



**REPUBLIC OF KENYA**

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

Coram: Hon. D. K. Kemei – J

**MISCELLANEOUS APPLICATION NO. 405 OF 2019**

**JAMES KILONZO T/A**

**BASE AUCTIONEERS.....APPLICANT**

**VERSUS**

**CHINA WU YI LIMITED.....RESPONDENT**

**RULING**

1. The Applicant herein filed an application dated 28/04/2021 pursuant to the Provisions of Rule 55 (5) of the Auctioneers Rules, Order 22(22) of the Civil Procedure Rules and section 1A and 3B of the Civil Procedure Act seeking the following reliefs:-

**1. Spent**

**2. That the Honourable court do issue an order for consolidation of Machakos HCCMisc. Application Numbers 405/19, 406/2019 and 407/2019 for purposes of hearing and determination of the application/ reference.**

**3. Spent**

**4. That the entire decision of the Taxing Master on the Auctioneers Bill of Costs in Machakos HC. Misc. Application numbers 405/2019, 406/2019 and 407/2019 be set aside.**

**5. That the costs be provided for.**

2. The application is supported by the grounds set out on the face thereof and the affidavit of Martha Mutoro the Legal Manager Metropolitan Cannon General Assurance Co. limited the insurers of the Applicant sworn on even date. The Applicant’s case is inter alia: that the taxing master duly taxed the Respondent’s bill of costs in the three Miscellaneous applications and awarded excessive amounts which are not supported by any law; that the Respondent is intend on executing against the Applicant who is likely to suffer great prejudice; that the bill of costs in the three applications should have been taxed as per the Auctioneers Rules schedule 4 part II as follows:-

**a. Machakos HC Misc. Application No. 405/2019**

*i. Fees on Attachment .....Kshs. 105,257/92*

*ii. Auctioneers fees on transport – (actual amount spent be awarded subject proof of receipts.)*

*iii. All other items are not provided for and should not be allowed.*

**b. Machakos HC Misc. Application No. 406/2019**

*i. Fees on attachment .....Kshs. 96,688/3*

*ii. Auctioneers fees on transport .....(actual amount to be awarded subject to proof by receipts.)*

*iii. All other items are not provided for and should not be awarded.*

**c. Machakos HC Misc. Appl. No. 407/2019**

*i. Fees on attachment .....Kshs. 187,886/62*

*ii. Auctioneers fees on transport .....( actual amount spent to be awarded subject to proof by receipts.)*

*iii. All other items are not provided for and should not be awarded.*

It was further the Applicant's case that the Respondent will not suffer any prejudice if the application is allowed as it is in the interest of justice to do so. Finally, it was the Applicant's case that it is ready and willing to abide by such terms this court may impose on it including a deposit of the entire sum in court pending the determination of the reference.

3. The Application is opposed by the Respondent who filed a replying affidavit sworn on 11/05/2021 where he deposed inter alia: that the Applicant should forthwith pay the undisputed sums of Kshs.389,832/64 within two days failing which execution should ensue; that the application is time barred having been filed outside the 7 days allowed under Rule 55(5) of the Fourth Schedule of the Auctioneers Rules 1997 which provides that 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; that there is no appeal filed against taxation in Hc Misc. application No. 406/2019 and 407/2019 as required by the Auctioneers Rules and hence the court lacks jurisdiction to consolidate finalized matters where no appeal has been preferred; that during taxation all the bills of costs were taxed separately as distinct cases; that taxation is a mathematical exercise which has not been properly understood by the Applicant who is in obvious error as they did not file their submissions for consideration by the taxing master; that the bills were taxed to scale and a certificate thereto issued under the fourth schedule of the Auctioneers Rules; that the bulk of the items in the bill of costs are in tandem with the fourth schedule of the Auctioneers Rules while the remainder are as per the Advocates Remuneration Order which were awarded by this court after it dismissed the Applicant's application; that the Applicant has not provided evidence by way of affidavit as to how it arrived at the minimum amounts proposed in clear violation of the explicit schedules used for taxation; that the application is an abuse of the court process and should be dismissed with costs.

4. The application was canvassed by way of oral submissions.

5. Mr. Khamala, learned counsel for the Applicant submitted that the taxing master split the bill and in the end arrived at an erroneous decision. He submitted that the auctioneer's fees are catered for in the fourth schedule and staggered at 2%, 5% and 10% of the total sums. Counsel contended that the taxing master went into error when he calculated the fees using three bands instead of only one band for an amount over one million shillings. Learned counsel sought reliance in the statute of general interpretation section 57 regarding the computation of time and submitted that the 7 days began to run the following day after the ruling was delivered.

Finally, he submitted that the three (3) Miscellaneous Applications should be consolidated and that the certificate of taxation was not secured by the Applicant by the time the applications were filed.

6. Mr. Nthiwa for the Respondent first submitted that the application is time barred under the Auctioneers Rules 1997 on subsidiary legislation of the Auctioneers Act under Rule 55(5) in which the Applicant is required to file the requisite application within 7 days. Learned counsel pointed out that the order on taxation was made on 21/04/2021 and hence the last date of filing was 28/04/2021 yet it was done on 29/04/2021 which is outside the period stipulated and without leave of the court. It was submitted that no appeal or reference has been made in regard to **Hc Misc. application numbers 406/2019 and 407/2019** and hence the request for consolidation is misplaced since the taxing master delivered three distinct decisions after being taxed independently. It was also submitted that the Respondent's claim for transport expenses is provided for under Rule 11 of the Auctioneers Rules 1997 which is to be multiplied by three times according to the distance covered as per the automobile association of Kenya. Learned Counsel also pointed out that the Applicant has not annexed a copy of the taxing master's decision so as to enable the court satisfy itself whether the errors alleged ever happened. It was finally submitted that the Respondent is entitled to costs pursuant to the dismissal of the Applicant's application and which will be in accordance with the Advocates Remuneration Order since he was represented by an advocate. Counsel urged the court to dismiss the Application with costs.

7. I have given due consideration to the application and the oral submissions. It is not in dispute that the Respondent's bill of costs in the three matters namely **Machakos high court Misc. Application Numbers 405/2019, 406/2019 and 407/2019** have since been taxed by the taxing master and certificates of taxations issued. It is also not in dispute that the applicant did not file submissions regarding the Respondent's bill of costs. It is also not in dispute that each bill of costs was taxed separately by the taxing master. I find the issues necessary for determination are as follows:-

***i. Whether the Applicant's reference is time barred.***

***ii. Whether the three miscellaneous application numbers 405/2019, 406/2019 and 407/2019 should be consolidated.***

***iii. Whether the taxing master taxed the Respondent's bills of cost to scale as per the Auctioneers Rules.***

8. As regards the first issue, it is noted that under Rule 55(5) of the Auctioneer's Rules an appeal from a decision of a Registrar or a Magistrate or the Board under sub-rules (2) and (3) shall be to a judge in chambers and that the Memorandum of Appeal, by way of chamber summons setting the grounds of the appeal shall be filed within 7 days of the decision of the Registrar or Magistrate. According to the Respondent's counsel, the Applicant's application was filed outside the stipulated period in that the decision having been made on 21/04/2021 then the application ought to have been filed on 28/04/2021 and not 29/04/2021. The Applicant's counsel has sought refuge under the provisions of section 57 of the Interpretation and General Provisions Act Cap 2 of the Laws of Kenya. I have noted that the taxing master delivered his ruling on the bills of costs on 21/04/2021. According to the Respondent, the application aforesaid is late by one day. The computation of time under section 57 of the Interpretation and General Provisions Act is as follows: -

*“In computing time for the purpose of a written law, unless the contrary intention appears: -*

*a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;*

*b) if the last day of the period is Sunday or a public holiday of all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;*

*c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then, if that day happens to be an excluded day, the act or proceedings shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;*

*d) where an or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.*

From the foregoing, it is clear that the date of the event is excluded so that the period begins to run after the date of the event. In the circumstances, I am satisfied that the Applicant was within time. In any case, the ruling by the taxing master was delivered on the 21/04/2021 in the course of the day and which day was expected to end within 24 hours and hence the next date (22/04/2021) was to commence for the next seven days up to 29/04/2021. I find that the Applicants reference was filed within the stipulated period.

9. As regards the second issue, it is noted that the Respondent received warrants of attachment in the original Civil Suits namely **Machakos HCC No. 51/2014, 52/2014 and 53/2014**. Upon carrying out the execution of the warrants of attachment, orders of stay of execution were subsequently issued. The Respondent later filed his bill of costs only for the Applicant herein to seek to have them struck out vide an application dated 4/02/2020. The said application was subsequently dismissed and the Respondent's bill of costs ordered to be taxed. The Applicant vide the said application had sought for consolidation of the miscellaneous applications namely **Machakos Hc Misc. 405/2019, 406/2019 and 407/2019**. This court directed that the orders made vide **Hc. Misc. Application 405/2019** shall apply in **Misc. 406/2019 and 407/2019**. The Applicant has now sought for consolidation of the three matters whereas the Respondent is vehemently opposed thereto on the grounds that each of the bills of costs had been independently taxed by the taxing master. The purpose of consolidation is basically to save on time in the determination of disputes which are similar in nature. Indeed, the Respondent's bill of costs are similar and the principle running through is the same. There is no prejudice to be suffered by the Respondent if the matters are consolidated so that they are wrapped up fast and concluded. I decline the suggestion to have the matters handled separately. The Applicant has already taken the cue by canvassing the relevant issues in **Misc. 405/2019** as well as the other similar matters. Further, the court vide its ruling dated 8/12/2020 had ordered that the orders in Hc Misc Application No. 405/19 were to apply in Hc Misc Application Numbers 406/19 and 407/19 and hence the prayer for consolidation is in tandem with it. I am satisfied that the prayer for consolidation is merited and hence prayer No.2 is granted.

10. As regards the third issue, the Applicant has taken issue with the taxation of the Respondent's bill of costs by the taxing master who has staggered the fees chargeable in bands of 2%, 5% and 10% instead of the usual 2% of the sums on the warrant of attachment which are in excess of Kshs 1 million. The Applicant also objected to fees on transport being granted unless there is proof by way of receipts and finally, that the other items in the bills are not provided for under the Auctioneers Rules. The Respondent maintains that the bills of cost have been drawn to scale and should not be disturbed. It is noted that the bills of costs had originated from the determination of **High Court Civil Numbers 51/2014, 52/2014 and 53/2014** wherein warrants of attachment for the sum of Kshs. 10,525,797/-, Kshs. 4,834,417/- & Kshs. 9,394,308/- respectively were issued to the Respondent to execute therefor. It is also noted that the Applicant did not file submissions or rejoinder to the bills of costs and that the taxing master did not have any contrary view regarding the listed items from the Applicant. It is also not in dispute that this court dismissed the Applicant's earlier application dated 4/02/2020 with costs and which entitled the Respondent's counsel to seek for fees under the Advocates Remuneration Order. It is trite that a court dealing with a reference on assessment or taxation of costs should exercise great caution since the taxing master's assessment or taxation flows from the well of discretion. However, a court dealing with a reference can interfere with the said assessment or taxation if it is shown that the decision was based on an error of principle or that the fee awarded is manifestly high so as to represent an erroneous estimate of the sums awarded. (See the case of **Bank of Uganda –vs- Benco Arabe Espanaol [1999] 2 EA 45**).

As indicated vide paragraph 9 above, the three miscellaneous applications 405/2019, 406/2019 and 407/2019 have been consolidated and I will now proceed to consider them. The amended bills of costs are all dated 16/12/2020 and each contains 26 items. The relevant legislation governing auctioneer's fees/charges is Part II of the Fourth Schedule of the Auctioneer Rules No. 5 of 1996 (Revised 2017) which has 11 items thereunder. For the purpose of this reference, items 1, 2, 3, 4 and 11 under the aforesaid Part II thereof are relevant as they form the bulk of the dispute herein. Item 1 provides that the Auctioneer is entitled to charge Kshs. 4,000/- upon receipt of court warrants or letter of instructions while item 2 provides that where no property is found to attach or where the property found is worth kshs.4000/- or less earns the Auctioneer a sum of Kshs. 4,000/- as fees. Item 3 is on fees before attachment or repossession which entitles the Auctioneer a fee of Kshs. 4,000/-. Item 4 is on fees on attachment/repossession/dstraint and expenses and which has introduced categories within which fees are to be calculated on defined percentages. For sums between kshs.4001/- to Kshs. 100,000/- the fees are charged at the rate of 10% while sums between Kshs. 100,001/- and Kshs. 1,000,000/- the rate is 5% and any sum over Kshs. 1,000,000/- the fees are charged at the rate of 2%. Item II provides for travelling expenses as published by the Automobile Association from time to time and which shall be allowed at three times the scale.

11. As the Applicant's reference is in the form of an appeal, this court will proceed to analyze the Respondent's three amended bills of costs dated 16/12/2020 so as to reach an independent conclusion as to whether or not to uphold the taxing master's decisions dated 21/04/2021. This court has the power to tax the bills or refer to the taxing master for fresh taxation. I find that referring the matters to the taxing master will further delay the finalization of the said matters and hence I will proceed to tax them. It is noted that all the items in the three bills of cost are similar except item No. 4. Starting with items 1 and 2, I find them drawn to scale. Items 3 is not provided for and are taxed off. On items No. 4, I find the same to be the back bone of the Respondent since it is where the bulk of his fees/charges are to be earned based on the decretal amounts indicated on the warrants of attachment. It is noted that the taxing officer calculated the figures using the three bands under item 4 of part II fourth Schedule by splitting the sums and graduating them to suit the various percentages provided. I find that the taxing master fell into error since he was to peg the respective decretal sums according to the single percentage provoked for one band. As the

decretal sums were in excess of Kshs. 1,000,000/- then the taxing master ought to have used 2%. It is clear that the charges are to be taken as a one-off event so that the fees charged should reflect the percentage used against the sums indicated on the warrant of attachment or letter of instruction issued to the auctioneer. Hence items No. 4 in the three bills were not drawn to scale and must be set aside and taxed afresh. In **Hc Misc. No. 405/2019** the decretal sums is Kshs. 10,525,797/- which is subjected to 2% and which comes to Kshs. 210,515/94. In **Hc Misc. 406/2019** the decretal sums is Kshs. 4,834,417/- and hence the Auctioneers fees of 2% is Kshs. 96,688/34. In **Hc Misc. 407/2019** the Auctioneers fees at 2% is Kshs. 187,886/16. On items 5 the issue of VAT (16%) is automatic and hence the amounts in **HC Misc. 409/2019** will be Kshs. 33,682/55 while in Hc. Misc.406/2019 will be Kshs. 15,470/13 and in Hc.Misc.407/2019 the sums will be kshs. 30,001/78. As regards items 6 on transport, I note that no receipts were furnished and so the same is taxed off. The items on disbursements (7-25) are not provided for and are thus taxed off. As regards the last items No. 26 this court vide a ruling dated 8/12/2020 dismissed the Applicant's application dated 4/02/2020 with costs to the Respondents. The Advocates are noted to have engaged in their industry on research and filing submissions. I find the amount awarded by the taxing master in the sum of Kshs. 10,000/- in each bill to be reasonable and hence the same is upheld. Hence, the total amounts awarded to the Respondent in the three applications are as follows:-

(i) **Hc Misc. 405/2019** ..... **Kshs. 259,198/49**

(ii) **Hc Misc. 406/2019** .....**Kshs. 127,158/47**

(iii) **Hc Misc. 407/2019** .....**Kshs. 232,947/94**

12. In light of the foregoing observations, the Applicant's application dated 28/04/2021 succeeds in terms of **prayers 2 and 4** to the extent that the Taxing Master's orders dated 21/04/2021 are hereby set aside and substituted with an order that the three (3) amended bills of costs dated 16/12/2020 are taxed in the sums listed in paragraph 11 above. A certificate to issue in that regard. Each party to bear their own costs.

It is so ordered.

**DATED AND DELIVERED AT MACHAKOS THIS 29<sup>TH</sup> DAY OF JUNE, 2021.**

**D. K. KEMEI**

**JUDGE**