



REPUBLIC OF KENYA
HIGH COURT OF KENYA AT MOMBASA
MISC CIVIL APPLICATION 544 OF 2004
JOEL TITUS MUSYA t/a MAKURI ENTERPRISES.....APPLICANT
- Versus -
SOUTHERN CREDIT TRADING CORPORATION.....RESPONDENTS

Coram: Before Hon. Justice Njagi

Court Clerk - Ibrahim

RULING

This is an application by an amended chamber summons dated 20th July, 2006, and brought under Rule 55(4) of the Auctioneers Rules. The applicant prays from this court orders -

1. THAT this Honourable court do hear and determine the applicant's/Auctioneers' objection to the decision of the Taxing Officer, that is to say -
 - (a) The learned Taxing Officer erred in law and in fact in taxing item 4 of the applicant/auctioneers' bill of costs dated the 18th June, 2004 at Kshs. 36,042/= which was manifestly inadequate and/or too low.
 - (b) The learned Taxing Officer erred in law and in fact in declining and/or refusing to be guided by the provisions of the 4th the Schedule paragraph 6 of Counsel.
2. THAT this Honourable court do consider/assess the auctioneer's Bill of costs herein and -
 - (a) set aside the Taxing Officer's award on item 4 of the said Bill; and
 - (b) The said award be substituted with such sum as the justice of this case may require bearing in mind the value of the property and the complexity of executing the transaction/instructions herein.
3. THAT the Respondent be ordered to pay the costs of this Reference.

The application is based on the affidavit of JOEL TITUS MUSYA, sworn and filed herewith and on the following grounds –

- (i) The Taxing Officer failed and/or refused to take into account the value of the property herein.
- (ii) The Taxing Officer misdirected herself in failing to rely on the 4th schedule paragraph 6 of the Auctioneers Rules, 1997.

On 9th May, 2006, the defendant/respondent filed the following grounds by way of preliminary objection –

1. The chamber summons is misconceived and incurably defective and an abuse of the court process
2. The Chamber summons is premature and bad in law for non compliance with the mandatory provisions of the law.
3. From the foregoing reasons the said application is incompetent and ought to be dismissed with costs.

The preliminary objection was followed by grounds of opposition which were filed on 18th September, 2006. These were-

- (a) THAT the application is frivolous, vexatious and an abuse of the process of the court
- (b) THAT the application is incompetent and fatally, defective for want of compliance with mandatory provisions of the law
- (c) THAT the taxing master's decision is sound both in law and in fact.
- (d) THAT the application is misconceived and brought in bad faith purely to mislead the Honourable court into granting the orders sought.

During the oral canvassing of the application, Mr. Tindika appeared for the applicant while the respondent was represented by Mr. Onjoro. Mr. Tindika submitted that the taxing officer made a mistake on item 4 in the taxation in that the taxation ought to have been based on the value of the property which was given as Kshs. 17 million, in which case the fees should have been Kshs. 319,750/=. Counsel referred the court to NATIONAL INDUSTRIAL CREDIT BANK LIMITED v. S. K. NDEGWA AUCTIONEER, Civil Appeal No. 195 of 2004 in which the court of Appeal said that the taxation should be based on the value of the property. He further submitted that this court could either re-submit the bill for taxation on the basis of the value of the property or allow the figure of Kshs. 319,750/= to stand.

Mr. Onjoro opposed the application and relied on the grounds of opposition. Referring to Rule 55(5), he submitted that the application was defective as it should have been brought by a petition of appeal.

He further submitted that the application was not filed within 7 days as required by law, and that it was filed almost a year later. Finally, Mr. Onjoro submitted that the application was brought as a reference under paragraph 11 of the Advocates Remuneration Order, and the subsequent amendment only deleted rule 11 and substituted therefor rule 55(4) and (5) of the Auctioneers Rules, 1997, leaving the rest of the application as a reference as it had initially been filed. He also submitted that a copy of the ruling had not been attached to the application and this was fatal. Counsel thereupon urged the court to dismiss the application with costs.

In his reply, Mr. Tindika submitted that the application was filed subsequent to a consent filed between the parties and therefore the respondents couldn't go back on that. He also contended that Rule 55 does not give the format of the chamber summons and therefore the application was properly before the court. He also argued that there was no requirement that the order appealed from be attached, and that all the objections raised were only technical and should not be entertained. He asked the court to grant the application.

I have considered the application and the submissions of counsel. Arising from these, the issues to be

determined are whether the application complies with Rule 55(4) and (5) of the Auctioneers' Rules, 1997; whether it was filed on time; and whether the omission to attach a copy of the ruling or order appealed from was fatal.

Dealing first with the issue of failing to attach a copy of the ruling appealed from, I agree with Mr. Tindika that the Rule under which the application was brought does not prescribe that such a ruling be attached. I therefore hold that failure to attach the ruling to the appeal is not fatal.

The second issue is whether the application before the court complies with the requirements of Rule 55 of the Auctioneers Rules, 1997. A synopsis of that rule shows that the fees payable to an auctioneer for the attachment, repossession and sale of movable and immovable property shall be charged in accordance with the Auctioneers Rules, 1997. Where a dispute arises as to the amount of fees payable to an auctioneer in proceedings before the High Court, or where the value of the property would bring any proceedings in connection therewith within the pecuniary jurisdiction of the High Court, a registrar may, on the application of either party, assess the fee payable. An appeal from a decision of the registrar lies to a judge in chambers. It is made by a memorandum of appeal by way of chamber summons setting out the grounds of appeal. This differs from the procedure for filing references to objections under paragraph 11 of the Advocates (Remuneration) Order. The respondent herein contends that the applicant did not file an appeal within the meaning of Rule 55 (5) of the Auctioneers Rules, 1997, but that all he filed was a reference under paragraph 11 of the Advocates (Remuneration) Order. In order to place the application in context, I find it prudent to go back to the history of this matter.

The initial application which was dated and filed on 2nd November, 2005, was specifically by way of chamber summons taken out under paragraph 11(2) of the Advocates (Remuneration) Order. This is the procedure laid down under that rule for objections to decisions on taxation. It is significant that paragraph 3 of the application sought an order that the respondent "be ordered to pay the cost of this reference."

The supporting affidavit of Mr. Joel Titus Mutisya is even more telling. In paragraphs 2 and 3 thereof, he deposes that the Auctioneers' bill of costs was taxed by the Honourable Priscillah Ngugi (Miss) who proceeded to tax the same and delivered a ruling on the 22nd November, 2004. Being dissatisfied with the taxation of item 4 of the said bill, the respondent's advocates gave notice to the taxing officer of the item to which they were objecting. Their letter, dated December 1, 2004, read in part –

"Pursuant to the provisions of paragraph 11(1) of the Advocates (Remuneration) Order, we wish to notify you that we object to your taxation of items 4 (sic) of the said Auctioneers Bill of costs dated 18th June, 2004. In the premises, and in pursuant to the provisions of paragraph 11(2) of the said Advocates (Remuneration) Order, we call upon you to forthwith record and forward to us the reasons for your said decision on the aforesaid items..."

The reasons sought were not availed as Miss Ngugi had already retired from the judicial service. This information was relayed to the advocates by the Deputy Registrar vide his letter dated 29th August, 2005. Faced with this dilemma, the Advocates sought directions from the court whereupon they were directed to file the reference without the reasons. Mr. Musya follows these depositions by stating in paragraphs 7 and 8 of his supporting affidavit –

" 7. THAT it is on the basis of the foregoing (sic) that we have filed a reference to this Honourable court.

8. THAT I swear this affidavit in support of the application it accompanies seeking for the orders therein prayed (sic).

To the extent that what was filed was admittedly a reference under paragraph 11 of the Advocates (Remuneration) Order, and the applicants even seek costs for that reference, I have no doubt that there is no compliance with the dictates of Rule 55(5) of the Auctioneers Rules, 1997, which expressly provides for the filing of a memorandum of appeal by way of a chamber summons and not a reference. This was clearly a reference under paragraph 11 as aforesaid.

On 10th May, 2006, by consent, the court granted the applicant leave to amend the chamber summons. An amended chamber summons dated 20th July, 2006 was filed in court on the same date. The only amendments which were made were the addition of the word “amended” to precede the words “chamber summons” at the head of the application; the deletion of the words “under paragraph 11(2) of the Advocates (Remuneration) Order” and the substitution therefor of the words “under rule 55(4) and (5) of the Auctioneers Rules, 1997.” The date on which the application was dated was also shown as 20th July, 2006 in place of 2nd November, 2005. Everything else was left intact, including the prayer that the respondent be ordered to pay the costs of the reference. For the failure to file a memorandum of appeal in place of a reference, I find that the applicant strayed, and this renders his application incompetent.

Finally, Mr. Onjoro submitted that the application was filed out of time. I agree. Rule 55(5) of the Auctioneers Rules, 1997, is in the following words –

“The memorandum of appeal, by way of chamber summons setting out the grounds of the appeal, shall be filed within 7 days of the decision of the registrar of magistrate.”

The decision of the registrar in this matter was delivered on 22nd November, 2004. Even if the reference filed herein answered properly to a memorandum of appeal, it was filed in court on 2nd November, 2005. That was nearly one year from the date of the ruling. Secondly, even if we go by the date on which the court said the parties may consider to file a reference without reasons of the taxing master, that was on 14th October, 2005 – a whole 19 days after the directions. Either way, therefore the application was filed in court out of time. If for no other reason, I find that the application was not filed within the time stipulated, and this renders the application incompetent beyond redemption.

For the above reasons, the application is hereby dismissed with costs to the respondent.

Dated and delivered at Mombasa this 18th day of December, 2007

L. NJAGI

JUDGE