



IN THE HIGH COURT OF KENYA

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

MISC. CIVIL APPLICATION NO. 82 OF 2018

BETWEEN

EWASO NG'IRO NORTH DEVELOPMENT

AUTHORITY.....APPLICANT

AND

JOVAN H. KARIUKI T/A

MORAN AUCTIONEERS.....RESPONDENT

RULING

1. The subject of this ruling is a Chamber Summons dated 3rd August 2018 filed by the applicant and is made under, *inter alia*, the provisions of **Rule 55(4)** and **(5)** of the **Auctioneers Rules, 1997**. The applicant challenges the ruling dated 26th July 2018 arising from the taxation of the auctioneer's bill of costs dated 20th February 2018. The auctioneer claimed Kshs. 2,345,125.00 but the Deputy Registrar awarded Kshs. 1,094,385.00 having taxed off Kshs. 1,250,740.00.

2. The applicant raises several issues in the reference and supporting affidavit sworn on 3rd August 2018 by Omar Sheikh Mohamed, the applicant's Managing Director. First, as the auctioneer was licenced to operate in Nairobi, Machakos and Kajiado, he lacked jurisdiction to levy execution in Isiolo hence the proclamation was invalid *ab-initio* and he was not entitled to any fees. Second, that the receipt produced to support transport charges in the bill of costs was produced in contravention of the **Stamp Duty Act (Chapter 480 of the Laws of Kenya)**. Third, the said receipt for transportation charges dated 16th February 2017 lacked bona fides and was not genuine as the proclamation was carried out on 4th October 2016 yet the receipt was issue after about 4 months and 12 days.

3. In response to the application, the auctioneer relied on his deposition sworn on 19th November 2019. On the issue of jurisdiction, the auctioneer contended that he did not proclaim the applicant's property in Isiolo but did so in Nairobi at their offices at NSSF Building and at their yard as evidence by the fact that the proclamation was received by the applicant's advocates in Nairobi. Counsel for the auctioneer added that the issue of jurisdiction was not raised before the taxing officer hence it should not be entertained at this stage. As regards the date of the receipt, the respondent argued that the fact that the cost of services rendered by third parties are dated outside the period of validity of the warrant does not negate the fact that costs were actually incurred.

4. The first issue raised by the applicant relates to the territorial jurisdiction of an auctioneer. **Section 20(1)(b)** of the **Auctioneers Act, No. 5 of 1996** delineates the territorial jurisdiction of an auctioneer. It provides as follows:

20(1) The Board shall keep a registrar, in such form as it may determine, of all licenses issued under this Act and shall enter therein in respect of every license-

(a) The full names and identity card number of the auctioneer;

(b) The place of business in respect of which the license is granted;

(c) The county or counties to which the license relates;

- (d) The date of expiry of the license;
- (e) Particulars of any amendment of the licensee;
- (f) Particulars of any revocation or suspension of the license;
- (g) Any other particulars the Board may require to be recorded.” (emphasis added).

The aforesaid provision is buttressed by **Rule 3(1)** of the **Auctioneers Rules, 1997** states as follows:

3(1) The Board shall issue two kinds of licenses –

(a) A class “A” licence which shall be a general auctioneering licensee limited to specific districts;

(b) Class “B” license which shall be a general auctioneering license which shall enable the holder to realize charged securities, repossess and sell any property throughout Kenya, execute court orders, and to levy distress within specific districts.” (emphasis added).

5. The applicant contends that since the licence was restricted to the three counties, the applicant could not proceed to proclaim the applicant’s property in Isiolo. I agree that operating outside the purview of the licence would render such execution null and void. In the case of **Jeska Taaka Wanyonyi v Esther Opondo NKU HCCC No. 126 of 2006 [2007] eKLR**, the court held thus:

The said auctioneers repossessed the said motor vehicles from the possession of the respondent at Nakuru. It is apparent that the said Madume Auctioneers repossessed the said motor vehicles from Nakuru when they clearly did not have the territorial jurisdiction to do so. There is no evidence to suggest that the said Madume Auctioneers had obtained an order of the court to enable them execute a repossession order out of their area of operation. The said Madume Auctioneers therefore repossessed the said motor vehicle contrary to the provisions of the Auctioneers Act and the licence issued to them by the Auctioneers Licensing Board.

6. The respondent did not deny that he was duly licenced to operate in Nairobi, Machakos and Kajiado but contended that the execution did not take place in Isiolo as alleged. Whether or not the proclamation was made in Isiolo or Nairobi is a question of fact. Counsel for the respondent submitted that since this issue was not raised before the Deputy Registrar it should not be entertained. I take the view that it goes to the validity of the execution and that this court may consider it where the parties have had the opportunity to ventilate it which is the position before me.

7. The applicant’s Managing Director deponed as follows at paragraph 7 of his supporting affidavit:

[7] THAT the alleged proclamation took place in Isiolo area where the Respondent had no jurisdiction to proclaim goods which alleged proclamation was a nullity ab initio for want of jurisdiction and is not entitled to any costs arising therein.

8. In response to the said averment, the auctioneer deponed as follows:

[6] Contrary to the issue of my jurisdictional area of operation which is being raised at this late hour, I undertook a proclamation at their offices at NSSF Building and at their yard within Nairobi. Annexed hereto and marked Bundle JK1 are true copies of the Proclamation Notices.

In addition, counsel for the respondent submitted that the notices were received and acknowledged by the applicant’s firm of advocates, **Rahma Jillo and Company Advocates** in Nairobi as evidence that the notices were served in Nairobi.

9. The respondent’s did not seek an opportunity to controvert the respondent’s deposition. In fact, the receipt and acknowledgment of the proclamation by the applicant’s counsel in Nairobi tends to support the respondent’s case on a balance of probabilities hence I reject that the applicant’s contention that the proclamation was served in Isiolo and that the bill of costs was void *ab initio*.

10. The other issue for determination relates to the admissibility of the receipt for transportation charges. The applicant relied on **section 19** of the **Stamp Duty Act** to oppose the award of Kshs. 575,000/- on the ground that the receipt dated 16th February 2017 was not stamped in the manner provided by the **Act** which provides as follows at **section 19(1)**;

19(1) Subject to the provisions of subsection (3) of this section and to the provisions of sections 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever, except—

a. in criminal proceedings; and

b. in civil proceedings by a collector to recover stamp duty,

unless it is duly stamped.

11. Although both parties made extensive submissions before the Deputy Registrar on the admissibility of the subject receipt, the Deputy Registrar did not deal with the matter in the decision. Without belabouring the point, I would only cite what the Court of Appeal has said

about objection to documents on the basis of want of payment of stamp duty. In *Stallion Insurance Company Limited v Ignazio Messina & C S.p.A* [2007] eKLR where the Court approved its previous decision in *Diamond Trust Bank Kenya Ltd v Jaswinder Singh Enterprises* NRB CA Civil Appeal No. 285 of 1998[1999]eKLR where Owuor JA, with whom Gicheru and Tunoi JJA., agreed, stated as follows:

*The learned Judge also found that the agreements could not be enforced because they contravened section 31 of the Stamp Duty Act (cap 480). In view of my above finding, it suffices to state that sections 19(3) 20, 21, and 22 of the same Act provided relief in a situation where a document or instrument had not been stamped when it ought to have been stamped. The course open to the learned Judge was as in the case of *Suderji Nanji Ltd v Bhaloo (1958) EA 762* at page 763 where Law J., (as he then was) quoted with approval the holding in *Baghat Ram -vs- Raven Chond (2) 1930 A.I.R Lah 854* that:*

“before holding a document inadmissible in evidence on the sole ground of its not being properly stamped, the court ought to give an opportunity to the party producing it to pay the stamp duty and penalty

The appellant has never been given the opportunity to pay the requisite stamp duty and the prescribed penalty on the unstamped letter of guarantee on which he sought to rely in his support of his claim against the 2nd defendant/respondent and he must be given the opportunity”.

Although it was the respondent that was relying on the unstamped agreements, there was the offer by the appellant’s counsel to be given a chance to have the agreements stamped. This in my view was the correct step in terms of section 19 (3) of the Stamp Duty Act.

12. **Section 19(3)** of the **Act** allows applicant to apply to the Collector of Stamp duty to stamp the document. I believe it in light of this decisions that the respondent stated as follows in its submissions before the Deputy Registrar:

[29] [T]he Applicant urges this Honourable Court to exercise its judicial discretion and grant him leave and reasonable opportunity to obtain a Certificate under Section 21(1) and thereafter to provide this Honourable Court with the duly stamped receipts, before a Certificate of Taxation in respect of the Bill herein is issued.

13. Before I leave the issue of the receipt, I turn to the argument that the date on which the receipt was issued raised bona fides of the claim as the proclamation was carried out on 4th October 2016 yet the receipt was dated on 16th February 2017. In the submissions before the Deputy Registrar, the applicant contended that the discrepancy cast doubt on the genuineness of the claim. Although both parties submitted on the issue, the Deputy Registrar did not address it.

14. In my view, the issue was whether the services were rendered or not. An assertion that the receipt lacks bona fides or that it raised doubts about the claim is not sufficient proof that services were not rendered. There must be facts upon which the court can reach such a conclusion. It was not disputed that the auctioneer proclaimed the applicant’s property and it was upon the respondent to provide evidence that in fact the such expenses were not incurred by the auctioneer.

15. In his affidavit sworn on 29th May 2018, the auctioneer deponed that, “[He] had procured the services of labourers and transportation who accompanied me to the Respondent’s premises but when we intended to cart away the goods we proclaimed, we received resistance from the Respondent’s officers. As such charging for the said service in the Bill of Costs is justified.” This averment confirms that the auctioneer went to the premises to remove the proclaimed property but was repulsed. Nothing would have been easier than for the applicant to reject and provide its version of events, if any. The averment was not controverted and in face of such facts, merely raising the issue of bona fides cannot defeat the claim.

16. I therefore find that save for the issue of stamp duty, the costs for breakdown and transportation services as evidenced by the receipt were proved, I dismiss the applicants ground of complaint on this aspect.

17. For the reasons I have set out, this reference is dismissed. However, I direct that Deputy Registrar not to issue of a Certificate of Taxation of Costs until the auctioneer had complied with the provisions of the **Stamp Duty Act**.

18. The respondent shall have costs of this reference which I assess at Kshs. 10,000/-.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF NOVEMBER 2019.

D.S. MAJANJA

JUDGE

Mr Chege instructed by Abdulrahman, Saad and Associates Advocates for the applicant.

Mr Mutua instructed by E. K. Mutua and Company Advocates for the respondent.