



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

MISCELLANEOUS (REFERENCE) APPLICATION NO. E54 OF 2021

JAFRED WAMUKOYA & GIDEON OSUNDWA.....APPLICANTS

VERSUS

KENNEDY SHIKUKU T/A ESHIKHONI AUCTIONEERS...1<sup>ST</sup> RESPONDENT

IBRAHIM MUHUMED.....2<sup>ND</sup> RESPONDENT

RULING

**Introduction & Background**

1. Before this Court for determination is the applicants' reference from the decision of the taxing officer on 30<sup>th</sup> April 2021. The application is dated the 15<sup>th</sup> of May 2021 and was filed on the 20<sup>th</sup> of May 2021. The same is predicated on Rule 55 and Schedule 4 of the Auctioneers (practice) Rules, 2009.

2. The thrust of the application is that the lower court on the 30<sup>th</sup> of April 2021 issued a certificate of assessed costs against the applicants herein, in the sum of Kshs 122,070/=. The Applicants, Jafred Wamukoya and Gideon Osundwa, being aggrieved by the ruling and order of the taxing master made on 30<sup>th</sup> of April 2021 filed this Reference seeking to have the ruling and order of the taxing master set aside on grounds that:

**1. The award is too excessive**

**2. There is no legal basis for the award**

**3. The award is punitive in nature and not compensatory**

**4. Even upon request, the taxing officer has not availed a ruling and/or reasoning to shed light on how the sum of Kshs 122,070/- was arrived at.**

**5. The taxing officer misdirected himself/herself in taxing items 3,5,6,7,8,9,10 and 11 and the fees under 'fees on attachment' at Kshs 122,070/=**

**6. The taxing officer misdirected himself/herself in taxing the bill of costs at Kshs. 122,070/=**

**7. The said sum of Kshs 122,070/= is grossly and or manifestly excessive as to be indicative of error in principle.**

3. The reference is supported by the affidavit of one Jafred Wamukoya, dated the 14<sup>th</sup> of May 2021 wherein he reiterated that the certificate of costs is grossly exaggerated and not reflective of the value of work done by the 1<sup>st</sup> respondent.

4. The Auctioneer/1<sup>st</sup> Respondent opposed the Reference and filed a replying affidavit dated the 16<sup>th</sup> of June 2021 and filed in court on the 18<sup>th</sup> of June 2021 wherein he averred that the Auctioneers fees awarded by the taxing officer were not manifestly excessive to warrant interference by this court.

5. Counsel for the parties agreed to canvass the Reference by way for Written Submissions which were duly filed.

## Applicant's Submissions

6. In its submissions, the applicant identified four issues for determination namely; Proviso of the law on setting aside certificate of Costs and Auctioneers Costs; Whether the application is properly on record and therefore complied with the timelines of the Law on filing such reference; whether the Taxing Master award was manifestly high; where there is no legal basis for the award; whether is punitive in nature and not compensatory; whether no ground(s) and/or ruling has been availed to shed light on how the sum of Kshs.122,070/- was arrived at and as to be indicative of error in principles and finally, who should bear the costs of the application.

7. On the first issue, it was submitted that the court has power to intervene and set aside the decision of a taxing master. It was the applicant's submission that Schedule 4 of the auctioneers Act touches on the actual scale of fees. In this regard, the applicants submitted that items 1, 2, 4 and 12 were properly drawn to scale and are therefore not opposed to their award. The applicants however contend that items 3, 5, 6, 7, 8, 11, 13 and 14 are not drawn to scale and opposed therefore their award.

8. As regards item 3 on '*Fees on Taking Inventory*', the applicants submitted that the same is stipulated under Part II rule 10 and thus requires transportation of the attached movable property. It was therefore the applicants' submission that the auctioneer is to be remunerated for the actual work done and not on the basis of what he could have done had he attached the goods equivalent in value to the decretal sum. The applicants thus submitted that since there was no actual attachment of their movable property, the respondents cannot claim the same and the honorable magistrate thus erred in awarding the same. Reliance was placed in the case of ***ADC vs James Onkundi Omakori t/a Lifewood Auctioneers [2020] eKLR***.

9. On item 5 being the Commission on decretal totaling to Kshs 60,770/-, it was submitted that Schedule 4 of the Auctioneers Act does not provide for charging commission on decretal nor intended attachment and as such the same ought to fail. On Item 6 being insurance of proclaimed vehicles, the applicants submitted that the same is not provided under Schedule 4 and further, that no policy document or any evidence whatsoever of any insurance having been taken out has been annexed to the auctioneers Bill of Costs and as a result, the same ought not to have been awarded.

10. As regards item 7 on cost of transportation, the applicants disputed the amount of Kshs 15,000 awarded by the lower court arguing that the same amounts to unjust enrichment since the auctioneer's offices and the applicant's garage are a kilometer apart. In this regard, the applicants submitted that at most, the court should charge the transportation fees at Kshs 1000 and relied on the case of ***Oscar Otieno Odongo t/a Odongo Investment Auctioneers vs Sukari Industries Limited [2019] eKLR***.

11. On item 8 fees on investigations, Item 9 Security of Proclamation and Item 10 on other disbursements, the applicants submitted that the same are not provided for anywhere in the fourth schedule of the Auctioneers Act and as such, should fail. In addition, it was the applicants' submission that it's not clear what other disbursements the auctioneer incurred as all costs and disbursements have been captured in their bill of costs.

12. On Item 11 – advocates fees on defending and taxing bill of costs, the applicants submitted that the same is not provided for under schedule four of the Auctioneers Act and further, that even if it is awardable, instruction fees on an application is Kshs 3000 at most.

13. On item 13 on service of bill of costs at Kshs. 10,000/=, the applicants submitted that the said bill of costs was served upon the 1<sup>st</sup> respondent at his garage within Eldoret CBD which is less than a kilometer from the applicants advocate offices and as such, the maximum awardable amount should be Kshs.1000/=.

14. On Item 14 on VAT, the applicants submitted that the same should not be charged upon them as the same should be paid by the respondents from total earnings.

15. On the second issue, it was submitted that the application is properly on record and not time-barred since the applicant was not aware of the existence of the ruling and or decision and or certificate of costs by the taxing master until the 11<sup>th</sup> of May 2021 when the applicants advocates were served with a certificate of costs dated the 30/04/2021. In this regard, the applicant submitted that the computation of days should start on 11/5/2021 as the applicants were, is no position to ascertain the existence of a ruling of the same yet there was no ruling notice in the first place or any other notice for that matter.

16. In any event, it was submitted that this being a certificate of costs that was issued ex-parte, the applicants duly requested to be supplied with reasons giving rise to the certificate pursuant to Rule 11 of the ARO 2014. Consequently, it was the applicants' submission that if this provision was applicable, then the applicants had 14 days upon writing the letter requesting for the ruling to lodge the reference herein. Reliance was placed on the case of ***Republic vs University of Nairobi & Student Organization of Nairobi University (SONU) Ex-parte Nasibwa Wakenya Moses, Judicial Review Misc Application No.226 of 2016***.

17. On the third issue, it was submitted that since the certificate of costs was not backed and or supported by any grounds, reasons and or ruling, the award was manifestly high and thus punitive in nature. It was the applicant's submission that a taxing master must enter a ruling advancing grounds as to why an amount has been awarded and the failure therefore to give reasons is in itself an error in principle.

18. There were no submissions made by the applicants as regards costs of the application.

19. In conclusion, the applicants submitted that the court should find the sum entitled to the Auctioneers (1<sup>st</sup> respondent) as Kshs 10,350/-.

## 1<sup>st</sup> Respondent's Submissions

20. The 1<sup>st</sup> respondent through submissions dated the 18<sup>th</sup> of October 2021, identified and submitted on a single issue and that is whether the

application dated the 15<sup>th</sup> of May 2021 is proper before court. It was the 1<sup>st</sup> respondent's submission that the application before court is incompetent, defective, unknown in law, vexatious, frivolous, an abuse of the court process and ultimately, a delay tactic.

21. In this regard, the 1<sup>st</sup> respondent fronted a two-pronged argument.

22. First, he submitted that the application named "reference" is unknown in law, incompetent and therefore incurably defective. It was his submission that there is no provision under any law for such an application. The 1<sup>st</sup> respondent thus submitted that the law and procedure for challenging an Auctioneers Bill of Costs is provided for under Rule 55 of the Auctioneers rules and the current application (reference) offends the said rule and in particular rule 55(4) which provides that an objection to an auctioneer's costs assessed pursuant to Rule 55(2) must be by way of an appeal and not reference. In any case, the 1<sup>st</sup> respondent submitted that even if the application was a proper reference as envisaged under rule 11 of the Advocates Remuneration Order, it would still be incompetent as it would not amount to an appeal as envisaged under rule 55 (5) which requires that a memorandum of appeal be filed.

23. The second argument fronted by the 1<sup>st</sup> respondent is that the purported application violates rule 55(5) of the Auctioneer's Rules which requires that an appeal against an auctioneer's costs be filed within 7 days from the date of the decision of the taxing master. In this regard, it was submitted that the applicants' application having been filed on the 20<sup>th</sup> of May 2021, more than 7 days after the decision of the taxing master dated the 30<sup>th</sup> of April 2021, is defective and cannot be allowed. Reliance was placed on the cases of *Mutia Muindi t/a Matiba Auctioneers vs CFC Stanbic Ltd & another [2015] eKLR*, *Owners of Motor Vessel "Lilian S" vs Caltex Oil (K) Ltd [1989] KLR 1 and Kakuta Maimai Hamis vs Peris Tobiko & 2 others [2013] eKLR*.

24. The 1<sup>st</sup> respondent thus submitted that the appellate jurisdiction of any court is a creation of statutes and must be exercised within the strict edicts of the statutory jurisdiction. He thus submitted that there is no appeal pursuant to the Auctioneers Rules and as such, the court should dismiss the same with costs.

#### **Determination**

25. Having carefully considered the application, the submissions made and the authorities cited, it is my opinion that there are two issues for determination namely;

- a. Whether the applicant's application dated 15<sup>th</sup> of May 2021 is properly before court and if so,**
- b. Whether the taxing master taxed the 1<sup>st</sup> Respondent's bills of cost to scale as per the Auctioneers Rules.**

#### **Whether the Applicant's application dated 15<sup>th</sup> May 2021 is proper**

26. The 1<sup>st</sup> respondent contends that the application is not proper since it is time-barred having been filed outside the time period provided under Rule 55 (5) of the Auctioneers Rules. On the other hand, the applicant contends that the application is proper because time started running on the 11/5/2021 and not the 30<sup>th</sup> of April 2021.

27. Rule 55 of the Auctioneer's Rules provides as follows:

**"55 (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.**

**4) An appeal from a decision of a registrar or a magistrate or Board under sub rules (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"**

28. It is clear from the above provision and in particular rule 55 (5) that 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. This provision clearly prescribes the procedure to be followed where one challenges the decision of the Taxing Officer. That is, the only prescribed way is through a memorandum of appeal by way of Chambers summons. In addition, Rule 55 (5) of the Auctioneers Rules only allows a window of 7 days within which to file an appeal after the decision is made. This procedure was termed mandatory by court in *Ezekiel Kiminza t/a Auto Land Auctioneers v Mistry Valji Naran Mulji [2017] eKLR*.

29. Recently, the Court of Appeal in *Aprim Consultants vs Parliamentary Service Commission & Another, Civil Appeal No. E039 of 2021*, held to the effect that where terms of a provision are couched in terms that are plain and unambiguous, it leaves no interpretive wiggle room. The provisions of Rule 55 in my opinion are couched in clear terms with strict timelines for applicants. The timelines have also been set in a

sequential manner. Considering therefore that the above provisions are clear statutory commands it is the province of the courts to interpret and give effect to the express language of the above provision. See *Aprim Consultants (supra)*.

30. In the instant case, the 1<sup>st</sup> respondent submitted that the provisions of Rule 55 do not contemplate what is referred to as 'reference' but contemplates that the appeal is by way of memorandum of appeal made through chamber summons. In *Ezekiel Kiminza v/a Auto Land Auctioneers v Mistry Valji Naran Mulji [Supra]*, the court faced with a situation where an applicant approached court via a reference held that:

**“In this case, the Respondent has approached the Court by what is referred to as a “Reference” filed on 16<sup>th</sup> March 2017. This is obviously an unknown procedure under the Rules and certainly one filed outside the time permitted and without leave. These are both procedural and substantive issues which go to the jurisdiction of the Court. It is clear that the Respondent has not only failed to come to Court under the prescribed form but also failed to come to court within the time specified by the Law.”**

31. I am therefore in full agreement with the 1<sup>st</sup> respondent that a “reference” is not contemplated under Rule 55 of the Auctioneers Rule and that the only way to lodge an appeal is by memorandum of appeal through a chamber summon.

32. Turning to the issue of time, there is no doubt that the decision of the taxing master was given on the 30<sup>th</sup> of April 2021. Accordingly, and taking into account the provisions of *Section 57 of the Interpretation and General Provisions Act* on computation of time, the appeal ought to have been filed by latest, the 7<sup>th</sup> of May 2021. However, in our instant case, the appeal was filed on the 20<sup>th</sup> of May 2021, some 13 days after the lapse of the prescribed period. In attempting to explain this delay, the applicant noted that it was not aware of the decision/ruling/certificate of costs until the 11/5/2021 when its counsel wrote to inquire about reasons giving rise to the said sum of Kshs.122,070/=. Furthermore, the applicant submitted that the letter and the certificate of costs was served at the head office in Nairobi on the 11/8/2021 and as such, they were not aware of the same.

33. However, I am not satisfied by the explanation given by the applicants for the following reasons. For starters, the applicant submitted that it was not aware of the ruling or certificate of costs until the 11/5/2021. However, it is clear from the attached evidence and in particular, the applicants advocates letter to the Executive Officer, Eldoret Law Court dated the 8<sup>th</sup> of May 2021 and marked as exhibit JW-3, that they were aware and in fact were in receipt of the certificate of Assessed Costs dated the 30<sup>th</sup> of April 2021. As such, the applicants are misleading court when they argue that they became aware of the Certificate of Costs on 11/5/2021. There is thus inconsistency on the evidence of the applicants. Why would they write a letter dated 8<sup>th</sup> May 2021 confirming to be in receipt of the certificate and at the same time claim that they became aware of the same on 11/5/2021? No explanation has been furnished for this discrepancy. In fact, in the said letter what they were asking for is the ruling giving rise to the Certificate of Costs dated the 30<sup>th</sup> of April 2021.

34. Secondly, while the letter is dated the 8<sup>th</sup> of May 2021, the same was filed on the 18<sup>th</sup> of May 2021, about 10 days later. There has been no explanation furnished for this delay. A litigant well aware of the strict timelines of the provision of Rule 55 would be expected to hurry and file the appeal within those strict and mandatory timelines. That is, he or she must take steps to show that there was no delay in any way on their part. There is no explanation offered as regards this delay.

35. In the circumstances, I am unable to find any reasonable justification for the filing of the appeal outside the 7-day period prescribed under Rule 55(5) of the Auctioneer's Rules. In view of the above, it is my opinion that this Court does not have authority to entertain the applicants' application on the merits as the same is incompetent.

36. Consequently, the application herein is herewith struck out with costs to the respondents.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 20<sup>TH</sup> DAY OF DECEMBER, 2021**

**E. O. OGOLA**

**JUDGE**