



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISC. CIVIL CAUSE NO. E012 OF 2020

SINOHYDRO CORPORATION LIMITED.....APPLICANT

VERSUS

SAMSON ITONDE TUMBO t/a

DOMINION YARDS AUCTIONEERS.....RESPONDENT

JUDGEMENT

The matter before me is an appeal arising from the decision which the taxing officer rendered on a taxation of the Auctioneer's costs.

Pursuant to the provisions of **Rule 55 (5)** of the **Auctioneers Rules**, the appeal was filed by way of a Chamber Summons.

The appellant, SINOHYDRO CORPORATION LIMITED, invited this court to set aside the Ruling which was made by the learned Chief Magistrate on 15th October 2020.

It was also the appellant's prayer that the matter be referred back to the Chief Magistrate, with directions as to the proper manner of assessment of "Advocates fees."

In the alternative, the appellant reasoned that this court could proceed to carry out the process of taxation in accordance with the law.

The appeal was premised on the following grounds:-

"a. The Ruling of the Chief Magistrate has no basis in law in various items not taxed off and taxed.

b. The Chief Magistrate made an error in principle, in failing to appreciate the applicable law under the Auctioneers Rules 1997 (Rev. 2012) which he ought to have based his assessment under the Auctioneers Act.

c. The Chief Magistrate failed to consider the submissions of the Applicant's counsel.

d. The Chief Magistrate, having committed errors in principle, the Honourable Court has jurisdiction to interfere with her ruling on assessment of the Auctioneer's costs and

1. The taxation is arbitrary.

2. The taxation was based on the wrong principles.

3. The Chief Magistrate did not give reasons.

4. The Chief Magistrate misunderstood and misinterpreted the law.

5. The entire handling of the Auctioneer's Bill of Costs dated 12th August, 2020 was erroneous."

When canvassing the appeal, the appellant submitted that when the court is called upon to interfere with the exercise of the taxing master's discretion, the general principle applicable was that the court will not interfere unless it appears that the taxing master has not exercised his discretion judicially.

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.**

When the sum awarded was inordinately high, it would constitute unjust enrichment to the auctioneer, whilst subjecting the other party to unfair exploitation.

On the other hand, when the sum awarded was inordinately low, it would constitute unfair deprivation to the auctioneer, whilst exonerating the other party from a responsibility that he ought to carry.

The court is therefore called upon to set aside an award which was either inordinately high or inordinately low, so as to uphold fairness between the parties.

In order to ascertain whether or not the appellant had made out a case to warrant an interference with the decision of the taxing master, the court is called upon to re-evaluate the reasons given by the parties during taxation, and then determine if the decision arrived at by the taxing master was or was not justified in the circumstances of the case.

Obviously, the court would require the record of the proceedings and the ruling of the taxing master, to be able to carry out the requisite evaluation.

The appellant did not provide the necessary documents. In the circumstances, the court would have been unable to determine whether or not the learned taxing master had erred in principle, as asserted by the appellant, or at all.

However, the respondent decided to supply the court with the necessary documents, including:

- a. Warrants of Attachment and Sale;**
- b. Proclamation;**
- c. Notification of Sale;**
- d. Auctioneer's Bill of Costs;**
- e. Submissions by both parties;**
- f. Proceedings.**

Having provided the said documents, the respondent had inadvertently come to the rescue of the appellant, because it now became possible for the court to carry out the required re-evaluation.

The Auctioneer's Bill of Costs has been provided by the appellant, when the appeal was filed on 21st October 2020.

And the respondent supplied the Certificate of Costs [Exhibit SIT 13].

The respondent had cited the decision of the Supreme Court in **LAW SOCIETY OF KENYA VS CENTRE FOR HUMAN RIGHTS & DEMOCRACY & 12 OTHERS [2014] eKLR**, wherein it was held as follows:

“The Record of Appeal is the complete bundle of documentation, including the pleadings, submissions and judgement from the lower court, without which the appellate court would not be able to determine the appeal before it. If an intending appellant were to present the court with a Notice and Petition of Appeal, but without the Record of Appeal, and expect the court to determine ‘the appeal’ on the basis of these two, such an appeal would be incomplete and hence incompetent...”

Whereas the appellant had lodged an incomplete record of appeal, the respondent provided the court with all the material that had earlier been omitted. Therefore, it was now possible for the court to re-evaluate the ruling of the taxing officer, within the context of what had transpired during the process of taxation.

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.

I now set aside the Ruling of the learned Chief Magistrate, and (being aware that he was transferred from Kisumu), I direct that the Auctioneer’s Bill of Costs be taxed afresh, by the current Chief Magistrate.

On the issue of costs, I find that although the appeal was successful, it would not have been canvassed on merit, if the respondent had not rescued it by making available the documents that constituted the record of appeal. I therefore order each party to meet his own costs.

DATED, SIGNED and DELIVERED at KISUMU This 20th day of May 2021

FRED A. OCHIENG

JUDGE