



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**HIGH COURT MISCELLANEOUS APPLICATION NO. 328 OF 2012**

**MUGANDA WASULWA T/A**

**KEYSIAN AUCTIONEERS.....APPLICANT/RESPONDENT**

**VERSUS**

**NATIONAL CEREALS & PRODUCE BOARD....RESPONDENT/APPELLANT**

**RULING**

**INTRODUCTION**

1. What is before the court is Amended Chamber Summons dated 25th November 2013 filed by the Respondent/Applicant under Rule 55 (5) of the Auctioneers Rules, and Order 51 of the Civil Procedure Rules. The applicant seeks the following orders:-
  - i. ***That the Honorable Court be pleased to set aside and/or review the determination made by the Deputy Registrar of the High Court on 7th may 2013 and either tax or refer the Auctioneer's bill of costs dated 6th June 2012 for taxation before a different taxing master/Deputy Registrar with appropriate directions to the Registrar to disregard one item in respect of the commission chargeable by the Auctioneers.***
  - ii. ***That the Taxing Master be directed to tax the bill in compliance only with the order of the court of appeal made on 29th May 2012.***
2. The application is premised on the grounds that the Deputy Registrar was wrong in allowing taxation on commission fees chargeable by the Auctioneer twice, when the instructions on the same subject matter and the Auctioneer was one; that the warrants were only renewed after their lapse and the renewal could not have formed new instructions; that the Deputy Registrar had no jurisdiction to tax the Auctioneer's bill otherwise than in compliance with the order of the court of Appeal made on 29th may 2012 in Civil Application Number 48 of 2012 (UR 33 of 2012); that the Deputy Registrar did not rule on the preliminary objection raised as to his jurisdiction; and that the Deputy Registrar proceeded on a wrong principle and thereby arriving at a wrong decision.
3. The Appellant's case is as follows. On 29<sup>th</sup> May 2012, the Deputy Registrar, Hon. Reuben Nyakundi delivered a ruling on the Auctioneers' Miscellaneous application being the bill of costs dated 6<sup>th</sup> June, 2012. The Auctioneer expresses his bill to be arising from Civil Application No. 48 of 2012 (**UR 33 OF 2012**) and High Court Miscellaneous Application No. 639 of 2009. In brief, the Auctioneer had been executing instructions from the decree-holder, Erad Suppliers & General Contracts Limited against the Appellant from a judgement of the Court given in High Court

Miscellaneous Application Number 639 of 2009 aforesaid. The Appellant had, under a certificate of urgency, moved to the Court of Appeal for stay of execution pending appeal hence the Auctioneers' reference to Civil Application No. 48 of 2012 (**UR 33 OF 2012**).

By a Notice of preliminary objection dated 27<sup>th</sup> July, 2012, the Appellant objected to the taxation of the bill on five grounds namely;

1. ***The Applicant's bill is premised upon the order of the Court of Appeal given on 29<sup>th</sup> May, 2012 in Civil Application No. NAI 48 of 2012 (UR 33/2012) which order has yet to be settled by that Court.***
2. ***The order falls for interpretation as the Court of Appeal ordered payable to the Applicant its charges occasioned by the order of stay granted by the Court whilst the bill is exhaustive as if full fees are payable.***
3. ***The bill should have been filed at the Court of Appeal before the Registrar/taxing matter of that Court to determine the costs payable.***
4. ***Other than the charges occasioned by the order of stay granted by the Court of Appeal, the Respondent has not yet become liable to pay the Auctioneers fees as the decree is the subject of Appeal and there is a stay of execution.***
5. ***The bill is therefore wrongly filed and/or premature and must be struck out.***

The parties agreed to file written submissions both on the objection and the bill and the Appellant filed its submissions dated 25<sup>th</sup> February, 2013, the thrust of which is that the Auctioneers' bill was premature and did not lie. This was premised on the fact that when the Court of Appeal ordered stay of execution on 29<sup>th</sup> May, 2012, the Court was explicit and unambiguous on the Auctioneers' charges payable. The Court pronounced itself as follows;

***“The Applicant shall pay the Auctioneers charges occasioned by this order and the Respondent's costs for today in any event”.***

Arising from this order, the Auctioneers filed its bill aforesaid and stated as much but instead of billing on the ***“charges occasioned by this order . . .”*** the bill was comprehensive as if he had finalized execution.

4. The Appellant submits that the Deputy Registrar erred by failing to address the issues of jurisdiction, and completely ignored the grounds of preliminary objection and particularly that the only Ruling that he should have entertained was a bill in respect of ***“Auctioneers charges occasioned by the order of stay of the court of Appeal.”*** That being so, it is submitted that the Deputy Registrar without first considering and ruling on the issue of jurisdiction erred. This failure to consider all the issues amounted to miscarriage of justice. A case of ***Kukal Properties Development Ltd. – Vs – Maloo & Others [1990 - 1994] E.A. 281*** was cited where it was stated that:-

***“A Judge is obligated to decide on each and every issue framed. Failure to do so constituted a serious breach of procedure”***

5. Although there were no framed issues framed, the Appellant states that the pleadings and preliminary objection contained sufficient issues, and that in any event, the Deputy Registrar could not go outside the framework provided by the Court of Appeal Ruling, and which was that the Deputy Registrar could only tax items in relation to the Auctioneers charges occasioned by the orders of stay granted in the Court of Appeal.
6. The Appellant also faulted the Deputy Registrar in many other aspects. Firstly, he allowed taxation on commission fees chargeable by the Auctioneer twice i.e. on items 10 and 18 of the bill despite the fact that instructions to the Auctioneer were on the same subject matter and the Auctioneer was one. The Appellant objected to this because a renewal of warrants after their lapse for the same subject matter cannot form another basis for the Auctioneer to charge fresh commission.

Secondly, the Appellant submitted that in any case, execution having been stayed which stay subsists to date in Civil Appeal No. 9 of 2012 pending for hearing before the Court of Appeal, the Deputy Registrar should have come to the conclusion that the Auctioneers' fee was not or had not become payable by the Appellant. It is the Appellant's position that an order of stay of execution stays everything including the process of recovering Auctioneers' fees other than that which may be specified by the Court. In their submissions before the Deputy Registrar, the Appellants offered to pay the Auctioneers **Kshs. 700,000/=** being the approximate charges occasioned by the order of stay granted by the court but the Deputy Registrar never commented on this offer. The Appellants submitted that charges occasioned by the order of stay should have been in respect of disturbance or inconvenience caused to the Auctioneer by postponing execution. This would for example have included the cost of advertisement, hiring the venue for the auction and like things and cannot by any stretch of imagination be said to include auctioneers' fee based on the decretal sum. In the Appellant's view the Deputy Registrar proceeded on a very wrong principle in law by entertaining the Auctioneers' exhaustive bill of costs. He did not appreciate the subsisting order of stay by the Court of Appeal for if he did, he would have come to the inevitable conclusion that the Auctioneers' bill of costs, as drafted, was premature and in any case was not payable or taxable against the Appellant.

While the Deputy Registrar held that the Auctioneer was ***"entitled to be paid a commission as prescribed under Rule II paragraph 4 of the Auctioneer Rules"***, he fell into grave error by admitting the bill as against the Appellant. Suffice it to state that the Deputy Registrar's reliance on Rule II paragraph 4 is also misplaced in the context of his decision. In any case, auctioneers' charges are recoverable from a complete execution. The Appellant stated that there was no complete execution and those charges as billed against the Appellant are irrecoverable. The fundamental question to pose is what if the Appellant succeeds on its appeal? Would the Auctioneer still sustain the bill of costs against the Appellant. The Appellant submitted that Auctioneers' charges, unless there is a specific order to the contrary, are not payable by a party who has succeeded on appeal and where there is a stay of execution pending such appeal as in this case, it is wrong for the Deputy Registrar to proceed to tax such a bill as against the Appellant. He erred.

Thirdly, the Appellant submitted that the Deputy Registrar while correctly quoting the court of Appeal decision in **National Industrial Credit Bank Ltd –vs S.K. Ndegwa C.A. 195 of 2004**, where the court held that attachment charges should be based on the value of the goods attached and not the decretal sum, it is whimsical and completely incomprehensible for him to have based the value of the goods attached on the figures quoted by the Auctioneer in the proclamation. The value of goods can only be determined upon sale in an auction. The Deputy Registrar was obligated to inquire from the Auctioneer how the Auctioneer arrived at the figures quoted for the items attached.

7. In response, the Respondent submitted that the Deputy Registrar of the High Court was the proper officer with jurisdiction to tax the auctioneer's bill of costs for the following reasons:
  - a. The auctioneer was executing a decree of the High Court and all charges incurred by him were pursuant to that decree and nothing else.
  - b. The auctioneer was not a party to the proceedings in the Court of Appeal and as such could not file his bill of costs for assessment by the Registrar of that Court. He had not incurred any charges at the Court of Appeal that could be assessed by the Registrar of the Court. The converse is however true for the respondent ( i.e. Erad Suppliers and General Contractors Limited) whose costs for the day as ordered by the Court of Appeal could only be assessed by the Registrar of the Court of Appeal.
8. The Respondent further submitted that there was no ambiguity in the order of the Court of Appeal. The Respondent submitted that the order of the court was so clear on its terms that there was nothing to be settled. What constitutes auctioneers charges is well set out in the Auctioneers (Amendment) Rules 2009 published under legal Notice No. 144 of 2005. Auctioneers cannot charge outside the gazzetted rates and there cannot be any dispute or uncertainty on this. There

was as such nothing left to be settled as suggested by the appellant. Once the order was made, it was then upto the auctioneer to file a statement of all charges he had incurred from receipt of the warrants of attachment to the date of the order, for assessment by the taxing officer. This is what he did leading to the certificate of taxation in question.

9. The Respondent further submitted that the auctioneer was entitled to charge two sums on account of commission. The Respondent cited **Civil Appeal No. 195 of 2004 National Industrial Credit Bank Limited - VS - S.K. Ndegwa Auctioneers** where the Court of Appeal concurred with the holding by Ibrahim J. (as he then was) that:

*“Under our laws today once goods or property have been proclaimed under rule 12 (b) and the prescribed procedure followed, the process of attachment takes effect and it does not subsequently matter at what stage it is terminated. Once the goods are proclaimed they become the attached and seized by the law. The auctioneer from this stage is entitled to charge his commission under Rule 11 paragraph 4”.*

As to what value should the commission be based upon, the Respondent referred to **Civil Appeal No. 195 of 2004** above and stated:-

*“The main object of paragraph 4 is clear. It is intended to provide 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 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”.*

10. The Respondent submitted that the auctioneer posted values of the attached properties in the proclamation form and based his commission thereon in accordance with the decision of the Court of Appeal quoted above. These values were never challenged by the appellant and neither did they seek valuation under Rule 10 of the Auctioneers Rules if they ever doubted the values posted by the auctioneer.
11. The Respondent submitted that it is an undisputed fact that warrant of attachment was initially issued on 13<sup>th</sup> March 2012 and re-issued on 18<sup>th</sup> May 2012 and that the auctioneer proclaimed and attached the appellant’s goods on both occasions. The auctioneer was legally entitled to charge commission twice on the basis of the value of the proclaimed goods on the two occasions and the Deputy Registrar was right to tax and allow such commissions as he did. The appellant’s objection on this issue is devoid of merit and should be rejected as commission is lawfully earned on proclamation unless it can be shown by cogent evidence that the second proclamation was unnecessary which has not been done in this case.
12. The last issue raised by the appellant is the allegation that the Deputy Registrar did not rule on the issues raised in the preliminary objection dated 27<sup>th</sup> July 2012. To this the Respondent submitted that after several appearances the parties submitted orally on the bill of costs on 26<sup>th</sup> April 2013 whereafter the Deputy Registrar reserved his ruling to 3<sup>rd</sup> May 2013. The appellant did not pursue their preliminary objection and it was legally deemed withdrawn or abandoned and no ruling could be rendered thereon. The appellant’s submissions thereon are therefore not well taken and should be rejected as they lost the said preliminary objection by default.
13. I have carefully considered the appellant’s case and opposition to it. I raise two issues for determination herein:-
- Did the Deputy Registrar exceed the mandate required by the order of the Court of Appeal.***
  - Was the taxation of the entire bill at this stage premature.***
  - Was the auctioneer entitled to charge commission and was the Deputy Registrar right to allow two sums on account of commission?***
  - Whether the Deputy Registrar ruled on the preliminary objection.***
14. To answer issue number one, I refer to the said court of Appeal ruling. The same is found at page

3 of the court of Appeal Ruling at the 2nd last paragraph. It reads:-

***“The Applicant shall pay the auctioneers charges occasioned by this order and the Respondents costs for today in any event.”***

15. My understanding of the Ruling of the Court of Appeal is that after being persuaded to grant a temporary order of stay of sale of proclaimed goods, the Court awarded the costs occasioned by that temporary stay, and stated that the same was **“pending the hearing of the Notice of Motion dated 16th February 2010.”**
16. I do not understand the court to have meant that the entire costs relating to the auctioneers services were to be paid, given that the court acknowledge that the order was a temporary one pending the hearing of the matter. In my view, the auctioneer could then not take it upon himself to tax the entire bill at that stage. In any event the party to pay auctioneers fees is only determinable after the matter is concluded. It was premature for the auctioneer at that stage to tax his entire bill without waiting to know which party would ultimately bear the auctioneers costs. the only certain cost was the costs occasioned by the stay. Such costs could be agreed upon. However, if not agreed, only that aspect of cost was taxable. It is therefore the view of this court that the Honourable Deputy Registrar exceeded the mandate required by the order of the Court of Appeal when he entertained the auctioneers bill of costs in its entirety, and to answer issue number two, it is my finding that the purported taxation of the entire bill at that stage was premature.
17. The last issue I raised herein is whether the auctioneer was entitled to charge commission and whether the Deputy Registrar was right to allow two sums on account of commission. The answer to above is that the auctioneer is entitled to charge commission. This is provided for under the auctioneers’ rules. However a commission cannot be charged twice for the same instructions. It is noteworthy that there were no two instructions. The Respondent cited **Civil Appeal No. 195 of 2004 National Industrial Credit Bank Limited – Vs- S. K. Ndegwa Auctioneers**. However, the case does not appear to support the view that two different commissions can be charged for one instruction. The warrants of attachment was initially issue don 13th March 2012 and re-issued on 18th May 2012. The auctioneer proclaimed and attached the Appellant/s goods on both occasions. However, there were no two sets of instructions. The first instructions issued on 13th march 2012 were re-issued on 18th May 2012 in respect of the same party and the same subject matter and attachment. Allowing commission twice for the same instructions was an error on the part of the Honorable Deputy Registrar.
18. Lastly the Appellant submitted that the Deputy Registrar did not rule on the issue of preliminary objection which was put before him by the Applicant. Pursuant to the foregoing paragraphs of this Ruling, a determination of that issue is not relevant for the determination of this matter, save and except to say that a Judge is obligated to decide on each and every issue framed. Failure to do so constituted to a serious breach of procedure. This was the decision in **Alnoor Sherif Jamal – Vs – Bahadur E. Shamji, Tanzania Civil Appeal No. 25 of 2006** quoted with approval in the Kenyan case of **Kukal Properties Development Limited – Vs – Maloo & Others [1990 – 1994] EA 281**.
19. In the upshot this court finds that other than the charges occasioned by the order of stay granted by the Court of Appeal, the Respondent has not yet become liable to pay the Auctioneers fees as the decree is the subject of appeal and there is a stay of execution. The bill is therefore wrongly filed and/or is premature.
20. It has been argued by parties on whether the bill should be taxed by the Court of Appeal Registrar or by this court’s Registrar. My view I that the matter is now within the court, and if the Respondent still intends to comply with this Court of Appeal order through taxation of the bill in relation to costs occasioned by the said stay, the Deputy Registrar of this court can do that. In allowing the Appellant’s application, I make the following orders:-
  - a. ***The determination made by the Deputy Registrar of the High Court on 7th May 2013 on the Auctioneers bill of costs dated 6th June 2012 is hereby set aside.***
  - b. ***The Taxing Master is hereby directed to tax the said bill in compliance with the Order of the Court of Appeal on 29th May 2012.***

c. *The costs of this application shall be in the cause.*

Orders accordingly.

**READ, DELIVERED AND DATED AT NAIROBI**

**THIS 15TH DAY OF MAY 2015**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

M/s Ndogo for the Applicant/Respondent

Mr. Mungla for the Respondent/Appellant

Teresia – court clerk