



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

MISC. CIVIL APPEAL NO. 1093 OF 2010

**JOSEPH G. MUTURI T/A MUGA AUCTIONEERS & GENERAL
MERCHANTS.....APPLICANT**

VERSUS

GEORGE JAMES

KIRERU.....RESPONDENT

RULING

The Ruling is delivered in the Chamber Summons dated 24th December 2010, which is an appeal brought under Rule 55 of the Auctioneers Rules 1997, seeking orders of this court in the following terms:-

- 1. That this Honourable Court be pleased to call, consider, set aside and/or vary the Ruling of the Honourable Deputy Registrar Mr. Okato which was delivered on 17th December 2010 in High Court Misc. Application No. 314 of 2010.**
- 2. That the costs of this Application be provided for by the Respondent .**

The application is premised on two grounds set out in the Chamber Summons as follows:-

- (i) That the learned Deputy Registrar erred in Law and infact by taxing off the Appellants claim (Sic) No.5 of his Auctioneers Bill of Costs dated 17th March 2010 indicting that no sale had been conducted.**
- (ii) That the learned Deputy Registrar erred in Law and infact by failing to appreciate fully the**

Provisions of the Auctioneers (Amendment) Rules as contained in Legal Notice No.144 of 2009 and in particular Part II (Auctioneers Charges) thereof.

To support the application the Applicant (Auctioneer) relies on the affidavit sworn by himself on 24th December 2010 and filed with the application.

The applicant is aggrieved by the decision of the Deputy Registrar wherein a sum of Kshs.896,964/- of the Applicant's Bill of Costs was taxed off, allowing only Kshs.15,775/- of the total amount of Kshs.912,739/- presented under the bill. In his affidavit, the Applicant depones that the bill was properly drawn and presented under Part II of the 4th Schedule of the 2009 Revised Edition of the Auctioneers Rules which, under paragraph 7, provides the scale of auctioneers charges where an auction aborts, as was the case herein. Of particular concern is the taxing off of Ksh.760,000/- which sum the Applicant claims to be entitled to under the said paragraph 7 of Part II, based on the reserve price of Kshs.35,000,000/- provided for in the intended sale. According to the Applicant, the sale was stayed by a court order obtained by the Respondents on 1st October 2009 and served upon the Applicant on 2nd October 2009, after he had duly served the requisite Redemption Notices and Notifications of sale.

The application is opposed on the strength of a Notice of a Preliminary Objection dated and filed on the 7th February 2011. The points raised therein are that the application is both incompetent and incurably defective in that it is prematurely brought without first obtaining the reasons for the Deputy Registrar's decision. A Replying Affidavit sworn by the Respondent was also filed on 7th February 2011 in which he depones that the Applicant's desire is to unjustly enrich himself, since, according to the deponent, an auctioneer is not entitled to charge commission for work done, in the absence of either an advertised or concluded sale.

Oral submissions were made to support the rival arguments herein. In considering the same I have found it necessary to recite verbatim, the relevant provisions of Rule 55 of the Auctioneers Rules and paragraph 7 of Part II of the Auctioneers Rules as revised under L.N. No. 144 of 2009. They provide as follows:-

"55 (1) Except as may be provided by any other written law or by contract the fees set out in the Fourth Schedule payable to the auctioneer for the attachment, repossession and sale of movable and immovable property under court warrants or letters of instructions shall be charged in accordance with these rules.

(2) Where a dispute arises as to the amount of fees payable to an auctioneer-

(a) In proceedings before the High Court; or

(b) Where the value of the property attached or repossessed would bring any proceedings in connection with it within the monetary jurisdiction of the High court, a registrar, as defined in the Civil Procedure Rules, may on the application of any party assess the fee payable.

(3)

(4) An appeal from a decision of a registrar or a magistrate or the Board under sub-rules (2) and (3) shall be to a judge in chambers.

(5) The Memorandum of Appeal, by way of a Chamber Summons setting out the Grounds of Appeal, shall be filed within 7 days of the decision of the registrar or magistrate."

It is clear from the above that an appeal lies under **Rule 55(5)** by way of a Chamber Summons only as is

filed herein and there is no requirement that the Registrar's reasons be obtained as is the case in taxation of Bills under the **Advocates (Remuneration) Order**.

Fees on immovable property are provided under paragraphs 6 and 7 of Part II of - the Fourth Schedule which read as follows.

6. Fees on immovable property

Filing possession of property Kshs. 4,000/-

Sale of immovable property—charge shall be based on the amount realized on the sale.

Ksh. 0 – 600,000/-..... 10%

Ksh.600,000/- - 3,000,000/-..... 5%

Over 3,000,000/- 2%

7. Where requisite notices are served and sale is stayed, or postponed 10% of the amount realized at the sale plus reasonable expenses.

Whereas it is absolutely correct to say that there can be no sale, and none can be presumed, when the same has been stayed, as submitted by the Respondents herein, it is quite clear to me that the contents of paragraph 7 are contradictory in themselves. In the 1997 Rules an auctioneer was entitled, in similar circumstances, to charge **“1/2 of the fees to which he would have been entitled to after the sale plus expenses”**, in any case where a sale was advertised but stayed or postponed. A ½ scale fees is provided for under paragraph 8 of the 2009 Amendment which deals with the attachment of livestock. The paragraph reads as follows:-

“8. Attachment of Livestock ½ of fees to which auctioneer would have been entitled to after sale , plus expenses.

In the 1997 Rules the same paragraph 8 provides that an auctioneer would be entitled to 10% of the amount realized at the sale (of livestock).

With due respect, the Deputy Registrar ought to have realized that the provisions in the Revised Act and Rules have been mixed up, since a sale cannot be stayed or postponed and still realize proceeds. The Bill having expressed itself to have been presented, inter alia, under Rule 55 of the Auctioneers Rules 1997, Part II of the Fourth Schedule as amended by Legal Notice No.144 of 3rd September 2009, the Deputy Registrar was duty bound to read and apply the provisions relied upon in order to make appropriate orders. It seems to me that the Deputy Registrar abdicated his responsibility and exercised his discretion without due consideration of the principles governing taxation as provided for under the Auctioneers Act and Rules.

I am convinced that the contents of paragraph 7 of Part II of Schedule Four were meant for paragraph 8 and vice versa. However, not having the jurisdiction to correct an error in a statute, (be it of printing, typographical or otherwise), the power to do so being vested only in the Attorney General, I can only comment and say that, in my view, the 2009 Amendment was intended to widen the scope for which an auctioneer can charge his fees in an abortive sale, since the 1997 provisions restricted the same only to situations where there was an advertisement.

In view of the above I am not able to rule on the appeal. I direct that a certified copy of this Ruling be

served upon the Honourable Attorney General for the correction of the interchanged provisions, namely paragraphs 7 and 8 of Part II of the Fourth Schedule of the Auctioneers' Rules, as amended under Legal Notice No. 144 of 2009. The Ruling shall also be served on the Registrar of the High Court for information and circulation as appropriate, and on the Secretary to the Auctioneers Board for appropriate follow up. Pending the correction, the decision in the taxation issued on 17th December 2010 is and shall remain stayed.

DATED, SIGNED and DELIVERED at NAIROBI this 10TH DAY of JUNE 2011.

M.G. MUGO

JUDGE

In the presence of:

Mr. Kibwaka

No appearance

For the Applicant

For the Respondent