



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISCELLANEOUS CIVIL APPLICATION 47 OF 2009**

**A.D.M. LIMITED.....APPELLANT/APPLICANT**

**VERSUS**

**KINYUA & CO.**

**AUCTIONEERS.....RESPONDENT**

**JUDGMENT**

A.D.M. Limited (hereinafter “the appellant”) has lodged this appeal from the decision of Hon. Richard Kirui, Deputy Registrar Mombasa, dated 6<sup>th</sup> February 2009 by which decision, the said Deputy Registrar taxed the Auctioneers (hereinafter “the respondent”) Bill of Costs in the sum of Kshs. 7,712,092.20 which was the sum claimed by the respondent in its bill of costs dated 16<sup>th</sup> December 2008. The appellant has invoked the provisions of Sections 3, 3A, 63 (e) and 89 of the Civil Procedure Act, Order XXI Rule 22 and Order XLI Rule 4 of the Civil Procedure Rules, Sections 27 and 28 of the Auctioneers Act and Rule 55 (4) and (5) of the Auctioneers Rules.

The appellant had contended before the Deputy Registrar that he had no jurisdiction to entertain the respondent’s bill of costs as there was no order for costs in its favour and further that the respondent had, in any event, not provided any services to the appellant for which the respondent could have charged any fees. The appellant had also contended that the parent suit which had given rise to the said bill of costs was pending hearing after an ex parte judgment had been set aside and an order made that costs await the outcome of the said suit.

In a short ruling delivered by the Deputy Registrar aforesaid, all those contentions of the appellant were not entertained by the Deputy Registrar on the ground that he had no jurisdiction to entertain the same and further that they had not been argued as preliminary objections before the bill was canvassed before him. The Learned Deputy Registrar, held the view that his duty was limited to simply taxing the bill.

There are ten grounds of appeal raised by the appellant. The gist however is that the Learned Deputy Registrar misconstrued the appellant’s submissions before him and also misconstrued his jurisdiction in declining to consider those submissions. Those grounds have the same foundation as the submissions which were made before the Deputy Registrar at the time of taxation of the respondent’s bill. The submissions made on behalf of the appellant have basically remained the same even when the appeal was canvassed before me on 1<sup>st</sup> April 2009. They are, in a nutshell as follows: that the Deputy Registrar had jurisdiction to entertain the appellant’s objections to the respondent’s bill of costs; that the judgment and decree which the respondent purported to execute had been set aside and costs were to await the outcome

of the suit; that indeed no services were rendered by the respondent as instructions to execute were stayed by an order of the court in the said suit.

In opposing the appeal, counsel for the respondent relied upon an affidavit sworn on 15<sup>th</sup> January 2009 by Peter Kinyua, the auctioneer practicing under the name and style of the respondent. The substance of that affidavit is that the respondent indeed provided services to the appellant for which the latter must pay as taxed by the Deputy Registrar notwithstanding that the default judgment was subsequently set aside and an order of stay granted. The respondent contends that infact the order of stay of execution in the parent suit was issued way after the respondent had complied with the appellant's instructions.

In his oral submissions before me, counsel for the respondent contended that the appeal is incompetent on the ground that the proceedings before the Deputy Registrar have not been furnished and further that no directions have been given as required under Order XLI of the Civil Procedure Rules. Counsel further contended that the Deputy Registrar was entitled to reject the appellant's plea to strike out the bill of costs on the basis that he had no jurisdiction to do so. Counsel further took objection to provisions of the Law cited by the appellant and argued that the same were not relevant. In the premises, counsel urged me to dismiss the appeal with costs.

I have carefully considered the grounds of appeal, the Auctioneers Act and Rules and the provisions of the Civil Procedure Rules. Having done so, I take the following view of the matter. This appeal is from the decision of the Deputy Registrar acting as a Taxing Officer of this court with respect to the taxation of a bill of costs presented before the Deputy Registrar by the Respondent. The appeal was therefore properly lodged under the provisions of Rule 55 (4) and (5) of the Auctioneer's Rules 1997. The appellant has properly invoked those rules. The Civil Procedure Rules provide for hearing of such an appeal in Chambers (See Order XLVI Rule 7(3) of the Civil Procedure Rules). The appellant has not cited the correct provisions of the Civil Procedure Rules but that failure in my view cannot vitiate this appeal. I am also of the view that directions need not have been given before determination of the appeal as contended by counsel for the Respondent. In any event, counsel for the Respondent took the objection rather late in the day when the appellant had concluded its submissions. It is my view therefore, that the respondent waived its right to raise the said objection. I am of the further view that the objection was in any event on form and would not have been a bar to my consideration of the appeal on merits. In the premises, I find and hold that this appeal is competent and should be determined on merits.

The appellant has raised pertinent matters against the decision of the Deputy Registrar. Those matters were argued before the Deputy Registrar who was of the view that he had no jurisdiction to determine them. The first consideration in my view, and which issue the Learned Deputy Registrar failed to consider, when he should have, is whether the respondent had an order in its favour for costs against the appellant. That issue in my judgment was one of jurisdiction. Before proceeding to tax the respondent's bill of costs, the Learned Deputy Registrar had to satisfy himself that an order existed that condemned the appellant to pay costs. That determination was crucial in view of the submissions which the appellant made before the Deputy Registrar. The appellant had contended before the Deputy Registrar that when the default judgment was set aside an order was made that costs abide the results of the suit. That argument did not impress the Learned Deputy Registrar. Yet he had to make the determination on whether or not the bill of costs presented before him was lodged pursuant to an order made in the parent suit. It has been held that jurisdiction is everything, without it the court cannot make any further step in the matter. (See **The Owners of the Motor Vessel "Lillian's – v – Caltex Oil (Kenya) Limited: [Civil Appeal No. 50 of 1989] 1989 LLR 1653 case**).

It was irrelevant that the issue of jurisdiction had not been raised as a preliminary point of objection. Having been raised by the appellant in its submissions, the Learned Deputy Registrar had to grapple with it before proceeding to tax the same. In Kuloba J's Judicial Hints on Civil Procedure at page 121, it is stated as follows:-

**"A taxing officer's jurisdiction in Kenya is to tax a bill and deal with all questions in relation to the bill..... He is concerned with the taxation of a litigant's costs as authorized by the order of the court. His function is to interpret the order of the court, not to make one for the parties....."**

(emphasis supplied).

Mutungi J was of the same view in **Mua Park Investments Limited – v – Kenya National Assurance Company Limited & Another [HCCC No. 5357 of 1993] (UR)**. The Learned Judge delivered himself as follows:-

**“It is the Law that the Deputy Registrar is the Taxing Master and in that capacity, it is his/her duty to Tax the Bills of Costs pursuant to the court’s decrees..... To recap, it is within the Deputy Registrar’s jurisdiction to tax Bills of Costs. This is only so however, if there are items for taxation. If there aren’t, it is no violation of this court’s orders/decrees to strike out the taxation bill as presented by any party..... (emphasis supplied).**

The issue of jurisdiction was distinct from the other challenges made by the appellant before the Learned Deputy Registrar. If the Learned Deputy Registrar had made a determination on the issue in favour of the appellant, he would probably not have proceeded to tax the bill at all. His failure to determine the issue was fatal to the subsequent taxation.

With regard to the appellant’s other complaints before the Learned Deputy Registrar, the record indicates that despite the lengthy submissions made to the Deputy Registrar, he dealt with them in one sentence concluding that the respondent had rendered the services for which the bill was drawn and allowed the same as presented in the sum of Kshs. 7,712.092.20. The Learned Deputy Registrar referred to no document and no rule but made a blanket finding that the respondent’s bill of costs was drawn to scale.

I am not at all persuaded that the Learned Deputy Registrar dealt with the submissions made to him in a judicial manner. I have independently reconsidered and re-evaluated those submissions and have come to the conclusion that the appellant’s complaints were based on bonafide grounds. As I have come to the conclusion that the respondent’s bill of costs should await the results of the parent suit, I refrain from making findings on those complaints lest the Deputy Registrar who will eventually be seized of the taxation finds himself or herself in a bind.

Having come to that conclusion, I must allow this appeal. The ruling of the Learned Deputy Registrar dated 6<sup>th</sup> February 2009 allowing the respondent’s bill of costs dated 16<sup>th</sup> December 2008 is hereby set aside. The respondent’s bill of costs shall abide the results of the parent suit (the suit in which instructions to attach were allegedly issued). The Deputy Registrar will deal with all aspects of the appellant’s complaints.

Costs of this appeal are awarded to the appellant.

Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 8<sup>TH</sup> DAY OF MAY 2009.**

**F. AZANGALALA**

**JUDGE**

Read in the presence of:-

Oloo for the Respondent and Mr. Adhoch holding brief for Havi for the Appellant.

**F. AZANGALALA**

**JUDGE**

**8<sup>TH</sup> MAY 2009**