



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

MISC. CIVIL APPLN. NO. 293 OF 2018

OSCAR OTIENO ODONGO T/A

ODONGO INVESTMENT AUCTIONEERS.....APPELLANT

-VERSUS-

SUKARI INDUSTRIES LIMITED.....RESPONDENT

(Being a Reference from the ruling and order of Hon. C. M. Kamau, Senior Resident Magistrate in Rongo Senior Resident Magistrate's Misc. Application No. 23 of 2018 delivered on 13/11/2018).

RULING

1. This ruling relates to the appeal by reference filed by the Appellant against the ruling of **Hon. C. M. Kamau**, Senior Resident Magistrate rendered on 13/11/2018 upon the assessment of the Appellant's Bill of Costs dated 11/10/2018.

2. The Appellant is a Licensed Auctioneer under the law and was ordered by the lower court to commence execution of the lawful decree in **Rongo Senior Resident Magistrate's Civil Case No. 221 of 2015**. To that end the court issued Warrants of Attachment and Sale accordingly for the sum of Kshs. 1,533,252/=. The Appellant later filed a Bill of Costs for Kshs. 388,110/40 for assessment.

3. The Bill of Costs had 11 items and the court received written submissions from both sides and upon consideration thereof rendered the ruling subject of this appeal.

4. The Appellant then aggrieved by that decision preferred an appeal by way of reference which is the subject of this judgment. In a Chamber Summons dated 19/11/2018 and evenly filed in Court, the Appellant made the following prayers: -

1. The Honourable Judge be pleased to set aside the assessment and ward by the subordinate court concerning items 3, 6 & 11 of the Appellants bill dated 11/10/2018.

2. The Honourable Judge to re-assess items 3, 6 & 11 of the Applicants bill dated 11/10/2018 to scale and facts.

3. The Honourable Judge to issue a certificate of assessment of costs as per the re-assessed costs.

4. The Honourable Judge do enter judgment in favour of the Appellant in terms of the certificate of assessment issued.

5. Such further and/or other Orders be made as the Court may deem fit and Expedient.

5. The Chamber Summons was not supported by any Affidavit, but the Appellant filed a Record of Appeal and introduced all the documents filed before the lower court. The Respondent filed Grounds of Opposition dated 02/02/2019.

6. The reference was heard by way of oral submissions. Whereas the Appellant appeared in person, the Respondent was represented by **Mr. Otieno** Counsel. The Appellant took issue with the assessment of items 3, 6 and 11 of the Bill of Costs. On item 3 of the Bill of Costs the Appellant submitted that the court erred in holding that the Auctioneer's commission on proclamation was pegged on a percentage of the lump sum amount in the Warrant of Attachment and Sale instead of adopting a fragmented approach. On item 6 of the Bill of Costs the Appellant contended that the court erred in holding that the distance of travel for proclamation should begin at the court issuing the Warrants of Attachment and Sale instead of the Auctioneer's office where the Auctioneer is required by law to maintain a Register of all the instructions received. The Appellant did not tender any submissions on item 11 of the Bill of Costs. He urged this Court to allow the reference as prayed.

7. **Mr. Otieno** Counsel opposed the reference. He reminded this Court that assessment of costs is an exercise of discretion and an appellate Court should be so hesitant to interfere in such instances. He relied on **Zacharia Barasa vs. Dubai Kenya Limited (2015) eKLR**. Counsel supported the court's assessment. On item 3 of the Bill of Costs Counsel submitted that the **Auctioneer Rules** were clear on how the commission ought to be calculated and the court did not err. That, the proposed graduated assessment is craftily aimed at enriching the Auctioneer more so when the sums involved are huge. On item 6 Counsel submitted that the travelling expenses ought to be calculated from the court which issued the warrants and not at the Auctioneer's offices.

8. It was also submitted the reference is incompetent as **Rule 55** of the **Auctioneers Rules** required the Appellant to file a Chamber Summons accompanied by an Affidavit and not to file a Record of Appeal. That, **Order 42** of the **Civil Procedure Rules** did not apply in this matter and the prayers cannot issue. Further, it was submitted that the prayers as drafted in the Chamber Summons cannot issue since the Court has no jurisdiction to re-assess any item as that the duty of the assessing court. He prayed that the Chamber Summons be struck out with costs.

9. In a rejoinder, the Appellant reiterated his earlier submissions and added that **Rule 9** of the **Auctioneer Rules** was specific that the Chamber Summons must be accompanied by an Affidavit unlike in **Rules 12** and **55** of the **Auctioneer Rules**. In that case the reference was competent.

10. Parties further agreed that this ruling shall apply to **Migori High Court Civil Misc. Application No. 294 of 2018**.

11. A Court dealing with a reference on assessment or taxation of costs must exercise caution since the assessment or taxation is based on exercise of discretion on the part of the assessing or taxing officer. Such assessment or taxation can only be interfered with when it is demonstrably shown that the decision was based on an error of principle or the fee awarded was manifestly high as to justify an interference. (See **First American Bank of Kenya vs. Shah & Others Nairobi (Milimani) High Court Civil Case No. 2255 of 2000**, **Behan and Okero vs. Pan African Insurance, Kisumu High Court' Misc. Case No. 229 of 2003**, **Bank of Uganda vs. Benco Arabe Espanol (1999) 2 EA 45**, **Zacharia Barasa vs. Dubai Kenya Limited (2015) eKLR**).

12. With the foregone in mind, I will now consider the items 3 and 6 of the Bill of Costs as assessed *vis-s-vis* the rival submissions herein. On **item 3** of the Bill of Costs, **Part II** of the **Fourth Schedule** of the **Auctioneer Rules No. 5 of 1996 (Revised 2017)** (hereinafter referred to as '**the Rules**') variously provided for the Auctioneer Charges. Item 4 of the Schedule is on Fees on attachment/repossession/distrain and expenses. The item introduced bands within which fees are to be calculated on defined percentages. For sums between Kshs. 4, 001/= to Kshs. 100,000/= the fees are charged at the rate of 10%, between Kshs. 100,001/= and Kshs. 1,000,000/= the rate is 5% and any sum over Kshs. 1,000,000/= the rate is 2%.

13. The Schedule speaks for itself and there is no need of introducing any uncalled for mathematical calculations. The fees are clearly provided for. The argument by the Appellant that for instance fees chargeable in respect of attached goods worth Kshs. 1,500,000/= ought to be calculated through the three bands is foreign to the Schedule. According to the Appellant such a sum will be calculated as follows: 10% for the first Kshs. 100,000/=: 150,000/=, 5% for the next Kshs. 900,000/=: 45,000/= and 2% for the balance of Kshs. 500,000/=: 10,000/= This formula yields the Auctioneer fees for proclamation of the goods worth Kshs. 1,500,000/= at Kshs. 205,000/= whereas on the other hand the 2% of Kshs. 1,500,000/= will result to Kshs. 30,000/=. It is hence clear that the proposal by the Appellant is intent on sustaining the urge to unjustly enrich the Auctioneer. This Court is under a duty to ensure that costs of litigation are possibly minimized since uncushioned high such costs can impede access to justice. (See **Article 48** of the **Constitution**).

14. I therefore find and hold that Auctioneer Fees on proclamation must be pegged on the relevant single percentage provided for in **Part II** of the **Fourth Schedule** of the **Rules** and should not be worked through the various bands with different percentages. The court was hence right and the Appellant's contention fails.

15. On **item 6** of the Bill of Costs, **Rule 3** deals with the classes of Auctioneers' licenses and the licensing processes. There are two types of Auctioneers' Licences. **Class A** license is a general auctioneering licence and is limited to certain districts. **Class B** licence is a general auctioneering licence which enables the holder to realize charged securities, reposses and sell any property throughout Kenya, execute court orders and to levy distress within specific districts. One of the licensing requirements is '*evidence that the Applicant has insured his premises against burglary, fire and theft for a minimum sum of five hundred thousand shillings or such higher amount as the Chief Justice may prescribe*'. (**Rule 2(e)**). The Auctioneer is also supposed to maintain a Register of Warrants and Letters of Instruction in the premises under **Rule 5**. Failure to observe any legal requirements attracts appropriate penalties.

16. An Auctioneer may receive instructions to execute Warrants and Letters of Instructions. Warrants are usually issued by the Courts whereas Letters of Instruction are issued by other entities for instance banks and other financial institutions, landlords among others. However, details of both the Warrants and Letters of Instruction must be entered in the Register. I therefore find the position that the journey of an Auctioneer must start from the Court to be negating the fact that not all instructions to the Auctioneers arise from the courts. How will a court be involved in a case where instructions to realize a charged security by a bank which is 50 kms away from a Court are issued to an Auctioneer? Should an Auctioneer therefore go to the nearest court and begin the journey to proclamation? I suppose that could not have been the intention of the law. As the law defines the areas of operation of the Auctioneers, that in itself regulates the ultimate Auctioneers fees and are held at the minimum. The position that the journey ought to start from the Auctioneer's office is therefore reasonable, promotes order and is cost effective.

17. I hence find and hold that the journey of an Auctioneer for purposes of proclamation begins from the Auctioneer's offices and not from Court. To that end, and with tremendous respect, the learned Magistrate erred in law and that finding must be disturbed. The sum of Kshs. 20,817/= awarded on item 6 is hereby set-aside and substituted with the sum of Kshs. 38,082/80.

18. As I come to the end of this ruling I must deal with the aspect of the competency of the matter before Court. The Respondent contended that under **Rule 55** the Chamber Summons must be supported by an Affidavit and that the requirement for a Record of Appeal is foreign. That, since the Chamber Summons was not supported by an Affidavit then the matter is incompetent and ought to be struck out with costs.

The Appellant was of the contrary view and submitted that **Rule 55** does not provide for an Affidavit in support of the Chamber Summons.

19. **Rule 55(4)** and **(5)** provides as follows: -

(4) An appeal from a decision of a registrar or a magistrate or the Board under subrule (2) and (3) shall be to a judge in chambers.

(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.

20. The Appellant filed the Chamber Summons under **Rule 55(4)** as an appeal to a Judge in Chambers. Under **Rule 55(5)** the memorandum of appeal is a Chamber Summons setting out the grounds of the appeal. Unlike **Rule 9** which expressly provides that the intended application must be supported by an Affidavit, **Rule 55(5)** does not so provide. To me, the Chamber Summons under **Rule 55(5)** is the equivalent of a Memorandum of Appeal under **Order 42 Rule 1** of the **Civil Procedure Rules** ‘... which sets forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative...’ That is the reason why an Affidavit is not required to accompany the Chamber Summons. Like the appeals under **Order 42** of the **Civil Procedure Rules**, all what transpired before the court appealed from is to be introduced to the Court appealed to by a Record of Appeal. I therefore do not see how the Chamber Summons and the Record of Appeal infringed any law. In any event the argument rests on the form of the appeal and procedural issues which **Article 159(2)(d)** of the **Constitution** overrides for substantive justice. Indeed, the Record of Appeal enabled this Court to instead deal with the substance of the appeal. The objection by the Respondent is hence overruled as I find and hold that the Chamber Summons before Court is competent.

21. The appeal therefore partly succeeds to the extent of substituting the award of Kshs. 20,817/= awarded on item 6 of the Bill of Costs with the sum of Kshs. 38,082/80. A Certificate shall issue and each party do bear its own costs.

22. Those are the orders of this Court.

DELIVERED, DATED and SIGNED at MIGORI this 28th day of March 2019.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Oscar Otieno Odongo the Appellant in person.

Mr. Otieno Counsel instructed by Messrs. O. M. Otieno & Company Advocates for the Respondent.

Evelyne Nyauke - Court Assistant