



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

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Misc Appli Case 761 of 2006

JAMES FRANCIS KARIUKI T/A

NDARUGUMERCHANTS AUCTIONEERS..... APPLICANT

VERSUS

SAVINGS & LOANS (K) LTD..... 1ST RESPONDENT

KIMMESSY ENTERPRISES2ND RESPONDENT

RULING

The applicant herein has taken a preliminary objection to the respondent's application by Chamber Summons dated 28.8.2006 upon the grounds that the provisions and rule cited in the Chamber Summons are not applicable; that Rule 55(2) of the Auctioneers Rules 1997 relates to the fees and disbursements payable to an auctioneer and specifically empowers the Registrar to assess the fees payable and finally that the issues deponed to by the applicant are not merited to be disposed of by way of an application but by way of hearing as to items disputed as the services were actually rendered by the auctioneer.

The respondent's application impugned is for the primary order that the applicant's bill of costs be struck out. The bill itself is pending taxation by the Deputy Registrar of this court. I have considered the submissions of the learned counsels appearing. In **Mukisa Biscuit Manufacturing Company Limited – vs – West End Distributors Limited [1969] EA 696** which is now recognized as the locus classicus on preliminary objections Law J A at page 700, stated as follows:-

“... a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit”

AND Sir Charles Newbold P. at page 701 stated as follows:-

“A preliminary objection is in the nature of what used to be demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

The first ground of objection is based upon an alleged incorrect citation of a rule by the respondent. Even if this were the position such failure would not be fatal to the application. That is the position this court has taken in various decisions with the support of the Court of Appeal.

The failure to cite the correct rule would therefore amount to no more than a procedural lapse which in the circumstances would be excusable.

The second ground of objection is a challenge to the jurisdiction to tax auctioneers bills which jurisdiction according to the applicant is specifically vested in the Deputy Registrar of this court. According to the respondent, however, no fees are due to the auctioneer at all. What is in contention is therefore not amount due but the legal basis of the bill which in my view is outside the preview of mere assessment.

The 3rd ground of objection is based upon the applicant's view that services were actually rendered by the auctioneer. The respondent is of a contrary view. The dispute between the parties cannot therefore be resolved without ascertaining the facts. As per Sir Charles Newbold P in the Mukisa Biscuit Company Case, (Supra) a preliminary objection should not be raised where facts have to be ascertained.

In the premises I must overrule the preliminary objection with costs to the respondent. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF FEBRUARY, 2007.

F. AZANGALALA

JUDGE

28/2/2007

Read in the absence of the parties.

F. AZANGALALA

JUDGE

28/2/2007