



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISC. CIVIL APPLICATION NO.61 OF 2018

IN THE MATTER OF TAXATION OF AUCTIONEER'S BILL OF COSTS AND IN THE MATTER OF THE AUCTIONER'S ACT

KEROCHE BREWERIES LTD.....APPELLANT

-VERSUS-

HEZRON GETUMA T/A HEGEONS AUCTIONEERS...RESPONDENT

JUDGMENT

1. By a chamber summons dated the 8th October 2018 the appellant seeks the following orders that ;

(a) The ruling delivered by the Resident Magistrate's Court in **Ogembo PM Miscellaneous Civil Application No.18 of 2018** be reviewed and/or vacated and in lieu thereof there be made an order striking out and/or dismissing **Ogembo PM Miscellaneous Civil Application No.18 of 2018**.

(b) Costs of **Ogembo PM Miscellaneous Application No.18 of 2018** and of this appeal be borne by the respondent in any event.

2. The appeal is buttressed upon the following grounds that ;

i. The respondent hereto (hereinafter referred to as **"the auctioneer"** where the context may so admit) lodged a Notice of Motion seeking a raft of reliefs, chief of which was assessment of their fees pursuant to the Fourth Schedule of the Auctioneers Rules (hereinafter referred to as **"the Rules"**) founded upon instructions given to him by the Respondent in **Ogembo SRM Civil Suit No.212 of 2016**.

ii. The trial magistrate totally misapprehended the tenor, import and purport of the provisions of **Rule 55(1)** of the Rules by failing to adopt the appellant's objection and submissions but instead proceeded to uphold the Respondent's bill of costs as drawn.

iii. The trial magistrate erred in failing to find that lodgment of the application by the auctioneer for determination of his fees pursuant to the Fourth Schedule in the face of the proclamation allegedly executed was a nullity.

iv. The trial magistrate erred by failing to properly interpret the provisions of Rule 7 of the Auctioneers Act for determination of Respondent's fees in the face of the proclamation allegedly executed was a nullity.

v. The trial magistrate erred proceeded to give excessive award without any tangible evidence that the alleged costs were ever incurred.

vi. The trial magistrate gave an award as it was an attachment.

vii. The respondent ha by the ruling appealed been afforded benefits not within the contemplation of **Rule 55(1)** of the Auctioneers Rules.

3. Mr. Mose for the appellant submitted that the appeal is on costs of Kshs. 570451/- which is excessive. That the respondent only proclaimed, this was a simple exercise which does not require much. That they have looked at the auctioneer's bill of costs and they have serious issues with item No. 3. That the court awarded Kshs.271807/-. The judgment was an interlocutory judgment. Item No. 4 is not reasonable as stated. That they were not told the means that was being used. That the sum of Kshs. 80,000/- was too generous as the respondent charged Kshs. 85,000/-. That the court arrived at Kshs. 9000/- but it's not clear how this was arrived at. The court gave Kshs. 15,000/- for service of the proclamation yet the person served is not disclosed. That the bill of costs were just given as drawn, the court should look at the figures and give reasonable sums. That the appeal should be allowed the court order set aside as the sum awarded was not

warranted.

4. The response from the respondent was that the appeal was filed without the leave of the court after time had lapsed. That Rule 55 states that an appeal shall be filed within 7 days of the delivery of the judgment. That the judgment was delivered on the 25/9/2018 and the appeal was filed on the 4/10/2018 without the leave of the court. Thus the appeal is not properly before the court. That the respondent was entitled to the sum awarded under item no. 3 as provided under schedule 4. It was based on the decretal amount which is Kshs. 2,718,079/- and was calculated at 10% of the first 100,000/-, then 5% on the sum of Kshs. 1,000,000/- and 2% on anything over 1 million which gave the figure of Kshs. 271807/-. That even if the attachment is stayed the auctioneer is awarded fees for attachment and repossession charges and in addition to expenses. That the auctioneer had done investigations of the assets belonging to the appellant and was able to trace 8 vehicles a fact the appellant does not dispute. That the appellant is a company and the auctioneer had a rough time tracing the vehicles and investigating ownership he spent Kshs.85,000/- but the court awarded him Kshs. 80,000/-. The sum should be upheld. On item no.7 the auctioneer had an agent on the ground and incurred expenses of Kshs. 15,500/-. This took place in Naivasha. On item no.9 the same was served by way of a registered process and the fees is provided, the service took place in Naivasha and the order was issued in Ogembo. That the service of his fees should be calculated as follows 35x302kmx2, for this they got a figure of Kshs.25,000/-, but the court awarded Kshs. 15,000/-. On item no. 4 there are provisions in the rules which provide for the same, that this was the only item which was wrongly calculated. In response it was argued that since the respondent has admitted that there are errors in calculating some of the items the appeal should be allowed. That the court should invoke the provisions of Article 159 (2) (d) on the issue raised that the appeal was filed without the leave of the court, that this is a court of justice and in the interest of the parties the said provision should apply .

5. I have considered the submissions and affidavits filed. The first issue that I have to consider is whether the appeal is properly before this court. The ruling the subject of this appeal was delivered on the 25th of September 2018. Rules 55 (5) of the Auctioneers Rules 1997 provides that “ ***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 register or magistrate.***” . The ruling was read on the 25th September 2018. The chamber summons challenging the ruling was filed on the 9th October 2018. This was after the 7 days had lapsed. The appellant did not seek leave of the court to file the appeal out of time. The appellant argues that the court should exercise its discretion as provided under Article 159 (2) of the Constitution in the interest of justice, as the respondent has admitted that there are errors admitted by the respondent. The wordings of Rule 55 (5) of the Auctioneers Rules 1997 are in mandatory terms, *the chamber summons shall be filed within 7 days*. The chamber summons were filed on the 9th of October 2018 without leave of the court. In my view the appellant cannot rely on the provisions of Article 159 (2) (d) of the Constitution, where the provisions of a Rules are clear and mandatory. Filing an appeal without the leave a court cannot be considered to be a procedural technicality. The appellant should have withdrawn the matter and filed an application to appeal out of time, further no such leave was sought even at the time of hearing. I will not delve into the merits of the appeal, but dismiss it for it was filed without leave of the court. Each party to bear its own costs.

Dated and delivered at Kisii this 25th day of January 2019.

R.E. OUGO

JUDGE

In the presence of;

Mr. Wesonga h/b Mr. Mose For the Appellant

Respondent Absent

M/s Rael Court Clerk