



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Misc 1392 of 2005

OSTRICH LION AUCTIONEERSPLAINTIFF

V E R S U S

PAUL MUCHIRIDEFENDANT

R U L I N G

The Applicant in these proceedings, who is the respondent in the application at hand is an auctioneer. He will be called the Auctioneer hereinafter. He attached some properties of the Respondent (who is the applicant in the application and also an auctioneer) in execution of decree in Kiambu RMCC No. 262 of 2002. The Respondent will be called the Judgment-Debtor.

A dispute arose with regard to the Auctioneer's charges. The Auctioneer then lodged his bill of costs in this court in the present proceedings. The Judgment-Debtor took by notice dated 13th January, 2006 a preliminary objection to the bill of costs upon the ground that it ought to have been lodged in the first instance either in the court executing the decree (the Senior Principal Magistrate's Court, Kiambu) or before the Auctioneers Licensing Board. It appears that the preliminary objection was never argued, as on the date it would have been argued (when the bill of costs came up for taxation) there was no appearance for the Judgment-Debtor, and the taxation proceeded. The Auctioneer's bill of costs was taxed at KShs. 125,036/00. This was on 16th June 2006.

The Judgment-Debtor has now applied by chamber summons dated 28th June 2006 seeking the main orders that the taxation of 8th May 2006 (upon which ruling was delivered on 16th June 2006) be set aside and that the court be pleased to undertake the taxation afresh. The application is expressed to be brought upon grounds which can be rephrased as follows:-

1. That the matter had not been listed on 8th May 2006, and that therefore the taxation should not have proceeded *ex parte*.
2. That it is just that the *ex parte* taxation be set aside

During hearing of the application learned counsel for the Judgment-Debtor also argued the point that he had intended to raise as a preliminary objection before the Deputy Registrar, to wit, that the Auctioneer's bill of costs was not properly before the court as it ought, in the first instance, to have been filed either before the subordinate court at Kiambu or before the Auctioneers' Licensing Board. Although this point is not included in the grounds of the application appearing on the face thereof, I permitted it to be argued, as I considered it an important jurisdictional point. There is a supporting affidavit sworn by the Judgment-Debtor's advocate.

The Auctioneer has opposed the application as set out in his replying affidavit filed on 18th September 2006. The points taken in the affidavit are, that contrary to the Judgment-Debtor's claim, the matter had been duly listed on 8th May 2006; that the said date had been taken by consent; and that the Judgment-Debtor and/or his advocate were never within the court building on 8th May 2006 as has been claimed.

I have duly considered the submissions of the learned counsel for the Judgment-Debtor and those of the Auctioneer (who was unrepresented). First, let me deal with a point varied by the Auctioneer at the hearing, to the effect that the application is incompetent as it is not provided for in the Auctioneers Act or Rules. Indeed there is not any provision in the Auctioneer's Act or Rules under which the application could have been brought. That is why the Judgment-Debtor has properly invoked Section 3A of the Civil Procedure Act, Cap 21 which saves the inherent powers of the court to make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the court.

Rule 55(2) of the Auctioneers Rules, 1997 provides:-

“(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 to the dispute assess the fee payable.”

And then subrules (3) and (4) of the same rule provide:-

“(3) In any other case where a dispute arises as to the amount of fees payable to an auctioneer a magistrate or the Board may, on the application of any party to the dispute, assess the fees payable.

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

The dispute herein over the Auctioneers fees arose in proceedings, not before the High Court, but before the Senior Principal Magistrate at Kiambu. The value of the property attached by the Auctioneer as appears in the proclamation dated 15th March 2005 which is in the original record of the lower court (which is before this court) is KShs. 94,200/00. This sum was well-within the pecuniary jurisdiction of the Senior Principal Magistrate under Subrule (3) of rule 55 of the Auctioneers Rules, 1997 therefore, the Auctioneer's bill of costs ought in the first instance to have been lodged before the subordinate court concerned or before the Auctioneers Licensing Board. The decision of the subordinate court or the Board would then have been appealable to a judge in chambers under Subrule (4) of the same rule.

It follows that the Auctioneers bill of costs was wrongly lodged in this court and was thus incompetent. The deputy registrar had no jurisdiction to tax it. I so hold.

There is another point. The fees claimed by the Auctioneer and as awarded by the deputy registrar were calculated upon the decretal sum, not upon the value of the property attached. Schedule IV of the Auctioneers Rules, 1997 under which an auctioneer's charges are calculated is silent on whether they ought to be calculated based on the decretal sum or on the value of the property attached. But the Court of Appeal has held that the auctioneers fees ought to be calculated based on the value of property or properties attached. This was in **Nairobi Civil Appeal No. 195 of 2004, National Industrial Credit Bank Limited –vs- S. K. Ndegwa Auctioneer** (unreported). So, the deputy registrar herein erred on principle when assessing the Auctioneer's fees. This would be a sufficient reason to set aside the taxation.

In the event, having found that the Auctioneer's bill of costs was wrongly filed in this court, I will allow this application. The assessment of the Auctioneer's fees done on 16th June 2006 is hereby set aside. The

Auctioneer's bill of costs filed herein on 21st September 2005 (which is neither signed by the Auctioneer nor dated) is hereby struck out. The Auctioneer may file his bill of costs either before the subordinate court concerned or before the Auctioneer's Licensing Board. The Judgment-Debtor shall have costs of this application. Those will be the orders of the court.

DATED AT NAIROBI THIS 12TH DAY OF JULY 2007

H. P. G WAWERU

J U D G E

DELIVERED AT NAIROBI THIS 13TH DAY OF JULY 2007