



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
MISC. APPLICATION CIVIL CASE NO. 597 OF 2009

STANLEY MUGACHA T/A GALAXY AUCTIONEERS.....APPLICANT/RESPONDENT
VERSUS
MAERSK KENYA LIMITED.....RESPONDENT/
APPELLANT

R U L I N G

The applicant in the Chamber Summons dated 9th June, 2010 seeks orders for the setting aside of the taxing officer's decision of 1st February, 2010 in the Respondent's Bill of Costs dated 6th October, 2009 and for the said bill to be taxed afresh.

The application is premised on 5 grounds, namely:

- 1. That the learned Deputy Registrar (Taxing Officer) lacked jurisdiction to award the Respondent costs against the Applicant.**
- 2. That the learned Deputy Registrar erred and applied the wrong principles or the Auctioneers Rules when taxing the said Bill.**
- 3. That the learned Deputy Registrar misapprehended the facts in making his decision as a consequence of which he awarded the Respondent costs which were manifestly high and wrong in quantum.**
- 4. That the learned Deputy Registrar enhanced the commission payable to the Respondent without any legal basis.**
- 5. That the fees awarded to the Respondent's are, in the premises, manifestly excessive and unjust.**

The application is opposed on the strength of grounds of opposition filed by the Respondent on 1st July, 2010 to the effect that

1. The applicant's challenge to the Deputy Registrar's jurisdiction is an afterthought.
2. That since the Respondent's Bill arose out of an order of the court authorizing the attachment and sale of the applicant's property, the taxed costs were rightfully due from the applicant to the Respondent.
3. That the appeal herein is untenable as it seeks to challenge the discretion of the Deputy Registrar in the assessment of the costs payable.
4. That there was neither error nor application of wrong principles or misapprehension of facts on the part of the Deputy Registrar when taxing the bill and awarding the costs appealed against.
5. That the costs awarded in the taxation are neither excessive nor unjustified but properly and rightly awarded, since the Deputy Registrar had the right, jurisdiction and discretion to award the same.

The parties hereto filed written submissions in support of their opposing positions. As regards jurisdiction, the applicant's position is that the High Court having not made a specific order in **H.C.C.C.**

No. 19 of 2007 (where the applicant was the 2nd Defendant) as to whom among the various parties to the suit would bear the auctioneer's charges, then the taxing officer (Deputy Registrar) lacked jurisdiction to order such costs. The applicant cited the decision of Ringera, J (as he then was) in **Adero & Another Vs. Ulinzi Sacco Society Ltd (2002) KLR 577** to support this position, arguing further that the attachment herein, having been ordered before judgment, the issue as to who was the debtor as defined under Rule 7 of the Auctioneers Rules had not been determined. The applicant considers the bill of costs to have been taxed prematurely, suggesting that the Respondent ought to have applied for an order compelling it to bear the auctioneer's costs. In addition to reiterating the other grounds on the basis that the wrong principles of assessment were applied when invoking the Auctioneers' Rules, the applicant submitted that the issue of jurisdiction is enough on its own to cause this court to allow the appeal.

In its submissions, the Respondent contends that the applicant is estopped from raising the issue of jurisdiction having submitted to the taxation without challenging such jurisdiction of the taxing officer. Counsel for the Respondent submitted further that the auctioneer's costs were incurred pursuant to an order of the court dated 3rd December, 2007 for the attachment and sale of the Appellant's property, which has never been challenged, meaning that the same are rightful and justified as costs which "follow the event". He contends further that the taxing officer considered all the relevant matters attendant to the costs payable and properly applied the provisions of the Auctioneers' Rules of taxation.

I have examined the Amended Auctioneer's Bill of Costs dated 6th October, 2009 in light of the submissions made herein. I have also perused the entire record and considered the Ruling on taxation delivered on 1st February, 2010 in light of the provisions of the Auctioneers Rules 1997, as amended under Legal Notice No. 144 of 2009.

In prior proceedings, including at the taxation itself, the applicant not only avoided raising a challenge to the jurisdiction of the taxing officer but also prayed for certain orders to be made in its favour. Having thus submitted to that jurisdiction it would appear that the applicant is now reprobating. Even without seeing the proceedings and orders made in **H.C.C.C. No. 19 of 2007** which are not before me, I am inclined to uphold the Respondent's submission that the costs herein follow the event in view of the fact that the applicant, without protest, did pay the Respondent a substantial sum towards its costs, pursuant to the order of the court, pending taxation.

The above notwithstanding, I have no doubt in my mind that the Deputy Registrar has undisputed jurisdiction to tax the auctioneer's charges under Rule 55 (2) of the Auctioneers' Rules which provides inter alia, that

"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 property attached or repossessed would bring any proceedings in connection with it within the jurisdiction of the High Court,

a registrar as defined in the civil Procedure Rules may on the application of any party to the dispute assess the fee payable."

The power of the court as regards costs is as wide as it is discretionary as is clear from Order 1 Rule 19 of the Civil Procedure Rules which applies directly to the present application and states that:

"The court may decide all questions of costs between a third party and the other parties to the suit, and may make such orders as to the costs as the justice of the case may require."

The power to assess or tax costs, being vested in the Registrar or Deputy Registrar, with the judge having only the appellate jurisdiction in respect thereto I am of the considered view that any failure by a trial judge to make specific orders as to who would bear whose costs does not affect the jurisdiction and/or discretion of the taxing officer to make orders as to who pays the costs of a third party. This, in my considered view is within the provisions of Section 27 of the Civil Procedure Act which provides that: **"Subject to such conditions and limitations as may be prescribed and provision of any law for the time being in force the costs of and incidental to all suits shall be in the discretion of the court or judge and the court or judge shall have full power to determine by whom or out of what property and to what extent such costs are to be paid and to give all necessary directions for the purposes**

aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of these powers, provided that the costs of any action, cause or other matter or issue shall follow the event unless the judge shall for good reason otherwise order.”

In view of the above I find that the Deputy Registrar in this case had full power and discretion to assess the Respondents Bill of Costs and to award the same. In my view therefore the decision in **Adero & Another** –vs- **Ulinzi Sacco** (above) only applies in so far as it provides that the question of jurisdiction can be raised at any time.

The question that follows is whether the Registrar’s power and discretion were properly exercised and in accordance with the principles pertaining to assessment of costs, in which case I would have no discretion to interfere with his decision and/or award.

Parties are in agreement that the assessment of costs herein is governed by the Auctioneers Rules. The applicant contends that it has never been constituted a debtor for liability to attach to it under Rule 7 of the Auctioneers Rules. I am of the considered view that the said provision does not apply to the present case where the attachment has neither been succeeded by a sale nor was it executed pursuant to a decree. As earlier stated, I am of the view that the provisions of the proviso to Section 27 of the Civil Procedure Rules provide the correct guide in the circumstances.

As mandated under Rule 55 (1) of the Auctioneers Rules, the fees payable to an auctioneer are those provided for or calculated in the mode set in the Fourth Schedule as specified in Part II thereof.

Rule 55 (1) of the Auctioneers Rules provides that:

“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 moveable and immovable property under court warrants or letters of instructions shall be charged in accordance with these rules.”

The auctioneer’s instructions having terminated with the attachment, as is evident from the Amended Bill of Costs, then paragraph 4 of Part II of the Schedule was properly invoked as providing the legal formula for calculation of the fees payable.

The Ruling on taxation shows that the taxing officer, in addition to the fees calculated as above also allowed various items said to have represented expenses and disbursements in respect of the hiring of labour and transport as specified in petty cash vouchers and receipts submitted alongside the written submissions.

The expenses represented by the petty cash vouchers were allowed as claimed, despite the fact that none of the several alleged labourers had signed any endorsement in acknowledgement of payment, and despite the fact that their specific role had been questioned by the applicants in their detailed submissions. Whereas Items 6 and 7 of the Bill suggest that the same number of labourers were hired at the same rate for the same period, the expenses as drawn and allowed differ substantially. Items 9, 13 and 17 do not indicate how many labourers were hired and at what rate. For these items also, there no evidence to prove that such people were actually paid the sums alleged to have been expended in the hiring of labour. It is my considered view that the petty cash vouchers did not meet the legal requirements as to admissibility, leading me to conclude therefore, that the claim for expenses represented thereby did not pass the legal credibility test.

Over and above the fees and expenses allowed, the taxing officer also allowed the sums claimed as commission. Strictly under Rule 55, the fees payable to an auctioneer are those stipulated under Part II of the 4th Schedule,

“Except as may be provided by any other written Law or by contract...”

The Respondents rely on the authority of **KINGSWAY TYRES & AUTOMART LTD. VS. RICHARD MUCHAI T/A RICHARD MUCHAI ACUTIONEERS & ANOTHER (2005) KLR** to

support their claim for commission.

I will be quick to state that the authority is distinguishable in that the auctioneer in that case had been constituted a distraining agent under the Value Added Tax (Distraint) Regulations, which removed him from the ambit of Rule 55 (1) of the Auctioneers Act, thereby placing him within the exception to the said Rule. I am of the considered view that the learned Deputy Registrar ought to have invited submissions in the matter of commission for the Respondents to mitigate the same.

In addition to allowing the commission the taxing officer also increased the same by a sum of Ksh. 100,000/= having invoked paragraph 12 of Part II of the 4th Schedule. His ruling states that he did so **“.....having regard to the complexity of the work required to be done, the skills, specialized knowledge and labour expended by the auctioneer. He continued to say that “the labour expended by the auctioneer was much as reflected in the voucher annexed to the applicant’s submissions. It was complex and that is why a deposit of Ksh. 1,100,000/= has so far been paid to the applicant as part of his fees.”**

The above reasoning does not have the backing of the Respondent’s submissions and the taxing officer appears to have imported his own propositions as to the skill, specialized knowledge and complexity without the Respondents laying a foundation for the same, yet the appellants had challenged the Respondents to substantiate the extra costs claimed over and above the fees payable under paragraph 4.

Lastly my other observation is that the taxing officer appears to have leaned heavily in favour of the Respondent’s submissions whilst ignoring those of the appellants. For all the above reasons I find that, much as the taxing officer had the jurisdiction to tax the Auctioneers’ fees herein he did not exercise his discretion in the manner required of him. He misapplied the Auctioneers Rules and misapprehended the facts. He also ignored basic principles of evidence and allowed himself to be influenced by presumptions which were not supported by the facts as presented before him. As a result the taxing officer arrived at an erroneous decision in the taxation and awarded the Respondents costs which, in my considered view are not justifiable.

I allow the appeal and order that the Respondent’s Amended Bill of Costs dated 6th October, 2009 be taxed afresh before another taxing officer other than the Hon. S. A. Okato, Deputy Registrar.

DELIVERED and SIGNED at NAIROBI this 21ST day of OCTOBER 2010.

**MUGO G.
JUDGE**