



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
(MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)
CIVIL CASE 437 OF 2003

CALTEX OIL KENYA LIMITED PLAINTIFF

VERSUS

CRESCENT CONSTRUCTION CO. LIMITED DEFENDANT/APPLICANT

KENYA COMMERCIAL BANK LIMITED OBJECTOR

IN THE MATTER OF THE AUCTIONEERS ACT (ACT NO. 51997)

IN THE MATTER OF TAXATION OF THE AUCTIONEERS' BILL OF COSTS

ROBERT MAINA NGURU T/A NGURU ENTERPRISES AUCTIONEER/RESPONDENT

AND

CRESCENT CONSTRUCTION CO. LIMITED JUDGMENT DEBTOR

RULING

The judgment debtor's application dated 14th March, 2012 seeks an order to set aside the taxation of the bill of costs dated 25th February, 2010 which was done in the absence of the judgment debtor's advocate so that the taxation can be done afresh. The bill of costs was taxed on 24th October, 2011 but the ruling thereof delivered on 20th December, 2011.

In an affidavit sworn by **Mark Kezegule**, the Administration Manager of the applicant, he stated that their advocates had informed him that the taxation did not proceed on the aforesaid date. The judgment debtor was therefore surprised to see Warrants of Attachment of their property being served upon it on 8th March, 2012.

A replying affidavit was filed by **Robert Maina Nguru, Auctioneer**, trading in the name and style of **Nguru Enterprises**. He stated that the Auctioneer's bill of costs came up for taxation on 24th October, 2011 and the same was done in the absence of the judgment debtor's advocate, having been duly served

with a Taxation Notice. Prior to the date of taxation, the judgment debtor's advocates had been served with letters asking them whether they were willing to settle the bill but there was no response. The taxation was therefore done lawfully, the respondent stated.

Mr. John Ochola, an advocate in the firm of Soita & Saende Advocates, who are on record for the judgment debtor, swore a further affidavit to which he annexed a copy of the cause list for 24th October, 2011. The cause list shows that the matter was listed before Mrs. Njora, Principal Deputy Registrar. The advocate further stated that the applicant should not be penalized on account of an inadvertent mistake by counsel, although the deponent had not conceded that there was any mistake on the part of the applicant's advocates. He added that the applicant was objecting to the taxed sum and wanted the taxation done afresh.

Both **Mr. Ochola** for the applicant and **Mr. Chacha** for the respondent made brief submissions which I have considered. Mr. Ochola's contention was that there was no notation in the cause list of 24th October, 2011 against the particular case number to show that it had actually been dealt with. However, counsel conceded that he was in court on the material day but did not hear the matter being called out, although he did not make any enquiry from the trial court as to what became of the matter.

Mr. Chacha responded that on the material day the matter was cause listed and when it was called out the applicant's advocate was not present. The Taxing Officer proceeded with the same and eventually delivered a ruling on 20th December, 2011. He submitted that there was no proper basis for the court to exercise its discretion in favour of the applicant.

The court record is clear that the Auctioneer's bill of costs was listed for taxation on 24th October, 2011. The applicant's advocates had been served with a taxation notice on 22nd August, 2011. That was conceded by Mr. Ochola. The record further shows that only Mr. Chacha for the respondent was in attendance. Mr. Ochola said that he was outside the court room but did not hear the matter being called out. That seems to be a departure from the applicant's earlier contention that the matter was not listed for taxation on the material day.

Although the Taxing Officer did not deliver her ruling on 8th December, 2011 as initially indicated, the ruling was delivered on 20th December, 2011. The Taxing Officer noted that the decretal sum was Kshs.31,533,847.20. Apart from a sum of Kshs.10,000/= on account of disbursements that was disallowed, the Taxing Officer stated that the bill had been drawn in accordance with the **Advocates (Remuneration) Order, 2006**.

In view of the foregoing, I am satisfied that the applicant/judgment debtor's advocate failed to attend court for no good reason for taxation of the Auctioneer's bill of costs. If he was outside the court but did not hear the matter being called out he ought to have made appropriate inquiry with the court on the material day but he did not do so. The respondent's advocates cannot be blamed at all.

Secondly, Mr. Ochola did not demonstrate to this court that the Auctioneer's bill was not taxed properly. The Taxing Officer applied her mind to it before she gave her considered ruling. I see no basis of interfering with the certificate of taxation.

Consequently, the judgment debtor's application is dismissed with costs to the Auctioneer/Respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF APRIL, 2012.

D. MUSINGA
JUDGE

In the presence of:
Alex/Muriithi – Court Clerks

Mr. Chacha for the Auctioneer

Miss Minishi for Mr. Sarende for Judgment Debtor