



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL AND TAX DIVISION
MISCELLANEOUS CIVIL APPLICATION NO. 80 OF 2018

KENYA OIL COMPANY LIMITED.....APPLICANT

VERSUS

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

RULING

1. This ruling is in respect to the application dated 11th June 2019 in which the applicant herein, Kenya Oil Company Limited, seeks the following orders:

- 1. That the applicant be granted leave to file this application out of time.*
- 2. That the decision by the Deputy Registrar Honourable C. Wanyama on taxation of the Bill of Costs (“the Bill”) filed in Miscellaneous Application No. 80 of 2018 by the respondent against the appellant herein and dated 25th April 2019 be hereby set aside in its entirety.*
- 3. That in the alternative, the bill be reviewed and taxed off or remitted with appropriate directions to a Taxing Officer as the court shall deem fit for reconsideration.*
- 4. That the costs of this appeal be provided for.*

2. The application is supported by the affidavit of the applicant’s General Manager, Mr. Martin Kimani and is premised on the grounds that:

- 1. The respondent filed his Bill of Costs for Taxation on 20th February 2018 seeking the sum of Kshs 5,152,793.00 as auctioneer’s charges for services rendered in attaching the applicant’s goods in execution of a decree in HCCC No. 106 of 2002.*
- 2. The applicant opposed the bill by a Notice of Preliminary Objection dated 10th May 2018 on grounds, inter alia, that the Taxing Master lacked jurisdiction to tax the Bill of Costs in light of a pending application dated 25th March 2015 in HCCC No. 106 of 2002 in which the respondent herein had sought a determination on which party was responsible for payment of the Auctioneer’s charges, and that the applicant herein had entered into a consent with Westmont Power (Kenya) Limited, the plaintiff in HCCC No. 106 of 2002 and fully settled its obligations under the decree. The consent did not include payment of auctioneer’s charges by the applicant.*
- 3. The Honourable Deputy Registrar delivered her ruling on 25th April 2019 wherein she taxed the bill against it at Kshs 2,127,112 after having taxed off the sum of Kshs 3,025,681. In her decision, the Taxing Master made the following errors of law and facts in relation to the taxation of the Bill of Costs.*
 - a) The Taxing Master failed to appreciate that she lacked jurisdiction to tax the Bill of Costs as there was a pending application dated 25th March 2015 seeking the determination of which party was responsible for payment of the auctioneer’s charges.*
 - b) The Taxing Master failed to appreciate that she lacked jurisdiction to tax the Bill of Costs against the applicant as there was no order condemning the applicant to pay the auctioneer’s charges.*

c) The Taxing Master having correctly found that the auctioneer could only have recovered the fees from the debtor if the sale went through but could not do so as the sale was called off and that in the circumstances the instructing party was to pay for the instructions given out, went ahead to tax the Bill against the applicant who was not the instructing party and therefore not liable to pay the auctioneer's fees.

d) The Taxing Master failed to appreciate that the applicant had fully settled the decretal amount in HCCC No. 106 of 2002 and there could be no outstanding amounts due to from the applicant or at all.

e) The Taxing Master failed to appreciate that the respondent had only proclaimed the applicant's goods and had not attached and sold the said goods and was therefore not entitled to the sums claimed in the Bills of Costs.

f) The Taxing Master erred in taxing the bill of costs at Kshs 2,127,112/= and in failing to give sound reasons for such taxation.

g) The Taxing Officer erred in adopting wrong principles in the exercise of her discretion in taxing the Bill of Costs.

3. The auctioneer/respondent opposed the application through his replying affidavit sworn on 1st July 2019 wherein he avers that he received a Warrant of Attachment and sale from the court on 23rd January 2015 with instructions to execute a decree for Kshs 89,649,005.95 issued in HCCC No. 106 of 2002. He states that pursuant to the said Warrants of Attachment, he proceeded to attach the assets of the Judgment Debtor, the applicant herein, by a proclamation notice dated 23rd January 2015 but that on 27th January 2015, he received an order of stay of execution stopping the attachment of the proclaimed goods.

4. He further states that he later learnt that the parties had by consent, compromised the application for stay of execution after which he filed his bill of costs for taxation in accordance with the applicable law. He states that ruling on the taxation was rendered on 25th April 2018 when the Taxing Officer allowed his Bill of Costs in the sum of Kshs 2,127,112.00.

5. The respondent contends that under Rule 55(5) of the Auctioneers Rules the applicant was required to file an appeal against the decision of the Taxing Officer within 7 days from the date of the decision and that no reason, had been advanced by the applicant for filing the application on 11th June 2019, 45 days after the delivery of the impugned decision.

6. It is the respondent's argument that the reasoning of the Taxing Officer was legally sound and that in light of the unexplained delay in the filing of the present application, the applicant is not entitled to the orders sought in the application

7. Parties filed written submissions to the application which I have carefully considered and I find that the main issue for determination is whether the applicant has made out a case for the granting of the orders sought in the application.

8. As I have already states in this ruling, the orders sought are firstly, for leave to file this appeal/application out of time; secondly for the setting aside of the impugned decision of 25th April 2019 and in the alternative, the review of the Bill of Costs by a different Taxing Officer and lastly; the costs of the appeal

a) Leave to appeal out of time.

9. As I have already pointed out in this ruling, the impugned decision of the Taxing Master was rendered on 25th May 2019. Under Rule 55(5) of the Auctioneers Rules, the applicant had upto 25th May 2019 to file an appeal against the said decision the said Rule 55(5) stipulates as follows:

"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."

10. The instant application was filed on 11th June 2019, a period of 45 days after the said decision was rendered. I have carefully perused the application and the supporting affidavit and I note that nowhere in the applicant's pleadings has any attempt been made to explain the reason for the delay in filing the instant application. While I find that this court has the discretion to grant leave to the applicant to file the appeal out of time, I also find like all discretionary orders, the discretion to grant leave to appeal out of time is not an automatic right and can only be exercised where the applicant has placed before the court, sufficient grounds to explain the delay in the filing of the appeal.

11. In the present case, the applicant has not explained the reasons for the delay and I therefore find that it is not entitled to the exercise of the discretionary powers of this court.

12. I am guided by the decision in *Leo Sila Mutiso –Vs – Rose Hellen Wangari Mwangi CA Application No. Nairobi 25 of 1997* wherein it was held:

"It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether or not to grant an extension of time are: firstly, the length of the delay; secondly, the reason for the delay; thirdly (possibly) the chance of the appeal succeeding if the application is not granted; and fourthly, the degree of prejudice to the respondent if the application is not granted."

13. My finding on the issue of leave to appeal out of time has the effect of determining the entire application as having declined to grant the

applicant such leave, the court does not need to go further and determine the rest of prayers regarding the setting aside or review of the orders of the Taxing Master upon finding that the applicant is not entitled to orders for leave to appeal out of time.

14. Be that as it may, this court is still minded, in the interest of justice, to address the pertinent question of who should pay the auctioneers fees in this case. The answer to this question could have been found in the ruling in respect to the application dated 25th March 2015 which was however withdrawn by the Auctioneer on 28th May 2018.

15. In the impugned ruling of 25th May 2019, the Taxing Officer stated as follows on the subject of the party liable to pay the auctioneers costs:

“From the proceedings the auctioneer could have recovered he fees from the debtor if the sale went through. He is entitled to fees for work done. The sale was called off meaning that the instructing party was to pay for the instructions given out.”

16. Having regard to the above extract of the ruling, this court finds that the party liable to settle the auctioneers costs is instructing party in the suit that gave rise to the execution which was West Mont Power (K) Ltd.

17. Having regard to my findings on the subject to leave to appeal out of time, I find that the instant application is not merited and I therefore dismiss it with costs to the respondent/auctioneer.

It is so ordered.

Dated, signed and delivered in open court at Nairobi this 20th day of February 2020.

W. A. OKWANY

JUDGE

In the presence of:

Miss Mbuthia for the applicant.

No appearance for the respondent.

Court Assistant – Sylvia