Kenya Pipeline Company Limited v Jovan Kariuki t/a Moran Auctioneers (Miscellaneous Civil Application E481 of 2021) [2021] KEHC 367 (KLR) (Commercial and Tax) (16 December 2021) (Judgment)

Neutral citation: [2021] KEHC 367 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS CIVIL APPLICATION E481 OF 2021

EC MWITA, J

DECEMBER 16, 2021

BETWEEN

KENYA PIPELINE COMPANY LIMITED ..... APPLICANT

AND

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

JUDGMENT

1. The applicant filed a reference dated 24th June 2021, challenging the taxing officer's decision dated 17th June 2021. In that decision, the taxing officer taxed the applicant's bill of costs and allowed item 3 of the bill of costs at Kshs, 96, 253, 588. The applicant, therefore, seeks to set aside the certificate of taxation and remission of the bill of costs for fresh taxation on that item.

2. The reasons for seeking to set aside the taxing officer's decision, as can be seen from the grounds on the face of the motion and the supporting affidavit, are that; the amount allowed in item 3 was inordinately high; that the taxing officer was wrong in basing his decision on the decretal amount and not the value of the proclaimed or attached goods; that he failed to find that there was no evidence on the value of the goods attached and that he erred in relying on paragraph 4 of the Fourth Schedule to the Auctioneers Rules instead of paragraph 3 which covers fees before attachment or repossession.

3. The reference is also supported by an affidavit by Stanley Manduku sworn on 24th June 2021 which reiterated the grounds on the face of the reference. According to him, the applicant was directed to pay a total sum of Kshs. 111,659,962, out of which item 3 of the bill of costs was taxed at Kshs. 96,253,588, which was manifestly excessive. He also stated that the taxing officer was wrong in using Paragraph 4 of Part II of the Auctioneers Rules instead of paragraph 3 which provides for fees before attachment or repossession.

4. According to the deponent, the taxing office should have based his decision on the value of the goods attached and not the decretal sum. He also asserted that the respondent only gave an estimated value of the goods in the notice dated 2nd September 2020 and not the true value of the goods attached.

5. The respondent filed a replying affidavit sworn on 6th July 2021. He deposed that the applicant omitted to include crucial documents that were before the taxing officer such as the warrants of attachment and the record was, therefore, incomplete. He cited *Sinohydro Corporation Limited v Samson Itonde Tumbo t/a Dominion Yards Auctioneers* [2021] eKLR and asserted that the applicant had not shown good reason for this court to interfere with the taxing officer's decision.

6. The respondent deposed that the value of the goods attached was in the proclamation which again the applicant did not annex to this reference. The applicant cannot therefore raise the issue of the value of goods in the reference when it was not an issue before the taxing officer. He stated that since the value of the goods was higher than the decretal sum, the taxing officer was in order to use the decretal sum of Kshs. 4,811,279. 393 and properly applied paragraph 4. He further stated that there was no issue before the taxing officer on whether or not he was entitled to fees.

7. The applicant filed a further affidavit sworn on 13th September 2021, stating that failure to include the entire record was an oversight on the part of their advocate and that they have good reason why this court should interfere with the discretion of the taxing officer. The applicant maintained that the respondent's proclamation notice contained an estimated value of the goods attached which was, in any case, exaggerated..

8. Parties filed written submissions. The applicant's written submissions were dated 13th September 2021. It was submitted that the court awarded judgment for USD 4,450,287.165 equivalent to Kshs. 4,450,287, 165. Warrants of attachment were then issued and and pursuant to those warrants, the respondent proclaim applicant's goods on 2nd September 2020 to recover Kshs. 6,403,083,128 but Execution was suspended by the court. The respondent then filed his bill of costs which was taxed and allowed at Kshs. 111,659,962, prompting this reference.

9. The applicant argued that the taxing officer allowed a fee that was manifestly excessive which calls for this court's interference. It relied on *Peter Muthoka & another v Ochieng & 3 others* [2019] eKLR. According to the applicant, the amount of Kshs 96,253,588 was excessive and should not be allowed.

10. The applicant also took issue with the taxing officer for relying on paragraph 4 of Part II of the Fourth Schedule to the Auctioneers Rules instead of Paragraph 3 which, it argued, covers fees before attachment or repossession. According to the applicant, the respondent only proclaimed but did not cart away the goods and, therefore, the taxing officer should have applied paragraph 3 and not paragraph 4. In the applicant's view, paragraph 4 covers fees once attachment, repossession or distraint has been completed. The applicant cited *Agricultural Development Corporation v James Onkundi Omakari t/a Lifewood Auctioneers* [2020] eKLR for the submission that proclamation and attachment are two mutually exclusive processes and, therefore, the fee charged is different. The applicant argued that the respondent was only entitled to charges before attachment under item 3.

11. The applicant again blamed the taxing officer for failing to find that there was no sufficient evidence on the value of the goods attached. According to the applicant, an auctioneer ought to attach property with a value as close as possible to the decretal amount. It relied on *Moindi Zaipeline v Karatina University & another* [2017] eKLR to argue that the proviso to Order 22 rule 13(4) of the *Civil Procedure Rules* requires that the value of the goods attached should be as close as possible to the amount of the decree.

12. In the view of the applicant, the respondent proclaimed assets with an estimated value of Kshs. 6,403,550,000 which gave rise to a variance of Kshs. 1,953,335 as between the decretal amount and the estimated value of the assets which was exaggerated. It argued, therefore, that basing the respondent's charges on the estimated value of the goods proclaimed would result in awarding the respondent higher fees than he would be entitled in executing the decree.

13. The applicant submitted that the taxing officer should not have taxed the respondent's bill of costs on the basis of the decretal sum. According to the applicant, the decretal amount was USD 44,019,024.64 which was equivalent to Kshs. 4,450, 287,165. However, the respondent equated the amount to Kshs. 4,828,083,128 which was erroneous as it was not based on the correct exchange rate. The taxing officer was, therefore, wrong in using that erroneous sum to determine the respondent's charges for proclaiming the goods.

14. The applicant maintained that the respondent's charges should be based on the value of the attached goods and not the decretal amount. It cited *National Industrial Credit Bank Limited v S K Ndegwa Auctioneer* [2005] eKLR, to argue that that the meaning to be given to paragraph 4 of part II of the Fourth Schedule to the Auctioneers Rules is an auctioneer's charges for attachment should be based on the value of the goods attached and not the decretal sum. In that regard, the applicant argued, the respondent's charges should have been determined under paragraph 3 and not 4.

15. The applicant urged that should this court hold that paragraph 4 was applicable, then it should find that there was no evidence of the value of the proclaimed goods; that the value in the proclamation notice was more of guess work; exaggerated and the estimated value was more than the decretal amount. It relied on the *NIC Case* (supra) where the court stated that it was unable to assess the auctioneer's fees since there was no sufficient evidence on the value of the goods attached. It urged the court to allow the reference.

16. The respondent also filed written submissions. He submitted that he proclaimed the applicant' s goods but he was advised to suspend the attachment. When the applicant failed to pay his fees, he filed his bill of costs and item 3 was taxed and allowed at Kshs. 96,258,588. The total amount was Kshs. 111, 659,962 inclusive of VAT of Kshs. 15,401,374.

17. The respondent submitted that item 3 of his bill of costs as taxed was not excessive. According to him, the taxed costs can only be excessive if not in accord with the *Auctioneers Act* and the Rules, or the taxing officer wrongly exercised his discretion. He cited *First American Bank of Kenya v Shah & others* (2002) EA 64, that the court should not interfere with the discretion of the taxing officer unless it is shown that there was an error of law or the fee allowed was manifestly excessive. He also cited *Republic v Ministry of Agriculture & 2 others Exparte Muchiri W Njuguna & 6 others* [2006] eKLR on the same principle.

18. It was the respondent's case that the fee was not manifestly excessive and that the taxing officer did not use the value of the attached goods in the proclamation, namely Kshs. 6,403, 550,000 because it was well above the decretal amount of Kshs. 4,811,279,393. According to him, had the taxing officer used the amount in the proclamation, the fees would have been much higher.

    The respondent further argued that the taxing officer correctly interpreted and applied the decision in *National Industrial Credit Bank Limited v S K Ndegwa Auctioneer* (supra), that in principle the auctioneer's fee ought to be based on value of the goods attached and that the auctioneer is only entitled to full fees based on the decretal sum where the attached goods satisfy the decree.

19. On the argument that there was no evidence on the value of the attached goods, he relied on rule 12(1) (b) of the *Auctioneers Rules* which requires a proclamation to indicate the value of the specified items

and condition of each item which he complied with. He argued that the applicant did not contest the value of the attached goods as shown in the proclamation before the taxing officer as required by rule 10 of the Rules. He cited the decision in *Muganda Wasulwa t/a Kesyian Auctioneers v National Cerials & Produce Board* [2015] eKLR, that the values in the proclamation if doubted can only be challenged under rule 10 of the Auctioneers' Rules.

20. On which paragraph should have been used, he argued that the auctioneer's fee crystalizes upon proclaiming and not necessarily upon taking custody of the goods proclaimed. He again relied on the *NIC Case* and supported the taxing officer's decision to apply paragraph 4 as opposed to paragraph 3. He distinguished this case from the decision in *Moindi Zaipeline v Karatina University & another* (supra) since in that case, the court was considering an application for stay of execution and lifting of attachment. The court did not consider which paragraph (between 3 and 4) of the Auctioneers Rules was applicable. In that case, he submitted, the decretal sum was Kshs. 169,807 while the value of the attached goods was given as Kshs, 1,000,000 giving a variance of about 71%. In the present case, however, the variance cannot be considered as that wide given that the decretal sum was Kshs, 4,828, 083,128 against the value of attached goods of Kshs, 6,403,550,000.

21. The respondent argued that the decision in *Agricultural Development Corporation v James Onkundi Omakari t/a Lifewood Auctioneers* (supra) was made per incuriam and against the principle of stare decisis given the decision of the Court of Appeal in the *NIC Case.* He urged that the reference be dismissed.

22. I have considered this matter and arguments by counsel for the parties. I have also considered the decisions relied on in support their respective positions. The main issues that arise for resolution are which of paragraph 3 and 4 of Part II of the Fourth Schedule to the Auctioneers Rules was applicable in assessing the respondent's charges and whether the amount allowed was inordinately high.

23. The applicant has called on this court to set aside the taxing officer's decision on the basis that he assessed and allowed the respondent' charges at Kshs. 96,253,588 which was inordinately high when the respondent only proclaimed but did not complete the process of attachment. According to the applicant, the respondent did not seize or cart away the attached goods which meant the process of attachment was not complete and the taxing officer should have applied paragraph 3 and not paragraph 4 in determining the respondent's charges. On his part, the respondent argued that the taxing officer applied the correct paragraph since he (respondent) had proclaimed thus completed his work.

24. The law is settled that a judge will not readily interfere with the decision of the taxing officer but should only do so in very exceptional cases. That is; a judge should only interfere where it is sufficiently demonstrated that the taxing officer erred in principle. An example is where the sum allowed is either inordinately high or low, taking into account the nature of the proceedings, or has used the wrong parameters to conclude that he acted on a wrong principle.

25. In *Premchand Raichand Ltd & another v Quarry Services East Africa Ltd & another* [1972] EA 162, Spray, Ag. V. stated:

> The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A court will not therefore interfere with the award of the taxing officer, and particularly where he is an officer of great experience, merely because it thinks the award somewhat so high or so low as to amount to an injustice to one party or the other.

26. Similarly, in *Rogan-Kemper v Lord Grosvenor (No.3)* [1977] KLR 303, Law, JA. stated:

> A Judge will not substitute what he considers to be the proper figure for that allowed by the taxing officer unless in the judge's view, the sum allowed by the taxing officer is outside reasonable limits so as to be manifestly excessive or inadequate.

(See also *First American Bank of Kenya v Shah & others (2002) EA 64*; *Republic v Ministry of Agriculture & 2 others Exparte Muchiri W Njuguna & 6 others [2006] eKLR*).

27. So which paragraph between 3 and 4 should the taxing officer have used? Both parties agree that the respondent proclaimed the applicant's goods but did not cart them way because the court issued a stay of execution before he seized them. It is on that basis, the applicant argued, that the respondent's bill of costs should have been assessed under paragraph 3 and not paragraph 4.

28. I have considered this matter and the arguments by parties. I have also perused the supporting affidavit and the ruling of the taxing officer, the subject of this application. The taxing officer used paragraph 4 in determining the respondent's costs. Both parties cited the decision of the Court of Appeal in *National Industrial Credit Bank Limited v S K Ndegwa Auctioneer* (supra) to support their positions.

29. I have read that decision and I am persuaded that the issue of which paragraph was applicable in a case where an auctioneer has proclaimed but not seized or carted away the goods was settled in that case and should not be an issue in this matter. The court of Appeal agreed with the High Court, Mohamed Ibrahim J, (as he then was), that once proclamation is done, the attachment is complete and the auctioneer is entitled to charges for attachment.

30. The court of Appeal stated:

> The purpose of the attachment is the execution of the decree. The essence of the attachment is to remove the goods from the possession of the judgment-debtor and place them in the custody of the law so that they can be sold to satisfy the judgment debt if the judgment-debtor does not pay the debt. To place the goods in the custody of the law it is not necessary... that the goods must be carried away from the premises of the judgment-debtor.

31. The court then concluded:

> It is clear from Rule 12 as read with Rule 14 of the Auctioneers Rules and the contents of the prescribed form, that is, Sale Form 2 that the proclamation of the movable goods is legally and effectively an attachment. From the moment the goods are proclaimed, the judgment-debtor is deprived of the legal possession and physical control of the goods and instead the goods are placed in the custody of the law and the court through the auctioneer. The judgment-debtor can only redeem them by the payment of the debt. If the judgment-debtor fails to pay the auctioneer moves to the second stage of conducting the sale of the attached goods.

32. It is clear from this holding that once an auctioneer proclaims, his work is done and he is entitled to his commission regardless of whether or not he has carried away the goods proclaimed. That being the case, the applicable paragraph is 4 and not 3 as the applicant argued. In that regard, the taxing officer did not err when he used that paragraph in determining the respondent's charges.

33. That brings us to the second part of the argument, that is; which amount was to be used to determine the charges. Was it the decretal amount or the amount of the value of the goods attached. That issue was again addressed by the Court of Appeal in the *NIC Case,* holding that the amount to be used in

assessing auctioneer's charges is the value of the goods attached and not the amount in the decree. In coming to that conclusion, the court argued that sometimes the amount of goods attached is far below the decretal sum and therefore the auctioneer must be remunerated for the work done. That issue of the amount to be used was again settled in that case.

34. In the present case both parties agree that the taxing officer used the decretal amount to assess the respondent's charges. I have read the taxing officer's decision and the reasons why he used the decretal amount and not the value of the goods. His arguments are valid but then there is the holding by a superior court, settling the law on the issue that a taxing officer should use the value of the goods attached as the basis for determining the auctioneer's charges and which is binding on this court. The Court of Appeal did not say that there were other times when the taxing officer would not use the decretal amount.

35. Although the taxing officer stated that the value of the goods given in the proclamation was higher than the decretal sum and, therefore, opted to use the decretal sum, which was reasonable, I do not think this would change the position held by the Court of Appeal given that the applicant did not agree with the taxing officer on this and has decided to challenge that finding before this court. This court has no option but to follow the law as settled by the Court of Appeal.

36. The applicant again argued that even if the taxing officer was to use the proclamation, there was no evidence on the value of the goods. In its view, the value assigned in the proclamation was at best guesswork and exaggerated. This issue, as the respondent correctly argued, was not raised before the taxing officer and for that reason it cannot be raised before this court at this point. This application is by way of appeal and for that matter only issues that were raised before the taxing officer and were the subject of the taxing officer's decision would form the basis of discussion and possibly a decision before this court.

37. In the circumstances, having given due consideration to the application, the response and submissions, the conclusion I come to is that the application must succeed given that the taxing officer used the decretal amount rather than the value of the goods in the proclamation.

38. Consequently, the application succeeds and is allowed. The decision of the taxing officer is set aside. the respondent' s bill of costs dated 1st February 2021 is remitted to the taxing officer to assess the respondent's charges on item 3 on the basis of the value of the goods attached. As to whether there was evidence on the value of the goods attached, the taxing officer will deal with the disuse if raised. Each party shall bear own costs of this application.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF DECEMBER 2021

EC MWITA

JUDGE