



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**MISC. CIVIL NO. 167 OF 2011**

**GEORGE A. SINO T/A JONE BROOKS CONS. LTD ..... APPLICANT**

**-VERSUS-**

**K. REP BANK LTD ..... DEFENDANT**

**RULING**

Before court is an application dated 20<sup>th</sup> June, 2011 by way of a notice of motion brought pursuant to Section 3A of the Civil Procedure Act, Section 22(1) of the Auctioneers Act No. 5 of 1996, rules 55(1) (2) & (3) of 1997, Rules 2(1) (2) of 2009 and part 11 of the 4<sup>th</sup> schedule 2009. The application seeks for the following:-

- a) That the Auctioneers bill of costs between the applicant and the respondent arising out of instructions to sale L. R. NO. KIMININI/KINYORO BLOCK 3/MATISI 169 & 2116/11/57 Kitale municipality in the name of Bernard Bifwoli Wanjala guarantor to Train Builders Ltd by Public Auction be taxed.
- b) That this Honourable do issue orders that the respondent is to pay the Auctioneers charges.
- c) That this Honourable do order the same be paid upon being taxed.
- d) Court attendance costs to the applicant.

The application was supported by the affidavit of **George A. Sino** dated 20<sup>th</sup> June, 2011 and grounds on the face of the application as follows; that the respondent herein instructed the applicant to sale by public auction the properties named herein; that the applicant upon receiving instructions advertised and auctioned the said property; however the respondent has not paid the auctioneer's costs and charges as required under Auctioneers Rules.

The respondent has vehemently objected to the application by filing a replying affidavit dated 6<sup>th</sup> October, 2011 and submissions dated 30<sup>th</sup> September, 2011 both filed on 7<sup>th</sup> October, 2011. In brief the objection is based on the following reasons; that the application is incompetent, incurably defective and does not give rise to the orders being sought; the applicant does not require leave of court to assess his costs; the costs of the auctioneer is to be borne by the debtor in the first instance; the parent suit is still pending; making any sale other than an auction of attached property shall unless it is otherwise agreed between him and the seller, be entitled to sue for recovery and discharge all sums due in respect of the sale.

Rule 55(2) of the Auctioneers Rules 1997 provide as follows:-

- “(2) where a dispute arises as to the amount of fees payable to an auctioneer –**
- (a) in proceedings before the High Court.**
  - (b) where the value of the property attached or repossesses would bring any proceeding in connection with it within the monetary jurisdiction of the High Court; a registrar, as defined.**

I have considered the pleadings before me and submissions by Counsel for the respective parties the issues in my view for determination are; whether or not the applicant requires leave of this court to have his bill taxed, whether this court ought to tax the bill and make orders for payment of the same.

**Mr. Ragot** for the applicant submitted that he requires leave of court to have the bill of cost taxed and that the application is in line with rules 55(2) (b) of the Auctioneers Rules.

On his part **Oundo** for the respondent argued that the application was filed under the wrong procedure as S. 3A is not applicable and Section 22(1) of the Auctioneers Act is not relevant. Application therefore incompetent. He also argued that no leave of court is required.

Section 22(1) of the Auctioneers Act provides;

**“A licensed Auctioneer in the Civil Procedure Rules, may on the application of any party to the dispute assess the fees payable.**

**3. ---**

**4. An appeal from a decision of a Registrar or Magistrate or the head under sub rules (2) & (3) shall be to a judge in chambers.**

In answer to the issues for determination, it is clear from the above Sections that Section 22(1) of the Auctioneers Act is not applicable herein. Secondly Rules 55 2(b) is clear that where there is a dispute such as the one before this court any one of the parties may refer the matter to a Registrar/Magistrate for assessment. I do in this regard agree with the respondents that in the circumstances of this matter leave is not required.

This court in view of Rule 55(4) ought to come in at an appeal level and not in the first instance.

The application is therefore, for the aforesaid reasons dismissed with costs.

DELIVERED THIS 23<sup>RD</sup> DAY OF JANUARY, 2012.

ALI-ARONI  
JUDGE

In the presence of:

..... present for plaintiff/Applicant

..... present for Respondent/defendant