



**Matei t/a Machete Auctioneers v Wachira (Miscellaneous Application 169 of 2019)
[2021] KEHC 410 (KLR) (Commercial and Tax) (16 December 2021) (Ruling)**

Neutral citation: [2021] KEHC 410 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION 169 OF 2019
WA OKWANY, J
DECEMBER 16, 2021**

BETWEEN

DICKSON MATEI T/A MACHETE AUCTIONEERS APPLICANT

AND

MOSES WACHIRA RESPONDENT

RULING

1. This ruling is in respect to the respondent's amended reference application dated 7th October 2020 wherein he seeks orders that: -
 - a. The court be pleased to enlarge time within which to file the instant application and Memorandum of Appeal and deem both documents as duly filed and served.
 - b. THAT the Honourable Court be pleased to issue a stay of execution of the Ruling and Order of the Deputy Registrar of the High Court given on 9th January 2020, reasons for which were issued on 23rd January 2020.
 - c. THAT the Honourable Court be pleased to set aside and/or review the determination made by the Deputy Registrar of the High Court given on 9th January 2020, reasons for which were issued on 23rd January 2020.
 - d. THAT the Honourable Court be pleased to proceed and tax the Auctioneers-Client Bill of costs dated 26th February 2019 accordingly.
 - e. THAT further and in alternative to (3) above the Bill be referred for taxation before a different taxing master/Deputy Registrar with appropriate directions



to the Registrar to disregard item (4) on auctioneer's commission on sale of the aircrafts since a sale has not taken place.

- f. THAT the Honourable court be pleased to grant any other orders it deems fit.
- g. THAT the costs of the reference be awarded to the Respondent.

2. The application is supported by the affidavit of Charles Kanjama Advocate sworn on 4th February 2020, the further affidavit of Moses Wachira sworn on 12th August 2020, the affidavit of Lynn Nyangweso sworn on 8th October 2020, and is based on the grounds on the face of the application which are that: -

- a. THAT on 9th January 2020, the Deputy Registrar delivered a Ruling in open Court to the effect that the Applicant's Auctioneer-Client Bill of Costs dated 26th February 2019 was partially allowed and taxed at Kshs 2,224,816.27, which amount included KSh. 1,400,000.00 for Commission on sale of the aircraft. The written reasons were availed on 23rd January 2020.
- b. THAT the Respondent herein, Moses Wachira, was aggrieved by the part of the Ruling that awarded the Applicant the amount of KSh. 1 400,000.00 as Commission on sale of the aircraft despite there being no such sale.
- c. THAT the Respondent did indeed file a Reference to this Court disputing the aforementioned award – on 5th February 2020. Unfortunately, the same was not only filed under the wrong provision of the Advocates Remuneration Order 2009 but also inadvertently failed to include a Memorandum of Appeal as required by Rule 55(5) of the [Auctioneers Rules 1997](#) and Order 49 Rule 7 (2) & 3 of the [Civil Procedure Rules 2010](#). Additionally, the same was inadvertently filed out of the set timeline of 7 days from the date of the decision of the Hon Deputy Registrar. –
- d. That the mistakes stated above were inadvertent and they were made by an advocate and as such should not be visited upon the respondent who is an innocent litigant in the instant case and stands to suffer financial harm if the said mistake is not corrected (See [Lucy Bosire v Kebanicha Division Land Dispute Tribunal & 2 others](#) in Miscellaneous Application No. 699 of 2007 reported in [2013] e KLR.
- e. That the mistakes were discovered by the Advocate on 30th September 2020 when the case was coming up for highlighting of submissions and the respondent thus promptly sought and was granted leave to amend the instant application and bring the same under the correct provisions of law as well as include a Memorandum of Appeal as required.
- f. That it is in the interest of justice and for the overarching purpose of constitutional integrity and especially the right to a fair hearing (Article 50(1) of the [Constitution](#)) that the respondent requests the court to exercise its discretion to enlarge the time within which to file the instant application and accompanying Memorandum of Appeal and deem both documents as duly filed and served.
- g. That the Deputy Registrar erred in failing to give consideration to the fact since the auction had not taken place, the auctioneer was not entitled to the



commission for the sale of the aircrafts as claimed in item number (4) of the Bill of Costs.

- h. That the Deputy Registrar erred in placing reliance on a wrong authority namely Mombasa HCCC Misc. Appl. 172 of 2009 in arriving at the finding that the auctioneer is entitled to commission for sale of the aircraft once they have been proclaimed, even where the same have not yet been sold.
 - i. That the Deputy Registrar erred in failing to discount the fee on proclamation and attachment despite parties being in agreement that the respondent made a pre-payment of Kshs 150,000.00 to the Applicant/Auctioneer.
 - j. That the Deputy Registrar having filed to take into account the aforesaid considerations, this Honourable Court has jurisdiction to interfere with the aforesaid Ruling.
 - k. That by a letter dated 4th February 2020 the applicant herein gave notice to the respondent to pay Kshs 2,224,816.27, in full and within 7 days, failure to which he shall proceed to execute the same against the respondent.
 - l. That the said amount stems from the taxation of the Applicants Bill of Costs, against the respondent, by the Deputy Registrar of this court on 9th January 2020, reasons for which were issued on 23rd January 2020, which Ruling and Order the respondent intends to challenge, thus the present Reference.
 - m. That since the execution of the aforementioned Ruling and Order is imminent, it is thus in the interest of justice to for the present application to be certified urgent and placed before this Honourable Court so that the subject matter if the suit is preserved pending the hearing and determination of the present Reference as not to reduce any and/or all orders eventually given by this court nugatory.
3. At the hearing of the application the respondent/applicant submitted that this court's jurisdiction to hear and determine the instant application flows from Rule 11 (1) & (2) of the [*Advocates Remuneration Order 2009*](#) which provide, inter alia, that any party aggrieved by the decision of the taxing master may within 14 days of receiving the written reasons apply to a Judge by chamber summons setting out the grounds of his objections. For this argument the applicant cited the decision in [*KTK Advocates vs Baringo County Government*](#) [2017] eKLR where the court discussed the general principles governing interference with the exercise of the taxing master's discretion and observed that the court will not interfere with the exercise of such discretion unless it appears that the taxing master has not exercised his discretion judicially and has exercised it improperly, for example, by disregarding factors which he should properly have considered, or considering matters which it was improper for him to have considered; or he had failed to bring his mind to bear on the question in issue; or he has acted on a wrong principle.
4. Counsel submitted that the Deputy Registrar erred in failing to consider the fact that the auction did not take place and that the Auctioneer was therefore not entitled to the commission for the sale of aircrafts as claimed in item (4) of the Bill of Costs. Counsel urged this court to interrogate the Deputy Registrar's discretion with regard to whether an important factor was disregarded. It was submitted that it will be unjust for a party, against whom substantial sums of money have been adjudged in the nature of taxed costs, to be required to pay such monies before they have been given an opportunity to challenge the quantum of the taxed costs through a reference.



5. Counsel noted that Auctioneer-Client Bill of Costs filed before the Deputy Registrar sought KSh. 3,589,080 in costs which amount included the fees for the sale by auction, yet the auction had not actually taken place. He reiterated that the Auctioneer was not entitled to his full commission since the auction did not take place. He added that the applicant obtained a court order allowing it to sell the subject aircrafts by private treaty. He relied on the decision in *National Industrial Credit Bank Limited vs S. K. Ndegwa Auctioneer* [2005] eKLR where it was held that:

“Under our laws today once goods or property have been proclaimed under rule 12 (b) and the prescribed procedure followed, the process of attachment takes effect and it does not subsequently matter at what stage it is terminated. Once the goods are proclaimed they become the attached and seized by the law. The auctioneer from this stage is entitled to charge his commission under Rule 11 paragraph 4... The main object of paragraph 4 is clear. It is intended to provide values on the basis of which the auctioneer's charges should be assessed. We think that it is reasonable that the auctioneer's charges for attachment should be based on the value of goods attached and not on the decretal sum. It is to be remembered 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 goods equivalent in value to the decretal sum. ”

6. The auctioneer opposed the application through the replying affidavit of his advocate Mr. Dan J. Kasina who confirmed that the Deputy Registrar delivered a Ruling and taxed the party to Party bill of costs dated 16th February 2020 at Kshs. 2,224,816.27 He attached a copy of the Certificate of Taxation to the replying affidavit as annexure marked “DJK 1”. He states that the respondent/applicant did not file a Memorandum of Appeal as is required of a party who is aggrieved by a decision and intends to appeal the same. The Auctioneer's case is that the Respondent cannot feign ignorance of the law for not filing the same within the set timelines. He added that the instant application is therefore an afterthought and not properly before the court.
7. At the hearing of the application, Mr. Ogunde, advocate for the Auctioneer submitted that the Auctioneer performed his work diligently upon being instructed to carry out the auction but was stopped from carrying out the auction midway without any notification. The auctioneer faulted the applicant for interfering with his duties and for participating as the seller of the aircraft and the purchaser at the same time.
8. I have carefully considered the instant application, the Auctioneers response and the submissions by counsel together with the authorities that they cited. The main issue for determination is whether the applicant has made out a case for the granting of the orders sought in the application. The main orders sought are for the enlargement of time within which to file the instant application and Memorandum of Appeal, stay of execution of the Ruling and Order of the Deputy Registrar of the High Court given on 9th January 2020, the setting aside and/or review of the decision by the Deputy Registrar so that the court can proceed and tax the Auctioneers-Client Bill of costs dated 26th February 2019 accordingly or in the alternative, that the Bill be referred for taxation before a different taxing master/Deputy Registrar with appropriate directions.
9. On the issue of enlargement of time within which to file the reference, the applicant stated that he indeed filed a Reference to this Court disputing the aforementioned award on 5th February 2020 but that the same was unfortunately filed under the wrong provision of the Advocates Remuneration Order 2009 and inadvertently omitted the Memorandum of Appeal as required by Rule 55(5) of the Auctioneers Rules 1997. He added that the same was also inadvertently filed outside the set timeline of 7 days from the date of the decision of the Hon Deputy Registrar.



10. On his part, the Auctioneer argued that the applicant was aware of the timelines set for the filing of the reference and could not therefore be seen to feign ignorance of the law.
11. Paragraph 11 of the Advocates' Remuneration Order 2009 grants the court the discretion to extend time for lodging a reference from the taxing master's decision on costs notwithstanding the expiry of the 14 days' period prescribed for the reference. Paragraph 11 of the Advocates' Remuneration Order provides as follows:

“11. Objection to decision on taxation and appeal to Court of Appeal.

1. Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.
 2. The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by Chamber Summons, which shall be served on all the parties concerned, setting out the grounds of his objection.
 3. Any person aggrieved by the decision of the judge upon any objection referred to such judge under subparagraph (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
 4. The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2), [and] may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
 5. The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by Chamber Summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.”
12. In *County Executive of Kisumu vs County Government of Kisumu & 8 Others* [2017] eKLR it was held that: -

“the under-lying principles that a Court should consider in exercise of such discretion: Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court; A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court; Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis; Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court; Whether there will be any prejudice suffered by the respondents if the extension is granted;”

13. My finding is that the explanation presented by the applicant for the delay on filing the reference is plausible. The impugned ruling that is the subject of the reference was delivered on 9th of January 2020 and the reasons for the ruling given on 23rd January 2020. The initial reference application was filed on 4th February 2020 and later amended on 7th October 2020. I note that the delay in filing the application



was not inordinate. Guided by the finding in the above cited case, I find that the applicant has made out a case for the granting of the order for extension of time within which to file the reference.

14. On whether the ruling/decision of the Taxing Master should be set aside, the applicant argued that the Auctioneer was not entitled to his costs on commission for the auction as the aircrafts that were the subject of the auction were sold by private treaty. According to the applicant, the auctioneer was only entitled to costs for the work he had done. The Auctioneer conceded that he did not conduct the auction but blamed the applicant for stopping the auction midway thus frustrating his efforts to complete the auction.
15. It is a principle of law that a judge will not readily interfere with the decision of the taxing officer, and should only do so in very exceptional cases. The judge should only interfere where it is sufficiently demonstrated that the taxing officer erred in principle. An example is where the sum awarded is either inordinately high or low, taking into account the nature of the proceedings. In *Premchand Raichand Ltd & another v Quarry Services East Africa Ltd & Another* [1972] EA 162, it was held that: -

“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.”
16. 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.”
17. I have considered this reference and the arguments by parties. I have also perused the supporting affidavit and the ruling of the taxing officer, the subject of this reference. Rule 55(1) of the Auctioneers Rules 1997 (hereinafter the Rules) as read with Paragraph 5 of Part II of the Fourth Schedule provide for the commission due to the auctioneer on the sale of movable property. A simple reading of the said provisions reveals that an auctioneer is only entitled to payment for the work done. As I have already noted in this ruling, it was not disputed that the Auctioneer did not conduct the auction and that the sale of the aircrafts was by way of private treaty. Indeed, the applicant presented a court order issued on 4th July 2019 in Milimani HCCC No. 16 of 2006 Moses Wachira vs. Niels Bruel & 2 Others wherein the court allowed an application to sell the aircrafts by private treaty in place of sale by auction. Needless to say, no material was presented by the Auctioneer to demonstrate that he conducted the auction so as to justify the payment of his commission.
18. Having regard to the findings and observations that I have made in this ruling, I find that the applicant has made out a case for the setting aside of the impugned ruling. The order that commends itself to me, therefore, is to allow the instant application and to refer the Auctioneers-Client Bill of costs dated 26th February 2019 for taxation before a different taxing master/Deputy Registrar with directions that the Auctioneer is not entitled to payment of commission for the auction.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 16TH DAY OF DECEMBER 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID-19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17TH APRIL 2020

W. A. OKWANY

JUDGE



In the presence of: -

Ms Owano for Kanjama for Applicant.

No appearance for Respondent.

Court Assistant: Margaret

