



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION- MILIMANI

MISC CASE NO. 329 OF 2017

JOSEPH GIKONYO T/A GARAM INVESTMENTS.....APPLICANT/RESPONDENT

-VERSUS-

SIDIAN BANK LIMITED.....RESPONDENT/APPLICANT

KAMUTHI HOUSING CO-OP SOCIETY.....INTERESTED PARTY

JUDGMENT

INTRODUCTION

The issue in dispute is the decision by the Taxing Officer, Hon. Claire Wanyama made on 2nd July 2018 which the Respondent sought to set aside and submit for fresh taxation. In the said ruling, the bill had been taxed by Hon. Opande on 27th March 2018 who inadvertently left out item 12 of the Bill of Costs where the parties had consented to the matter being placed before another Taxing Officer for the item. The Taxing Officer found that it was clear that the instructions given by the Respondent had been withdrawn before the process was complete hence, the commission to the Auctioneer was to be based on the forced sale value which was Kshs. **1,800,000,000/-** amounting to Ksh. 20,955,600 according to paragraph 7 of **schedule IV** of the **Auctioneer Rules**.

BACKGROUND OF THE CASE

INTERESTED PARTY

The court was first moved by the Interested Party through a Notice of Motion dated 26th September 2017 where the Interested Party sought to join to the proceedings as the registered owners of the property **number L.R 280/11** and **L.R 280/1728** which was charged to **Sidian Bank** for Kshs. 300,000,000. They submitted to court that taxation of the property on the basis of its worth which was **Kshs.1,800,000,000** an amount claimed to be excessive to the instructions issued by the bank to recover Kshs. 300,000,000.

The interested party submitted on 7th February 2019 that the ruling by Hon. Claire Wanyama was in accordance with the law as the instructions to call off the auction was given by the Respondent/bank. The Interested Party claimed the contract was only between the Auctioneer and the bank. Rule 7 of the Auctioneer rules therefore does not apply to the Interested Party.

The actions by the Respondent to instruct the Auctioneer to exercise the statutory power of sale without complying with the terms of the deed of priorities were illegal and consequences should not be revisited on them.

APPLICANT'S CASE

The Auctioneer submitted that the Interested Party was not privy to the contract, had no relationship with the interested party and that the claims should be separately addressed with the Respondent who is the interested party's banker.

The decision by the Taxation Officer was from the Auctioneer's Bill of cost dated 26th July 2017 where the Applicant claimed the balance of **Kshs.21,971,264.84** that was due and owed by the Respondent.

The Auctioneer claimed that the commission on item 12 was in accordance with the **Fourth Schedule Part 11** of the Auctioneers Rules,

where they relied on the valuation report on the property in question which was in line with **section 97(2)** of the **Lands Act**. They submitted that Item 12 emanated from the instructions dated 24th June 2015 from them to the Respondents where the Applicant was instructed to realize the Respondent's security by selling by public auction property **L.R 280/1728** and **L.R 280/11** registered under Kamuthi Housing Cooperative Society Ltd.

In the replying affidavit of the Auctioneer in response to the interested party, the Applicant stated that it was clear that the Auctioneer sought to tax the Bill of Cost against the Respondent as the instructing client and that they were not seeking to recover any part of his fees from the office bearers of the interested party. They also claimed that the Auctioneer's fees were based on the value of the property to be sold and not the amount of debt raised by the interested party.

In the supporting affidavit of the Auctioneer in response to the Respondent, the Applicant submitted that with regard to item 12 of the bill of costs, the Respondent should not be heard to dispute it and pass the responsibility on the interested party since the Respondent was the party that instructed the Applicant to realize its security from the interested party.

In the Applicant's submissions to the application dated 11th July 2018, they stated that the court rarely interferes with the decision of the Taxing Officer unless the decision is based on an error of principle or the fee awarded was manifestly excessive as was held in the case of **John Maina Mburu & Co advocates vs George Gitau Munene & 3others [2015]** where Mabeya J. cited "**First American Bank of Kenya vs Shah and others (2002) EA 64** at page 69, the court held that:-

"First, I find that on the authorities, this court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on error of principle, or the fee awarded was manifestly excessive as to justify an interference that it was based on an error of principle (see Steel Construction Petroleum, Engineering (EA) Ltd -vs- Uganda sugar factory (1970) EA 141 (Emphasis added)."

On the issue on **whether the Applicant is rightfully responsible for payment of the Auctioneer's costs**. The Applicants relied on **Section 27 of Cap 21** submitting that the Taxing Officer had discretion to grant orders on who was responsible for the payment Auctioneer charges. Therefore **Rule 7** of the Auctioneer Rules would not be applicable in this case as the Respondent/bank stopped the Auctioneer from completing the auction process. The Auctioneer could not pursue the Interested Party for his costs given that he had no mandate to deal with the Interested Party.

The Applicant relied on the case of **Njiru Benson Murage vs Peter Njue Zacharia & Another [2018]eKLR**, where the court condemned the instructing party and his advocate to pay the Auctioneer costs where the Judge held that the advocate should not have instructed the Auctioneer in the first place stating that;

"The law or rules are not cast on stone and the court has a duty to consider the facts of each case so as to serve the interests of justice in respect of the parties..."

The Applicant also relied on the case of **Trian Builders Ltd & Another vs K Rep Bank Ltd [2016]** the court condemned the Defendant bank which was the instructing party to pay the Auctioneers costs and seek reimbursement from the Plaintiff who was the customer as it was held that;

"...The auctioneers recourse was against their instructing client but not the Plaintiffs...", the plaintiff in the matter being the banks debtor.

On the issue of **whether the Taxing officer's decision amounted to rewriting of the contract**, the Applicant stated that in the replying affidavit of 10th October 2017 it stated that the Applicant would pay the Respondents costs then subsequently debit the Interested Party's account which was in line with the Ruling by the Taxing Officer.

With regard to **whether the award of item 12 of the bill of costs was excessive** the Applicant submitted that the computation of the Auctioneer fees is based on the value of the property and not the amount of debt as was the case of **Ostrich Lion Auctioneers vs Paul Muchiri [2007] eKLR** where the Judge set aside the ruling of the Taxing Officer because he based the Auctioneer's charges on the decretal sum as opposed to the value of the property. The court in this case held;

"...The fees claimed by the Auctioneer and as awarded by the deputy registrar were calculated upon the decretal sum, not upon the value of the property attached. Schedule IV of the Auctioneers Rules, 1997 under which an auctioneer's charges are calculated is silent on whether they ought to be calculated based on the decretal sum or on the value of the property attached. But the Court of Appeal has held that the auctioneers fees ought to be calculated based on the value of property or properties attached."

This was in **Nairobi Civil Appeal No. 195 of 2004, National Industrial Credit Bank Limited -vs- S. K. Ndegwa Auctioneer** (unreported).

"So, the Deputy Registrar herein erred on principle when assessing the Auctioneer's fees. This would be a sufficient reason to set aside the taxation."

RESPONDENT'S CASE

The Respondents disputed several items on the said bill of cost with regard to the provisions of **Auctioneer No.5 of 1996**. They claimed that

in Item 12 of the Bill of costs, the Applicant, had not completed the instructions/fulfilled their obligation as the Respondent and had not received invoices claiming the sums therefore unable to pay.

Through an email communication from an officer of the Respondent, the Applicant was instructed not to proceed with the sale of properties and thus heeded to the said instructions.

The Respondent filed Chamber Summons dated 11th July 2013 to stay execution for the costs awarded by the Taxing Officer on 2nd July 2018 pending hearing on the basis that the Taxing Officer exceeded jurisdiction.

The Respondent submitted that the Auctioneer's response that the Respondent is now estopped from departing from obligation is unfounded as per **Rule 7** of the **Auctioneer Rules** which provides that the debtor shall always pay the Auctioneer's fees except in the instances set out in the provision of the said rule.

The Respondent further submitted that the Taxing Master erred when she held that the Respondent/Applicant was obligated to pay the Auctioneer's fees for a reason other than those expressed in law. The Respondent stated that the decision amounted to rewriting both the law and contract. They relied on the case **Civil Appeal No. 262 of 2012** which defined an error in principle to be;

*“And in **Kipkorir Titoo & Kiara Advocates v Deposit Protection Fund Board [Civil Appeal No. 220 of 2004] (UR)**, the Court said:-*

*“We have no doubt that if the taxing officer failed to apply the formula for assessing instructions fees or costs specified in schedule VI or fails to give due consideration to all relevant circumstances of the case particularly the matters specified in proviso (1) of schedule VIA, (1) that would be an error in principle. And if a judge on reference from a taxing officer finds that the taxing officer has committed an error of principle the general practice is to remit the question of quantum for the decision of taxing officer (see – **D'Sonza v Ferrao [1960] EA 602**. **The Judge has however a discretion to deal with the matter himself if the justice of the case so requires (see Devshi Dhanji Naran Patel (No. 2) [1978] KLR 243.**” (Underlining ours).”*

They further submitted that the Taxing Officer failed to consider that the instruction fees to the Auctioneer was based on the amount to be recovered and not the value of the property to be sold and hence the sum awarded was excessive.

DETERMINATION

The court has considered the submissions by the parties and the following is the issue to be determined;

i) Whether the application for stay of the Taxing Master's Ruling of 2nd July 2018 should be granted.

The application dated 11th July 2018 sought orders to vary set aside the Ruling of 2nd July 2018 and the Bill of Costs resubmitted for fresh taxation on the following grounds;

The provisions of **Rule 7 of the Auctioneer Rules** which provides;

“A debtor shall pay the charges of the auctioneer unless

(a) that debtor cannot be found; or

(b) he has no goods upon which execution can be levied; or

(c) the sale proceeds are insufficient to cover the charges, in which case the creditor shall pay the charges or the deficiency thereof” was not applied as the Taxing Master ordered as follows;

“since the Respondent called off the sale he is to pay the Auctioneer fees”

The Applicant submitted that at paragraphs 7 & 8 of the Replying Affidavit by the Respondent it was deposed that, the statutory power of sale was stopped at the instance of the Borrower who made repayment proposals to the Applicant.

The above position was admitted and confirmed by the Interested Party who joined these proceedings pursuant to the Ruling of L. J. Ngetich of 10th October 2017. In the submissions filed before the Taxing Master on 29th January 2018; it was submitted as follows at paragraph No. 2;

“ The Applicant has purported to submit that item 12 on the Bill of Costs dated 26th July 2017 is drawn against the Respondent and therefore there is no relationship whatsoever between the Auctioneer and the Interested party”

The Applicant submitted as follows in reply;

“Your Honour, the position taken by the Applicant hereinabove is misguided and an abuse of the contractual obligations between the Respondent and the Interested party.

We refer your Honour to clause 15 and clause 24 of the charge dated 20th September 2011 and clause 6.23 of the further charge dated 23rd September 2013 which clearly state that all the expenses incurred by the Respondent during which the pendency of the charge dated 20th September 2011 and 23rd September 2013 would be recovered by debiting the interested party’s account without notice.

It is therefore goes without saying that any taxation done on item 12 on the Bill of costs dated 26th July 2017 will be debited into the Interested party Loan Account and result to substantive loss To The Co-Operative.”

In **Civil Appeal No 45 of 2015 Pius Kimaiyo Langat Vs Cooperative Bank of Kenya Ltd(2017) eKLR** the Court of Appeal held;

“...it is not the business of Courts to rewrite contracts between parties, the parties are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.”

See also **National Bank of Kenya Ltd Vs Pipeplastic Samkolit (K) Ltd 2002 2 E.A.503; Civil Appeal 63 of 2012 Laljirabadia & 2 Others Vs Commercial Bank of Africa 2015 eKLR** on the same point.

From the above consideration; this Court finds Costs follows the event. The statutory power of sale was/is conducted after requisite notices to the debtor in default of payment to defray the loan account, are/were sent to the debtor unless it is specifically shown/proved to Court that the instructing Client to Auctioneer violated any legal requirement with regard to the sale, the Auctioneer’s Costs are borne by the debtor directly and/or through the instructing client who shall debit the debtor’s account which amounts to the same position.

In these proceedings, the interested party was part and parcel of proceedings and does not deny or contest the fact of the sale being stopped by the bank on its request to present proposals to offset the debt. Similarly, the interested party did not contest the claim by the Respondent/Applicant that the sale though stopped by the instructing client, the bank, it was on request by the Borrower/interested party so as to propose repayments of Loan Accounts that they defaulted.

Secondly, the interested party did not contest/deny that there/are binding contracts in form of the 2 Charge Agreements with the Bank; one of 20th September 2011 and the 2nd one of 23rd September 2013. These Contracts expressly provide that all expenses incurred by the Respondent/Applicant during the pendency of the Charge would be recovered by debiting the Interested Party’s account without notice. This Court cannot rewrite the terms of the contract of the 2 subsisting Charges.

Thirdly, whereas the Interested Party was not party to Taxation proceedings and the claim by Auctioneers was against the Bank yet the Interested Party sought to be joined to proceedings just to say the taxation was between Auctioneer and instructing client/Bank.

The court recognizes guidance by the decision in the case of **First American Bank of Kenya Vs Shah & Others Nairobi (Milimani) High Court Civil case No.2255 of 2000**, where the Court held that :-

“The Court cannot interfere with the taxing master’s decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an interference that it was based on an error of principles”.

In the instant case, the interested party ought to bear the Auctioneers Costs as per Contracts between instructing client and interested party who is the borrower and whose default in repayments occasioned the beginning of statutory power of sale by the Bank instructing the Auctioneer. The said sale was stopped at the instance of the Borrower.

DISPOSITION

1) The Taxation proceedings and Ruling are set aside and all consequential orders. The matter be and is remitted for taxation proceedings of Item 12 and payment of Auctioneer fees; between the Respondent/Applicant & Interested Party/ Borrower. Secondly, whether taxation ought to be based on the value of the suit property or the amount of Loan account;

2) The application of 11th July 2018 is granted with costs by the Respondents.

DELIVERED SIGNED & DATED IN OPEN COURT ON 12TH APRIL 2019.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF;

WARUHIU, K’OWADE & NG’ANG’A ADVOCATES

JANE GACHUIGA & ASSOCIATES ADVOCATES

E.M. WASHIE & ASSOCIATES ADVOCATES

MS JASMINE COURT ASSISTANT