



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA**

**Civil Miscellaneous Application 172 of 2009**

**TROPHY ENTERPRISES ..... APPLICANT**

**VERSUS**

**SAN GIORGIO LIMITED ..... RESPONDENT**

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**RULING**

Before me is the Chamber Summons dated 16<sup>th</sup> August 2007 which is an appeal against the decision of the Taxing Master of the Auctioneers Bill of Costs dated 17<sup>th</sup> April 2007. In this application the Applicant asks for the following orders:-

***“(a) That the Ruling and Orders of the Deputy Registrar Hon. Kirui dated 10<sup>th</sup> August 2007 disallowing the Auctioneers Commission under item (4) of the Bill of Costs dated 17<sup>th</sup> April 2007 be set aside and substituted with a finding that the auctioneer/applicant is entitled to her commission under item (4) in the bill of costs dated 17<sup>th</sup> April 2007 subject to taxation.***

***(b) The entire Taxation of item (4) of the bill be set aside to be taxed afresh and/or in the alternative this court to proceed to tax the said item (4) as may be appropriate***

***(c) Costs be provided for”***

This appeal has arisen from **HCCC 131 of 2005** in Mombasa **ELLE**

**TISRI –VS- SAN GIORGIO LTD.** The Applicant herein who is an auctioneer was instructed by the Plaintiffs (Elle Tisri) in the above case to proceed and proclaim the Respondent’s property, following judgement obtained by the Plaintiff in that case. The Applicant did proceed and proclaimed the Respondent’s property on 5<sup>th</sup> July 2006. At that point the Respondent rushed to court and obtained a stay of execution thus no further action was taken by the Applicant. Subsequent to this the parties **in HCCC 131 of 2005** filed a consent dated 27<sup>th</sup> February 2007 wherein they agreed that the Respondents would satisfy the decretal sum of Kshs.5,945,118/40 inclusive of all costs by way of monthly instalments. By all accounts this consent was adhered to and the decretal sum was thereby satisfied.

On 23<sup>rd</sup> April 2007 the Applicant/Auctioneer filed its Bill of Costs dated 17<sup>th</sup> April 2007 as against the Respondent by which they claimed a sum of Kshs.397,866/08 as its costs based on the Warrants of Attachment in **HCCC 131 of 2005**. The matter came up before Hon. Kirui for taxation on 6<sup>th</sup> July 2007 at which point the Respondent raised a Preliminary Objection. The learned magistrate did hear submissions from both parties on this Preliminary Objection and reserved his ruling for 10<sup>th</sup> August 2007. On that date the learned magistrate dismissed the Respondent's Preliminary Objection and proceeded to tax the Bill at Kshs.6,380/-. Despite their being aggrieved the Respondent did pay this sum on a "**without prejudice**" basis. The Applicant then filed this present appeal against the ruling of the learned Taxing Master. The application is supported by grounds on the face of it together with the supporting affidavit of **Gladys K. Mutisya** who is the Auctioneer/Applicant and various annexures thereto. The Respondent did in turn file their Replying Affidavit sworn by one Ceccagnoli Italo the Managing Director of the Respondent's company which was accompanied by various annexures. At the hearing of the Appeal Mr. Khaminwa appeared for the Respondent whilst Mr. Mutisya appeared for the Applicant. The parties agreed by consent to file written submissions before the court. I have had the benefit of those written submissions in my preparation of this ruling.

The application does on the face of it raise five main grounds of appeal several of which in my view can be dealt with together. I will consolidate the five grounds into three broad areas as follows-

**(1) That the Honourable Deputy Registrar erred in law and in fact by failing to follow the precedent set out in HCCC 1818/2000, and by holding that the auctioneer/applicant was not entitled to commission even after goods had been attached.**

**(2) That the Honourable Deputy Registrar erred in law and in fact by proceeding to tax the auctioneer/applicants bill of costs dated 17/04/2007 and by disallowing item (4) while what was before him was only a preliminary objection only**

**(3) That the Honourable Deputy Registrar erred in law and in fact by holding that the auctioneer/applicant was entitled to costs on the one hand and failing to fully award such costs on the other. As a consequence the fees awarded to the auctioneer/applicant was manifestly little and not commensurate with the decree executed by the auctioneer/applicant.**

On the first ground the Applicant/Auctioneer submits that the

learned magistrate erred in law and in fact by holding that the Auctioneer/Applicant was not entitled to commission even after goods had been attached. The Applicant relies on the ruling of the Hon. Justice Mohamed Ibrahim in **HCCC 1818 of 2000 NATIONAL INDUSTRIAL CREDIT BANK LTD –VS- MAJANI SISAL ESTATE LTD and TWO OTHERS** to buttress this argument. In that case Hon. Justice Mohamed did hold at page 14 that :-

***“I hold that under our laws today, once goods or property have been proclaimed under r 12 (b) and the prescribed procedure followed, the process of attachment takes effect and it does not subsequently matter at what stage it is terminated. Once goods are proclaimed they become attached and seized by the law. The auctioneer from this stage is entitled to charge his commission under Rule 11 paragraph 4.”***

This case being a High Court decision which was on all fours with the matter before the learned magistrate was therefore binding on him. However a look at the ruling on Honourable Kirui delivered on 10<sup>th</sup> August 2007 reveals that it is not entirely correct for the Applicant to allege that he failed to find that the auctioneer was entitled to commission after proclaiming. At page 7 line 3 of the said ruling the learned magistrate observed that:-

***“There was however a proclamation done on 5<sup>th</sup> July 2006 before a stay of execution was obtained and***

***settlement eventually reached. This means the auctioneer had received instructions to proceed and indeed incurred some costs to which he is entitled to that effect.”***

It is therefore not entirely correct to state that the learned magistrate held that no costs were awardable to the auctioneer. The portion of the ruling which gave rise to this appeal follows on page 7 line 14 where the trial magistrate says:-

***“As per the record the auctioneer only proceeded to the point of proclamation of attachment upon the respondent but no actual attachment ever took place. He is therefore only entitled to the amounts in respect of item 1 (receiving instructions) 2 (fees before attachment) and 3 (transport to serve the proclamation upon the respondent.)”***

The Applicant’s contention is that the learned magistrate erred in disallowing their item 4 for commission. The said bill of costs is dated 17<sup>th</sup> April 2007. Item No. 4 thereof reads as follows:-

***“Fees payable on the warrants of attachment and sale for a decree of Kshs.6,649.766.00”***

The amount charged by the Auctioneer under this item is Kshs.332,488/- as per the decree in the original plaint. Item No. 4 did relate to the commission payable to the Auctioneer and as such the decision in **HCCC 1818** ought to have been relied upon and indeed applied by the trial magistrate particularly the holding by the learned Judge at page 14 that:-

***“Once goods are proclaimed they become attached and seized by the law. The auctioneer from this stage is entitled to charge his commission under Rule 11 paragraph 4.”***

I therefore find that the trial magistrate erred by totally taxing off this item 4 of the bill as he did. In my view the Hon. Kirui ought to have allowed item 4 and considered arguments on the amount. Once proclamation had taken place then commission was chargeable. I therefore allow this ground of the application.

The next ground upon which this application is based is that the learned trial magistrate proceeded to tax the bill which had not been argued. The record from the lower court indicates that this matter came up for taxation of the Applicant’s bill of costs before Honourable Kirui on 6<sup>th</sup> July 2007. On that date Mr. Khaminwa for the Respondent raised a Preliminary Objection which was argued before the trial magistrate. He reserved his ruling to 10<sup>th</sup> July 2007. On that date the learned magistrate delivered his ruling on the Preliminary Objection and concluded thus:-

***“For those reasons I decline to uphold the preliminary objection as it is.”***

He therefore dismissed the objection. However the Taxing Master failed to grant the parties an opportunity to submit on the bill of costs either orally or in writing. Instead in the same ruling in which he dismissed the Preliminary Objection the learned trial magistrate proceeded to declare that:-

***“Instead I proceed to tax the bill to the extent to which it is valid.”***

In my considered opinion this was unprocedural. The trial magistrate ought to have invited and considered arguments on the merits or otherwise of the bill before proceeding to tax the same. I find that the trial magistrate erred in proceeding to tax the bill in the same ruling by which he had dismissed the Respondent’s Preliminary Objection, without allowing an opportunity for arguments. I do hereby allow this ground of the appeal.

Finally counsel for the Applicant in his written submission has made a prayer that this court proceed to re-tax the bill. This is declined for the following reasons. Firstly taxation of Bills is a function proper to the Deputy Registrars of the High Court. Secondly I am persuaded by the decision in the case of

**JORETH LTD –VS- KIGANO & ASSOCIATES [2002] E.A. 92** where the court held that:-

***“If the Judge comes to the conclusion that the taxing master has erred in principle he should refer the bill back for taxation by the same or another taxing officer with appropriate directions on how it should be done.”***

I am convinced that the taxing master in this case did err in principle leading to an erroneous taxing of the Applicant’s Bill of Costs in **HCCC 131 of 2005**. As such I do allow this present appeal and I do hereby refer the said bill back to the subordinate court for re-taxing before another Deputy Registrar with competent jurisdiction. Each party to meet their own costs for this application.

**Dated and Delivered at Mombasa this 22<sup>nd</sup> day of October 2009.**

**M. ODERO**

**JUDGE**

Read in open court in the presence of:-

Mr. Mutisya for Applicant

Dr. Khaminwa for Respondent

**M. ODERO**

**JUDGE**

**22/10/2009**