



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENT AND LAND DIVISION

ELC MISC.NO 36 OF 2014

ZACHARIA BARASA..... PLAINTIFF

=VERSUS=

DUBAI BANK KENYA LIMITED DEFENDANT

RULING:

The appellant herein *Zacharia Barasa T/A Siuma Auctioneers* filed Auctioneers Bill of Costs dated **14th January 2013**, for **Kshs.352,359/63**, arising out of instructions dated **13th March 2013**, to redeem charged property **LR No.MN/1/1861 Nyali**, belonging to **Polycarp Okumu Ochola** for purposes of recovering **Kshs.30,066,463/19** owed to the Respondent- **Dubai Bank Kenya Ltd** . The said Taxation was scheduled for **26th February 2014**, at **9.00 am** as per the Notice of Taxation dated **11th February 2014**. The parties filed their Written Submissions and a Ruling was rendered on **17th April 2014**, by Hon. **EK Makori, Deputy Registrar**. The Bill was taxed at **Kshs. 14,695/=**

The appellant being dissatisfied with the Bills as taxed by the Taxing Master filed this Chamber Summons dated **23rd April 2014**, and prayed for the following orders:-

- a. *That the whole of the decision of the Registrar delivered on 17th April 2014, taxing the applicant's Bill of costs dated 14th January 2014 at Kshs 14,695 be set aside.*
- b. *That the decision of the Registrar given on 17th April 2014 particularly on items No. 3,4,5,&6 be set aside and/or varied .*
- c. *That such further or other orders be given as will be just and expedient*
- d. *Costs of this appeal be provided for.*

The application was supported by the grounds stated on the face of the application and the annexed affidavit of **Zacharia Baraza** . These grounds are:-

- i. *That the learned Registrar erred in law when he taxed the Auctioneers Bill of Costs dated 14th January 2014 at Kshs.14, 695/= contrary to the clear provisions of the Auctioneer's Rules of 1997.*

- ii. ***The learned Registrar erred in law and fact in disallowing item 4 yet the Auctioneer in fact issued a Statutory Notice based on instructions given to him by the Respondent.***
- iii. ***The learned Registrar erred in law and fact in holding that the Auctioneer would only be entitled to fees under item 4 after advertising the property for sale.***
- iv. ***The learned Registrar erred in law and fact in disallowing items 6 yet the Auctioneer provided evidence of having personally served one Ochola Polycarp on the 19th of March 2013 in Mombasa with the Statutory Notice in addition to sending the same by registered mail.***
- v. ***The Registrar erred in law and in fact by failing to understand that issuance of Statutory Notice is akin to issuance of a Proclamation Notice where the subject matter is immovable property like land***

In his Supporting Affidavit, the Applicant averred that the Deputy Registrar's decision ignored and/or failed to take into account the provisions of the ***Auctioneer's Rules 1997*** and the relevant case law. Further that the Registrar failed to appreciate the clear provisions of law that provides that ***an auctioneer is entitled to a fee upon issuance of Statutory Notice.*** Therefore this is proper case in which the court should interfere with the Registrar's decision on taxation.

The application is opposed by the Respondent herein. ***Nick Siso***, the Credit Director of the Respondent swore a Replying Affidavit. He averred that the Chamber Summons herein is not only premature and incompetent but fatally defective and should be dismissed in toto. It was his contention that the matter relating to taxation of costs and objections thereto are governed by the ***Advocates Remuneration Order and not Rule 55(4) and 5 of the Auctioneer's Rules*** as brought out by the applicant. It was his further contention that ***Rule 55(4) and 5 of the Auctioneers Rule*** only apply to disputes emanating from proceedings before the High Court or during the pendency of such proceedings. Since in the instant case, there were no proceedings during the pendency of the attachment, ***Rule 55(4) & 5*** was not applicable.

He further disposed that the applicant ought to have filed a ***Reference*** as opposed to ***an Appeal***, against the taxing officer's decisions as provided by paragraph ***11 (1) and 11 (2) of the Advocates Remuneration Order.*** Further that the jurisdiction of the High Court can only be invoked after the Taxing Officer has given his/her reasons for the decision pursuant to paragraph 11 (2) above stated. It was contended that in the instant case, the appellant neither gave any Notice in writing to the ***taxing officer*** of the items of taxation to which he objects to pursuant to ***paragraph 11 (1) of the Advocates Remuneration Order*** nor requested for the ***taxing officers*** reasons pursuant to ***paragraph 11 (2) of the Order.***

It was his further contention that in the instant Reference, this Honourable Court does not have the benefit of the reasons of the taxing officer ***Hon.E K Makori***, on the ruling dated ***17th April 2014*** and therefore this Court is curtailed in entertaining the present Reference. It was also contended that the service of ***Statutory Notice*** is not tantamount to proclamation as alleged by the appellant. Further that the Ruling by the ***taxing officer*** did not contain the requisite reason for the Ruling as envisaged by paragraph ***11(2) of the Advocates Remuneration Order.***

The Respondent finally averred that the Chamber Summons by the applicant is incompetent, premature, and fatally defective for non-compliance with the provisions of the ***Advocates Remuneration Order*** and hence should be dismissed with costs.

The parties herein canvassed this Chamber Summons by way of ***Written Submissions.***

The appellant relied on the Fourth Schedule, part II of the ***Auctioneers Rules, Paragraph 6*** which provides that the auctioneers fee on sale of immovable property and ***paragraph 7*** which provides that where requisite Notices are served and sale stayed or postponed, ***½ fees*** to which the auctioneers would have been entitled to after sale plus expenses is payable to the auctioneers as his fees.

It was further submitted that the Deputy Registrar's reasoning in the Ruling forming the basis of this

Appeal is that an Auctioneer will only be entitled to a fee once he advertises the property for sale or issue a **Proclamation Notice** was a fatal misunderstanding of the Law and amounts to a nullity. It was his submissions that once an Auctioneer serves the requisite Notice, and the sale is stayed or postponed, then he is entitled to a ½ of the fee he would have charged if the sale was successful. Further that the fee is not pegged on successful advertisement in the local daily newspapers or issuance of Proclamation Notice. It was the appellant's submissions that he served the statutory notice under **Section 96(2) of the Land Act 2012**. Therefore the Auctioneer /appellant complied with the law by serving the notification of sale upon the chargor and he is entitled to his fees as provided under paragraph 7 of the Auctioneers Rules. It was further submitted that the taxing master should have allowed item 4 on the Appellant's Bill of Costs. Further that one **POLYCARP OCHOLA** signed the Notice as an acknowledgement of receipt and therefore item **No. 6** on transport cost ought to have been allowed.

In their submissions, the Respondent stated that it is trite law that taxation of costs and objections thereto are governed by the Advocates Remuneration Order and not any other Statutory Provisions. Further that the Jurisdiction of the Court can only be invoked after the **taxing officer** has given his/her reasons for decision pursuant to paragraph 11 (2) of the Order. The Respondents relied on the case of **Machira & Co. Advocates Vs Magugu (2002) EA 428, Ahmednassir Abdikadir & Co. Advocates Vs National Bank of Kenya Ltd (2) (2006) IEA 5, Wanga & Co. Advocates Vs Busia Sugar Co. Ltd (2004) KLR 506.**

It was further submitted 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 in principle or the fee awarded was manifestly excessive to justify interference. They relied on the cases of **First American Bank of Kenya Vs Shah and others (2002) IEA 64 and Steel Construction Petroleum Engineering (EA) Ltd Vs Uganda Sugar Factory (1970) EA 141.**

The Court has now considered the instant Chamber Summons and the Written Submissions together with the relevant laws. There is no doubt that the Chamber Summons emanated from the Auctioneer's Bill of Costs dated **14th January 2014** and the Ruling delivered on **17/4/2014**. The said Bill of Costs was filed under the 4th Schedule, part II of the **Auctioneers Rules 1997**. The said Fourth Schedule is governed by **Rule 55(1) and 55(2) of the Auctioneers Rules**. The Respondent was served with the said Bill of costs and the Respondent submitted on the said items. The Deputy Registrar taxed the said Bill of Costs under **Rule 55 of the Auctioneer's Rules**. The governing Act for this application is therefore the **Auctioneers Act and Rules 1997** and not the **Advocates Remuneration Order** as submitted by the Respondent's Advocates. The instant application is therefore properly before the Court. **Rules 55(4) of the Auctioneer's Rules** provide that an appeal from the decision of a Registrar or Magistrate shall be to the Judge in Chambers.

Further **Rule 55 (5)** provides that a 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. The decision herein by the Registrar was delivered on **17th April 2014**. The Chamber Summons was filed on **24th April 2014**. The application was therefore filed within time as an appeal as provided by the Rules. The appellant needed not to file a Reference as submitted by the Respondent but an appeal and he has properly done so.

The question now for determination is whether the Deputy Registrar erred in law when he taxed the Auctioneer's Bill of Costs and whether the same should be set aside. The bone of contention is the Deputy Registrar's decision to disallow items **No.3 ,4, 5 and 6 of the Bill of costs**.

In arriving at my decisions, I will be guided by the provisions of **Rule 55 of the Auctioneer's Rules**, the Fourth Schedule mentioned therein and the several decided cases. I am alive to the decisions 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 same decision, it was further held that :-

“ It is within the discretion of the taxing officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary “.

Further in the case of *M/s Behan and Okero Vs Pan African Insurance Company, Kisumu High Court, Misc Case No. 229 of 2003* ,the Court held that:-

“ Each taxing master has the sole discretion and responsibility to decide the amount payable when a dispute arises as to the amount payable “.

Further in the case of *Bank of Uganda Vs Benco Arabe Espanol (1999) 2EA 45 , (2000) 2EA 297 (SCU)* , it was held that:-

“even if it is shown that the taxing officer erred in principle, the Judge should only interfere on being satisfied that the error substantially affected the decision on quantum and that upholding the amount would cause injustice to one of the parties”.

The appellant has alleged that the Deputy Registrar erred in law when he taxed the Auctioneers Bill of Costs to **Ksh. 14,695/=** .On **item No.3**, the Deputy Registrar gave reasons why he rejected **Kshs.5000/=**. The Deputy Registrar had discretion to decide the amount payable when a dispute arise as was held in case of *Mr Behan & Okero (Supra)* I find no reason why I should interfere with the said discretion.

On **item No. 4**. The appellant had contended that he had commenced the process of sale of the property in question. From the attached documents, the appellant sent out Notice to Redeem the property to the Chargor. There was no evidence of advertisement for sale which is the commencement of the sale process. The Deputy Registrar was right in his reasoning as to why he disallowed the amount sought by the appellant. He also distinguished the authority quoted by the appellant from the instant case. I find no reason to interfere with the taxing master’s decision on the said Item as was held in the case of **First American Bank of Kenya (Supra)**.

Further on items **No. 5 and 6**, the Deputy Registrar stated that the said claims were un-supported. The Court finds that the Deputy Registrar had the duty to tax the Bill of Costs and give reasons for the taxation. The Deputy Registrar in this case gave reasons why he did not allow those two items. He stated that the same were unsupported . It is clear that the Notice was sent to the Chargor by Registered post. The Court finds no reason to interfere with the Deputy Registrar’s decision on items **5 and 6**.

Having now considered the instant Chamber Summons and the Bill of Costs in issue and the Taxing Officer’s Ruling of **17/4/2014**, the Court finds that the Deputy Registrar gave reasons for arriving at the decision he did. He had discretion to do so and I find no reason to interfere with the said discretion.

For the above reasons, the Court upholds the Bill of Costs as taxed by the Deputy Registrar on **17/4/2014**.Consequently,the appellant’s Chamber Summons dated **23rd April, 2014** is not merited. The same is dismissed entirely with costs to the Respondent.

It is so ordered.

Dated and delivered this 29th day of June, 2015

L.GACHERU

JUDGE

In the Presence of:-

Mr Manjau holding brief for Mr Khakula for the Appellant/Applicant

Mr Tebino for the Respondent

Hilda: Court Clerk

Court:

Ruling read in open Court in the presence of the above counsels.

L.GACHERU

JUDGE