



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

MISC. CIVIL APPLICATION NO. 89 OF 2019

IN THE MATTER OF TAXATION OF AUCTIONEERS BILL OF COSTS KENYA SUGAR

RESEARCH FOUNDATION (as taken over by KENYA

AGRICULTURAL & LIVESTOCK RESEARCH ORGANIZATION).....APPLICANT

-VERSUS-

NIXON ODHIAMBO OKUMU T/A JONI CONSULT AUCTIONEERS.....RESPONDENT

RULING ON REFERENCE

By a Ruling dated 14th May 2020 the learned Taxing Officer awarded costs in the sum of Kshs 249,686.13.

1. Being dissatisfied with the Ruling, the Applicant, **KENYA SUGAR RESEARCH FOUNDATION (AS TAKEN BY KENYA AGRICULTURAL & LIVESTOCK RESEARCH ORGANIZATION)** lodged a Reference, seeking to set it aside.
2. The Applicant further requested this court to either remit the Bill of Costs for fresh taxation before a different taxing officer or to proceed to carry out the process of fresh taxation.
3. The application was based upon the following grounds;

“a. That the Taxing Officer erred in failing to find that the attachment of the Applicant’s Motor Vehicle was illegal and the Respondent was therefore not entitled to any fees.

b. That the Taxing Officer erred in failing to find that the retention of the Applicant’s illegally attached motor vehicle was unlawful and in breach of a lawful order and the Respondent was therefore not entitled to any storage charges.

c. That the Taxing Officer erred in failing to find that the Respondent was only entitled to ½ of the fee payable, the entire execution having been stayed by an express order of the High Court.

d. That the Taxing Officer erred in basing the commission fee on the decretal sum rather than the value of the work done, which was a total sum of Kshs 1,600,000/= being the proclamation value of the attached motor vehicle.

e. The Taxing Officer erred in law in failing to be bound by the law of precedent.

f. That the decision of the taxing officer, if allowed to stand, would set a bad precedent and prejudice the Applicant herein.”

4. The Respondent, **NIXON ODHIAMBO OKUMU** Trading As **JONI CONSULT AUCTIONEERS** , is a Court Broker.

5. He had been assigned the task of executing the Decree in the case of **ONSANGO FARMERS CO-OPERATIVE SOCIETY LIMITED Vs KENYA SUGAR RESEARCH FOUNDATION KISUMU CMCC NO. 46 OF 2017.**

6. The said process of execution of the Decree was to be undertaken by executing Warrants of Attachment which had been issued against the Applicant.

7. It is common ground that the Respondent carried out the process of proclamation in respect to some vehicles belonging to the Applicant.

8. Thereafter, the Respondent carted away four vehicles, whose registration particulars are as follows;

(a) **KBR 502U;**

(b) **KBL 125G;**

(c) **KAW 061A; and**

(d) **KBJ 569U.**

9. The Applicant then lodged an application for stay of execution. The said application was compromised between the Decree-Holder and the Judgment-Debtor, through a consent letter dated 15th August 2019.

10. The Respondent thereafter filed a Bill of Costs. After giving due consideration to the submissions made by the parties, the learned Taxing Officer delivered her Ruling, in which the Auctioneer's Bill of Costs was assessed in the sum of Kshs 449,686.13.

11. Being dissatisfied with the Ruling on Taxation, the Applicant lodged a Reference to this Court. The Court will address each of the issues in turn.

Item No. 3 "Fee before attachment"

12. Part II of the Fourth Schedule sets out the Auctioneer's Charges.

13. Item listed therein as No. 3 is in respect of "*Fee before attachment.*"

14. In the Bill of Costs, the Respondent listed the "*Fee before attachment*" as Item No. 2.

15. The item listed as No. 3 in the Bill of Costs was described as "*Commission on proclamation.*"

16. In respect to that item the Respondent asked the Taxing Officer to award him Kshs 216,550.86.

17. I find that the "*Fees before attachment or repossession*" is a static figure of Kshs 4,000/=, as provided for as Item 4 of Part II of the Fourth Schedule of the **Auctioneers' Rules**.

18. If the taxing officer had awarded any sum, other than as provided in the schedule, that would have been wrong.

19. But it does appear to me that the taxing officer did not award a sum for the said "*Commission on proclamation.*"

Fees on Attachment

20. The taxing officer based her calculation on Item 4 of the schedule.

21. In principle, the taxing officer utilized the appropriate provision in that respect.

22. However, the Applicant submitted that the taxing officer erred when she based her calculations on the decretal amount.

23. It was the contention of the Applicant that the calculations ought to be based upon the value of the goods which had been attached.

24. In answer to that submission, the Respondent told this court that the learned taxing officer had made a proper calculation and applied the correct principle.

25. He stated that the total value of the goods which had been proclaimed was Kshs 10,860,000/=.

26. Pausing there, for a moment, I find that there was consensus between the parties herein, that the calculations of Fees on attachment ought to be based upon the value of the attached goods. In that respect, the parties are right.

27. In the case of **NATIONAL INDUSTRIAL CREDIT BANK LIMITED Vs S. K. NDEGWA AUCTIONEER, CIVIL APPEAL NO. 195 OF 2004**, the Court of Appeal made the following pronouncement;

"The object of paragraph 4 is clear.

It is intended to provide the 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 the 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.”

28. In this case, the learned taxing officer based her calculations on the

“lumpsum amount in the warrants of attachment and sale”

29. I find that the taxing officer made an error of law, by so doing.

Value of the attached Goods

30. In the case of **NIC Bank Limited Vs S. K. Ndegwa Auctioneer, Civil Appeal No. 195 of 2004**, the Court of Appeal was unable to assess the auctioneer’s fees because;

“..... there is no or not sufficient evidence of the value of the goods attached.”

31. In this case, the Applicant submitted that the said goods were worth Kshs 1,600,000/=, whilst the Respondent submitted that the value was Kshs 10,860,000/=.

32. Pursuant to **Rule 12** of the **Auctioneers Rules**, the execution of a Court Warrant commences when the Auctioneer prepares a Proclamation. The said proclamation is supposed to be in the format provided, being the **Sale Form 2**.

33. **Rule 12 (1) (b)** stipulates that the auctioneer shall, when preparing the proclamation, indicate the value of the specific items, and the condition of each item.

34. After the proclamation has been prepared, it is an offence for any person to remove, alter, damage, substitute or alienate any of the goods comprised in the proclamation: that is stipulated in **Rule 14** of the **Auctioneers Rules**.

35. It is important for the whole Rule to be recited here, for a more comprehensive appreciation: It reads as follows;

“A person who removes, alters, damages, substitutes or alienates any goods comprised in the proclamation, before they are redeemed by payment in full of the amount in the warrant, or letter of instruction, or in such lesser amount as the creditor or his advocate may agree in writing, commits an offence.”

36. Clearly, therefore, the said Rule acknowledges that it is open to the creditor to accept a lesser amount, in settlement of the amount cited in the warrant.

37. Once there is payment based upon such an agreement, the attached goods are redeemed. In effect, there is no requirement that the agreement become an order of the court before the attached goods can be redeemed.

38. In this case, the Decree-Holder and the Judgment-Debtor signed a consent. As soon as the terms of the said consent were complied with, the attached goods were redeemed.

39. But, in any event, the terms of the consent were adopted as an Order of the Court on 16th August 2019.

40. Pursuant to the said Order;

“3. THAT there be a stay of execution of the judgment, decree and all consequential orders emanating from Kisumu CMCC No. 46 of 2017, Osango Farmers Co-operative Society Limited Versus Kenya Sugar Research Foundation pending the hearing and determination of the appeal on condition that;

a. The Applicant do release a sum of Kenya Shillings Three Million (Kshs 3,000,000/=) to the Respondent within the next seven (7) days from the date of filing of the Consent.

b. The Applicant do release a sum of Kshs 200,000/= to the Auctioneers, namely, Joni Consult Auctioneers, within the next seven (7) days from the date of filing this Consent pending the assessment by consent or taxation of the Auctioneers costs.

4. THAT the proclamation and Attachment of the Applicant’s goods as done vide the Proclamation dated 24th June, 2019 in Kisumu CMCC No. 46 of 2017, Osango Farmers Co-operative Society Limited Versus Kenya Sugar Foundation be and is hereby lifted and the Applicant’s attached Motor Vehicles registration numbers KBR 502U – Nissan Double Cabin, KBL 125G – Nissan Tiida, KAW 061Z – Nissan Caravan and KBJ 569U – Ford Ranger Double Cabin be released to the Applicant by Joni Consult Auctioneers.”

41. The said Order was explicit, that the proclamation and attachment be lifted; and that the four (4) specified vehicles be released by the Auctioneer, to the Applicant.

42. To my mind, by specifying the particulars of the goods which were the subject of the proclamation and the attachment, the Order had identified the items which were in issue. In other words, it was only the four (4) specified vehicles which were still the subject of the attachment, which was being lifted.

43. My said finding is fortified by annexure “**NOO3**” to the affidavit sworn by the Auctioneer on 22nd June 2020. The said annexure is a copy of the advertisement in the “*People Daily*” newspaper dated 25th July 2019.

44. In the advertisement, the auctioneer specified the four (4) vehicles, which he was planning to sell by Public Auction, on Tuesday 6th August 2019.

45. By the auctioneer’s own conduct, he is deemed to have attached only the said four (4) vehicles.

46. I find that the value of the attached vehicles was Kshs 1,600,000/=.

47. By my calculations 2% of Kshs 1,600,000/= is Kshs 32,000/=.

48. I therefore set aside the sum of Kshs 181,550.87 which was assessed by the learned taxing officer; and I substitute it with the sum of Kshs 32,000/=, in respect to Fees on attachment.

Storage Charges

49. The learned taxing officer awarded the sum of Kshs 242,000/= as Storage Charges. According to her;

“I find the storage charges of Kshs 242,000/= to be reasonable since the time of storage runs up to the date of the consent order dated 15/11/2019.”

50. It is common ground that the four (4) motor vehicles, in respect to which the auctioneer sought storage charges, were released to the Applicant on 15th November 2019.

51. As the taxing officer observed in her ruling, there was a dispute about the facts leading up to the release of the vehicles. On the one hand, the auctioneer insisted that it was the Applicant who delayed in going over to collect the vehicles; whilst on the other hand the Applicant’s case was that the auctioneers declined to release the vehicles until he was threatened that he would be cited for contempt of court.

52. As already noted herein, the consent order was issued on 16th August 2019.

53. Therefore, when the taxing officer made reference to a consent order dated 15th November 2019, she erred.

54. Secondly, the order expressly lifted the proclamation and attachment of the 4 vehicles.

55. Thirdly, it was expressly stated, by the said order, that Joni Consult Auctioneers would release the vehicles to the Applicant.

56. Although the auctioneer alleged that the Order was not served upon him until 15th November 2019, (as shown by the date-stamp affixed by him on Exhibit “**NOO7**”), I find that the auctioneer was served with the said Order on 7th August 2019. The said finding is based upon the hand-written endorsement made by the auctioneer, at the back of the document embodying the order in issue.

57. By the said endorsement the auctioneer stated thus;

“The order has been overtaken by events the auction of the vehicles took place on 06/08/2019 at 11.00am as per the newspaper advertisement. Motor vehicles released to buyers.”

58. The auctioneer was definitely saying that he could not release the vehicles, as the same had been released to those who had purchased them.

59. I find that that is a position which is wholly inconsistent with the auctioneer’s current assertion, that he had always been ready and willing to release the vehicles to the Applicant.

60. Furthermore, at paragraph 27 of his Replying Affidavit the auctioneer stated, inter alia, that;

“... but I do further believe that the Court Order dated 7/8/19 is and/or was not a release order in all respects but just an order of stay of execution and /or sale of the attached motor vehicles and/or that the same was served too late in the day after the auction had already taken place.....”

61. That deposition re-affirms my finding, that the auctioneer was not ready to release the 4 attached vehicles. He was therefore not right to have attributed the delay in releasing the vehicles, to the Applicant's delay in going to collect the vehicles.
62. On the other hand, the Applicant has not demonstrated to the Court, that it made efforts to get the auctioneer to release the attached vehicles, especially after the Applicant had, on 22nd August 2019, remitted payment of Kshs 200,000/= to the auctioneer.
63. I am not implying that the auctioneer should only have complied with the court order after being prompted to do so by the Applicant.
64. Once the auctioneer was served with the order, he had an obligation to comply with it.
65. It is common ground that the proclaimed goods were carted away by the auctioneer on 18th July 2019. From that date the vehicles were in the hands of the auctioneer, who would therefore be entitled to storage charges from then.
66. The only question is as relates to the date upto when the storage charges could be claimed by the auctioneer.
67. I hold the considered view that if the auctioneer was allowed to claim storage charges until the date when he actually released the vehicles, that would be tantamount to rewarding him for flouting the court order dated 6th August 2019.
68. I find that justice and fairness demand that the court should strike a balance which would demonstrate displeasure at the conduct of the auctioneer, whilst, simultaneously telling the Applicant that it ought to have shown the court the steps, if any, that it took to urge the auctioneer to comply with the court order.
69. After undertaking the said balancing act I hold that the auctioneer was entitled to storage charges from 18th July 2019, until 18th September 2019. By my calculations, that is a total of 64 days.
70. If for each day, the auctioneer was entitled to Kshs 500/=, he would be entitled to Kshs 32,000/=.
71. In the result, the reference is successful. I set aside the award made by the taxing officer, and substitute it with the award of Kshs 80,186/=.
72. The costs of the reference are awarded to the Applicant.

DATED, SIGNED and DELIVERED at KISUMU This 30th day of September 2020

FRED A. OCHIENG

JUDGE