



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS

Miscellaneous Case 408 of 2008

STANLEY MUGACHA

T/A GALAXY AUCTIONEERSAPPLICANT

VERSUS

BALOZI HOUSING CO-OP SOCIETY LTD1ST DEFENDANT

SHELTER AFRIQUE2ND DEFENDANT

RULING

By a Chamber Summons dated 15th April, 2011, brought under Rule 55 (4) & (5) of the Auctioneers Rules, the Applicant filed a reference against the decision of the Deputy Registrar Hon. Mrs. L.N. Njora for taxing the Applicant's Bill of Costs dated 5th June, 2008 at Kshs.224,545/-

The facts briefly are that on 24th July, 2007, the 2nd Respondent gave instructions to the Applicant to proceed with the sale by public auction of various properties belonging to the 1st Respondent. The very first letter of instructions was dated 9th August, 2006 which disclosed that the amount recoverable was Kshs.58,612,138/59 as at 30th June, 2006. The letter of 24th July, 2007 did not specify the amount recoverable. Pursuant to those instructions, the Applicant served on 20th August, 2007 a Notification of sale upon the 1st Respondent and on 22nd August, 2007 he caused an advertisement to appear in the Daily Nation. However, an order of injunction restraining the sale was obtained by the 1st Respondent who engaged in negotiations with the 2nd Respondent and had the matter between themselves settled. When the Applicant raised his fee note for Ksh.1,503,333/- for services rendered, the Respondents refused to settle the same. By a ruling delivered on 20th September, 2010 the Hon. Khaminwa J ordered that since

the Applicant had rendered services, he was entitled to be paid his costs by the Respondents.

In pursuance thereof, the Applicant filed a bill of costs dated 5th June, 2008 for Kshs.2,153,670/- inclusive of VAT 16%. The same was taxed and by a Ruling of 12th April, 2011, the Deputy Registrar taxed off the item on commission on the basis that there had been no sale. She thereupon taxed the bill at Kshs.224,545/-. By his Motion of 15th April, 2011, the Applicant has filed a reference against the said taxation.

This is the Notice of Motion that was argued before me on the 31/1/2012 and is the subject of this ruling.

The Applicant's arguments were that the Deputy Registrar proceeded on a wrong principle of law in refusing to grant a commission to the Applicant, that her reasoning that since there was no sale the Applicant was not entitled to fees on proclamation was wrong. Mr. Makumi, learned Counsel for the Applicant relied on the Court of Appeal decision in **CA No. 195 of 2004 NIC Bank Ltd –vs- S. K Ndegwa Auctioneer** in support of the proposition that once proclamation takes place, attachment has commenced and it matters not at what stage the goods are released to the Judgment Debtor. Counsel submitted that the value of the subject matter is the value of the goods attached, that in this case the value of the goods was Kshs.135,900,000/- in terms of the valuations prepared by the Respondents and availed to the Applicant at the time of instructions. Counsel, however admitted that the letter of instruction had instructed the Applicant to recover Ksh.34,641,085/- only. He urged the court to allow the application.

The 1st Respondent filed Grounds of Opposition dated 9th May, 2011. It was submitted on its behalf that the Applicant was not entitled to the orders sought in that the Deputy Registrar's decision was sound in law in that commission was not payable in the absence of a sale, that the applicable schedule was Schedule VI Part II paragraph 6 of the Auctioneers Rules 1997, that this was because what we are dealing with is immovable property, that the **case of NIC Bank Ltd –vs- S.K. Ndegwa** was not applicable as it dealt with issues relating to moveable property unlike in the present case, that a commission is defined in **Blacks Law Dictionary** to mean a percentage of the amount of a transaction thereby connoting a sale. That there was no sale in this case. The 1st Respondent therefore also urged that the application be dismissed.

The 2nd Respondent filed grounds of objection dated 24th May, 2011. It was submitted on its behalf that the decision of the Deputy Registrar was based on sound and proper law, that the powers of the Deputy Registrar are not governed by the 4th Schedule of the **Auctioneers Rules 1997**, that the Deputy Registrar exercised her discretion properly. That the properties had not been sold, that there having been a settlement immediately after instructions, the Applicant's charges should have been the amount recoverable under the letter of instructions, that since the issue before the Deputy Registrar was Commission under paragraph 6 of the 4th Schedule and not proclamation her decision was in accordance with the law. Finally, that the case of **NIC Bank Ltd –vs- S.K. Ndegwa** was not applicable. The 2nd Respondent urged that the application be dismissed.

I have considered the Affidavits on record, the Grounds of Opposition, Submissions of Counsel and the authorities relied on. The issue before court is whether the Deputy Registrar erred in principle in rejecting the Applicant's items on commission in his bill of costs dated 5th June, 2008. Those are item Nos. 6 and 12 of that bill which read:-

“6. Commission based on the valuation price of Kshs.135,900,000”
“12. Commission based on the valuation price of Kshs.135,900,000.”

The item appears twice because the Auctioneer made two (2) attempts to dispose off by public auction a total of 47 properties specified in the letter of instruction. The value of the properties was said to have been given by the 2nd Respondent at the time of giving the instructions.

It is not in dispute that the 2nd Respondent gave the Applicant instructions to sell the identified properties and recover Ksh.35,041,085/46, the properties were attached and advertised for sale. Before the 1st public auction an injunction restraining the sale was obtained by the 1st Respondent. When the Applicant once again advertised the properties for sale on the 2nd Respondents instructions, the Respondents entered into a settlement. The Applicant insisted before the Deputy Registrar that he was entitled to a commission based on the valuation of the properties given by the 2nd Respondent of Kshs.135,900,000/-. The 1st Respondent on its part submitted that the fees should be based on Kshs.15,000,000/- which was the amount at which the matter was settled between the Respondents. On its part the 2nd Respondent urged the Deputy Registrar to apply the figure of Kshs.34,641,085/- which was the amount outstanding and which was the amount the Applicant was instructed to recover.

Khaminwa J had on 20th September, 2010 held that:-

“ I have examined the facts discussed by the two Respondents. There is no one denying that the Applicant has performed services to them.”

The Judge ordered that the Applicant must therefore be paid for his services. It was not denied before the Deputy Registrar that attachment had been effected and that what was not done was sale of the properties attached. That being the case, it was imperative for the Deputy Registrar to have first resolved the issue of the amount to base the Auctioneer’s charges. Of course, there was no dispute before her of whether or not the sale had been effected, nor was there any dispute as to whether or not the Applicant was entitled to be paid for his services. It was obvious that having been awarded all the other items, item Nos. 6 and 12 must have related to the Applicants **charges for the attempted sales**. The deputy Registrar should have considered the provisions of paragraph 7 of the fourth schedule Part II which provides:-

“7. Where requisite notices are served and sale is stayed, or postponed.

“1/2 of the fees to which the auctioneer would have been entitled to after sale, plus expenses.”

That being the case, the Deputy Registrar erred in rejecting the whole of item Nos. 6 and 12 of the bill. She should have resolved the issue of the amount upon which to base the calculation then access the correct fees due to the Applicant. In my view, the figure of Kshs.135,900,000/- would not have been appropriate in the circumstances of the case and was properly rejected by the Deputy Registrar. Also the figure of Kshs.15million alleged to be the settlement amount would not be applicable as there was no such evidence before her. However, the figure of Kshs.34,641,085/- was submitted as the amount the Applicant had been instructed to recover. That is the amount he attached the properties to recover. Since he was entitled to be paid for services rendered as held by Khaminwa J on 20th September, 2010, that is the amount on which his fees, which he wrongly referred to as commission, should have been based. In my view, the use of the term” Commission” instead of “fees” or “charges” cannot be used to deny the Applicant his accrued right to be remunerated.

In my view therefore, once the sale aborts such as in this case, the value of the subject matter is the amount instructed to recover. In this regard, I think the case of **NIC Bank Ltd –vs- S.K Ndegwa CA No. 195 of 2004 (UR)** is not applicable because in that case, the court was dealing with moveable properties and secondly the court was considering paragraph 4 and not 7 of the fourth schedule as is in this case.

Accordingly, I would allow the Notice of Motion dated 15th April, 2011 and direct that the applicant’s bill of costs be remitted back for re-taxation before a different taxing master of this court with a direction that the values to be placed on item Nos. 6 and 12 should be the sum of Kshs.34,641,085/- and to be taxed under paragraph 7 of the fourth schedule part II thereof. That is to be one halved. Although the Applicant was successful, I will not award costs because he is the one who had misdirected the Deputy Registrar on the issue of commission and the value of the subject matter as Kshs.135,900,000/- which I have found to have been correctly rejected. I therefore make no order as to costs.

DATED and delivered at Nairobi this 14th day of February, 2012.

A.MABEYA
JUDGE