped by the Respondent through its advocate vide the said letter of 9<sup>th</sup> May 2019. The Respondents having stopped the sale, they ought to compensate the Applicant on the basis of valid instructions which the Applicant was acting on.”***

Each case is heard and determined on its specific facts and the Court has a duty to consider those facts against the law. Whereas the case Zacharia Barasa vs Dubai Bank Ky Ltd [2015] supra may apply, in these circumstances where the advertisement was curtailed by the Appellant, it would not apply. Secondly this case's finding is superceded by the Auctioneers Rules out of the Auctioneer's Act; specifically, 4<sup>th</sup> Schedule Rule 7 Auctioneers Rules which the Respondent complied with.

31. The Appellant opposed the Respondent's claim also on the basis that the computation of Auctioneer's Fees was based on the decretal amount instead of the value of the auction goods. The Appellant relied on the case of Ostrich Lion Auctioneers vs Paul Muchiri [2007] eKLR which referred to National Industrial Credit Bank Ltd vs S.K. Ndegwa Auctioneers which provided as follows;

***“The Fees claimed by the Auctioneer and as awarded by Deputy Registrar were calculated upon the decretal sum, not upon the value of the property attached. Schedule IV of the Auctioneers Rules, 1997 under which an Auctioneer's charges are calculated is silent on whether they ought to be calculated based on the decretal sum or on the value of the property attached. But the Court of Appeal has held that the Auctioneers fees ought to be calculated based on the value of properties attached.”***

32. Therefore, in the instant case the computation of Auctioneer's fees ought to have been based on the value of the property [to be] attached. **Item 4** -Commission on the sale of immovable property for Ksh 729,340,404.15/- is the decretal sum/outstanding debt. There was no evidence of the value of goods to be attached or valuation Report of immovable property to be attached.

33. The Taxing Officer erred in assessment of Auctioneer's Fees on the basis of the outstanding debt as the assessment ought to be based on value of goods to be /or attached.

34. The Appellant contested Item 5 VAT @ 16% on Commission and submitted it ought to be at the current rate of 14%. I find that in the absence of a contract executed by parties that agreed to interest at 16% or any consent or agreement to that effect, interest ought to be at Court rates at the time of judgment, ruling, order or decree of the Court. The objection is sustained.

35. The Appellant relied on the case of Joseph Gikonyo T/A Garam Investments vs Sidian Bank Ltd; Kamuthi Housing Corp Society

**(Interested Party) [2019] eKLR** to the effect that the claim for Auctioneer's Fees ought to be against the debtor and not the instructing client, the Appellant.

36. In the above-cited case, this court granted that order of claim for Auctioneers Fees should be settled by the debtor and not the instructing Bank because, the debtor joined the proceedings as an interested party and informed the Court that it approached the bank midstream and made proposals to settle the outstanding debt that resulted to the imminent auction that was now halted. Secondly, both the Bank and borrower relied on Legal Charge produced in Court wherein parties contracted that all expenses regarding the Charge, the bank would charge to the borrower's account without notice to the borrower. These circumstances are different from the present scenario, where it is the instructing client, the bank that gave instructions to their advocates then on record to appoint an Auctioneer to recover outstanding debt through auction and later withdrew the instructions. No evidence was adduced that the debtor was involved in stopping the sale or had contracted to pay all charges incidental to the Legal Charge. So, the Auctioneer's Fees cannot at this stage be visited on the Debtor unless such evidence is availed to the Court.

**DISPOSITION**

37. **The Court allows the appeal only to the extent of payment of Auctioneer's fees subject to;**

38. **The computation which shall be based on ½ the value of goods to be or attached or valuation of immovable property to be attached and**

39. **Interest at 14% Court rate.**

40. **Item 2 & 3 of Bill of Costs were not proved and therefore not included in Auctioneer's Fees another Taxing Officer.**

41. **The Taxation shall be before any other Taxing Officer.**

42. **The Auctioneer's fees shall be paid by the instructing client the Appellant Bank.**

**DELIVERED SIGNED DATED IN OPEN COURT ON 31<sup>ST</sup> MAY 2021 (VIRTUAL CONFERENCE)**

**M.W. MUIGAI**

**JUDGE**

**IN THE PESENCE OF;**

**MR. KIMANI FOR THE APPLICANT**

**MS DIRO ADVOCATES FOR THE RESPONDENT**

**COURT ASSISTANT - TUPET**