



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**Civil Case 1857 of 2001**

**GURSHARAN SINGH BRAR T/A KINALE SAW MILLS .....PLAINTIFF**

**VERSUS**

**MATHEW OSEKO.....DEFENDANT**

**RULING**

On 20<sup>th</sup> July 2006, the learned Deputy Registrar, Mr. Cherono taxed the Auctioneer's Bill of Costs, and allowed it in the sum of Kshs. 301,704.68.

The defendant felt aggrieved with that decision and has moved this court for a stay of execution pending the hearing and determination of an intended appeal. The defendant has also sought an order to set aside the decision of the learned Deputy Registrar.

It is contended that when the auctioneer's Bill of Costs was scheduled for taxation, the applicant herein raised a preliminary objection to the said taxation. At that point, it is the applicant's understanding that the taxing officer asked the parties to make submissions on the preliminary objection. Having done so, it would appear, (as far as the applicant is concerned) that the taxing officer proceeded to carry out the process of taxing the bill as well, instead of limiting his decision to the preliminary objection.

It has been submitted that if the taxing officer was minded to overrule or dismiss the applicant's preliminary objection, he should thereafter have invited the parties to make submissions on the taxation itself.

The applicant pointed out that the taxation in contention arose out of the summary judgement which had been granted in favour of the respondent herein. In other words, after the plaintiff had successfully prosecuted his application for summary judgement, he instituted execution proceedings. The Court Broker who was then mandated to carry out the execution process went to the extent of lodging a proclamation against the applicant's office equipment and furniture. The said process of execution took place on 23<sup>rd</sup> July, 2004.

According to the applicant, the only reason why the plaintiff was able to get summary judgement was because the applicant's advocate failed to attend court on the material day when the matter came up before the court.

As the applicant believed that the mistake of his advocates should not be visited on him, he applied to the court, to set aside the summary judgement.

After giving due consideration to the application the, Hon. AZANGALALA J. gave his verdict on 26<sup>th</sup> October 2004, setting aside the judgement and the decree, together with all consequential orders. However, the learned judge did impose a condition on the applicant, requiring him to deposit in court, the

sum of KShs. 1,668,551/25 within forty-five days. At the same time the learned judge ordered as follows:

**“The Defendant shall also pay to the plaintiff the costs of this application and all thrown away costs.”**

In the face of that ruling, the applicant submits that the auctioneer’s costs ought to be paid by the party who instructed him. And in the meantime, the applicant asks that the decision on the taxation be set aside, so that it can be done afresh, by a different taxing officer.

Once the orders of the taxing officer were set aside, as asked for by the applicant, he says that there should be in force an order for the maintenance of the status quo, until there is a new process of taxation.

In answer to the application, the plaintiff points out that there are two files relating to the matters in dispute between the parties. It was said that apart from the proceedings on this file, there were other proceedings in **High Court Miscellaneous Cause No. 435/06**. It is in that Miscellaneous Cause that the plaintiff says the Bill of Costs was filed.

But, the Memorandum of Appeal is said to be in this case, which was described as the **“original file”**.

If I understand the plaintiff properly, it is his contention that as the issue of the taxation had been undertaken on a file other than the one before the court currently, the orders sought should not be made in this file.

In any event, as far as the plaintiff was concerned, the applicant herein was given every opportunity to make his submissions before the taxing officer. It was said that the parties had mutually agreed to make written submissions on the Bill of Costs. Therefore, the plaintiff says that if the applicant opted to limit his submissions to only the preliminary objection, he could not fault the taxing officer.

Another aspect of the plaintiff’s answer to the application was pegged to the submissions previously made before the taxing officer, for the plaintiff still reiterates that the taxing officer had no jurisdiction to determine whether or not the Bill of Costs had been properly brought before him.

As I see it, one of the fundamental issues which I am called upon to determine in this application, is whether or not the ruling of the learned taxing officer should have been limited to the preliminary objection.

In order to be able to address my mind substantively to that issue, I did call for the court file for **MISC. CAUSE No. 435 of 2006, PETER KARIOKI THIRO, Trading As LIBCO MERCHANTS V MATHEW OSEKO**.

Upon perusing the record of the proceedings in that cause, I noted that on 11<sup>th</sup> July 2006, the matter was before the Hon. Mr. Cheronu, Senior Deputy Registrar. The record shows the following statements as having been made by the counsel who appeared:

***Coram: “Ms Muriu for Applicant.***

***Mrs Kurgat holding brief for Mr Koceyo for Respondent.***

**Ms Muriu – “Both parties have filed their written submissions on the Bill. We ask for a Ruling”**

**Mrs Kurgat – “That is correct.”**

In my understanding of that record, the applicant herein did confirm to the learned Deputy Registrar, that the written submissions filed by both parties were in relation to the Bill. Therefore, in the light of that understanding, it is my considered view that there was no reason why the learned Deputy Registrar should have limited his Ruling to the Preliminary Objection.

Of course, from the heading of the written submissions which were filed by the applicant herein, it is evident that the submissions were in relation to the preliminary objection. On the other hand, the respondent herein not only addressed his mind to the preliminary objection, but also to the taxation of the Bill.

In the circumstances, it does appear that counsel for the applicant herein, may have erred when she told the court that the submissions on record were on the Bill, whereas those of the said applicant appear to have been limited to the preliminary objection.

Whilst my sympathies lie with the applicant herein, I nonetheless hold that they cannot fault the learned Deputy Registrar for having proceeded to tax the Bill, after he had overruled the preliminary objection.

As regards the contention by the applicant that when the Hon. Azangalala J. set aside the summary judgement, the orders for payment of the auctioneers' costs also fell through, I hold the view that that is not the case. I say so because the learned judge expressly ordered that the thrown away costs were to be paid by the applicant herein. In effect, even though the summary judgement had been set aside, the applicant was ordered to pay any such costs as may have been incurred during the period when the order was still in force.

Had matters stopped at that point, there would be no doubt in my mind that the applicant herein was liable for the auctioneer's costs, as the said costs fall within the ambit of "**thrown away costs.**"

However, the applicant was dissatisfied with the conditions imposed by the Hon. Azangalala J., and he therefore filed another application for stay of execution. The said other application was filed in the Court of Appeal.

After giving due consideration to the application, the Court of Appeal ordered that there would be a stay of the orders granted by the Hon. Azangalala J., provided that the applicant herein deposited the sum of Kshs. 1.0 million within 45 days.

In my considered view, the stay of the orders which had been granted by the superior court meant that the order requiring the applicant to pay the thrown away costs would also be stayed.

That being the case, I hold the view that the applicant is entitled to an order staying execution of the taxed costs, until such time as the Court of Appeal will have passed its verdict on the appeal which the applicant has preferred, or intends to prefer against the ruling dated 26<sup>th</sup> October 2004.

However, I find nothing wrong with the fact that the learned Deputy Registrar did tax the Bill of Costs. He did so, as I have already said, following an intimation by both parties that the written submissions which they had filed were in relation to the said Bill. Furthermore, the applicant has not satisfied me that the costs, as assessed were manifestly erroneous. Nor has it been alleged or proved that the learned Deputy Registrar relied on the wrong principles during the taxation or that he took into consideration extraneous factors, which were inapplicable. The applicant also did not prove that the learned taxing officer failed to take into account such factors as were relevant in the process of taxation.

In arriving at these conclusions I am alive to the fact that pursuant to the provisions of rule 55 (4) and (5) of the Auctioneers Rules, 1997, an appeal arising from the decision by a taxing officer would be founded on sub-rules (2) and (3) of Rule 55. In other words, the taxing officer would have made a decision:

**"where a dispute arises as to the amount of the fees payable to an auctioneer."**

When such a dispute arises, the Deputy Registrar is authorised to "**assess the fee payable.**"

It does therefore appear to me that the learned Deputy Registrar herein cannot be faulted for finding

that it was not within his jurisdiction to determine whether or not the applicant should pay the auctioneer's costs.

In conclusion, I decline to set aside the Ruling and Order made by the Deputy Registrar on 20<sup>th</sup> July 2006. However, there shall be a stay of execution pending the hearing and determination of the appeal arising from the ruling made by the Hon. Azanglala J. on 26<sup>th</sup> October 2004.

As each party has been partially successful in this application, the order that commends itself to me, as being in the best interests of justice, is that each party will bear his own costs.

**DATED and DELIVERED at Nairobi this 1<sup>st</sup> day of November 2006.**

**FRED A. OCHIENG**

**JUDGE**