



REPUBLIC OF KENYA

THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MISC APPLICATION 676 OF 2005

KINGSWAY TYRES AND AUTOMART LTD.....APPLICANT

AND

**RICHARD MUCHAI(t/a RICHARD MUCHAI AUCTIONEERS).....1ST
RESPONDENT**

COMMISSIONER OF VAT.....2ND RESPONDENT

RULING

The 2nd Respondent herein, the COMMISSIONER OF VALUE ADDED TAX, instructed the 1st Respondent, RICHARD MUCHAI (t/a RICHARD MUCHAI AUCTIONEERS)(hereinafter called the Auctioneer) to attach the goods of the Applicant, KINGSWAY TYRE AND AUTOMART LTD., in distraint for alleged unpaid taxes amounting to over KShs. 272 million. A dispute regarding the Auctioneer's charges subsequently arose. Under Rule 55 (2) of 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 attached or repossessed would bring any proceeding 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. The Auctioneer brought such application for assessment of his charges before the Deputy Registrar of this court by originating notice of motion dated 11th May, 2004 vide Misc.

Appl. No. 359 of 2004 of this court. A fee note was attached thereto claiming the sum of 9,290,606/60. In that application the Applicant herein was named the first respondent. The 2nd Respondent herein was named the second respondent. The Applicant opposed that application as per grounds of opposition filed therein dated 25th May, 2004. By a notice of preliminary objection of the same date the Applicant objected to the taxation sought upon the various grounds stated therein. The Deputy Registrar upheld the objection and the Auctioneer appealed to a judge in chambers under sub-rules (4) and (5) of Rule 55 aforesaid vide chamber summons dated 25th November, 2004. That appeal was heard by Emukule, J., and in a ruling dated and delivered on 17th of February, 2005 he allowed the appeal. He directed the Deputy Registrar to assess the Auctioneer's charges as prayed in the originating notice of motion and in doing so be guided by the provisions of Regulation 14 of the Value Added Tax (Distraint) Regulations. The said Regulation 14 provides as follows:-

“14. The maximum rates of remuneration to which a distraint agent shall be entitled to demand from the distrainor for his assistance in executing a distress under these Regulations, and which may be recovered by the distrainor under regulation 9 or 11, as the case may be, shall be those specified in the Schedule.”

The judge noted that the Schedule referred to in Regulation 14 is comprised of two paragraphs, 1 and 2. He directed that the Deputy Registrar shall be guided by paragraph 2 which caters for distraint agent's charges.

The Deputy Registrar eventually assessed the Auctioneer's charges at KShs.9,231,788/= on 9th August, 2005. The Applicant has now come to court by way of chamber summons dated 12th August, 2005 under sub-rules (4) and (5) of Rule 55 of the Auctioneer's Rules, 1997 and also under the Value Added Tax (Distraint) Regulations, 1990 challenging the said assessment. The orders sought are that the whole of the decision of the Deputy Registrar of 9th August, 2005 be set aside and the Auctioneer do immediately and unconditionally release the four stated motor vehicles of the Applicant attached by the Auctioneer. The following grounds are set out on the face of the application:-

I. That in assessing the 1st Respondent's fees on the basis of the 2nd Respondent's estimated disputed demand for the payment of Kenya Shillings 272,370,537, the learned Deputy Registrar greatly erred in law and fact.

II. That in assessing the fees payable to the 1st Respondent at Kenya Shillings 9 million the learned Deputy Registrar completely misapprehended the provisions of Regulations 3 as read together with Regulations 14 and 15 of the Value Added Tax (Distraint) Regulations 1990 (the Regulations).

III. That in any event the figure of KShs.272,370,573/= the basis of which the learned Deputy Registrar assessed the fees payable to the 2nd Respondent was in any event merely an estimate, is disputed and was never acted upon by the 2nd Respondent at all, and the same is still in discussion for eventual resolution.

IV. That in assessing the 1st Respondent's fees at Kenya Shillings 9 million the learned Deputy Registrar failed to appreciate that the 1st Respondent is not an authorized officer within the meaning of Section 18 of the Value Added Tax.

V. That in assessing the fees at Kenya Shillings 9 million the learned Deputy Registrar erred in failing to appreciate that in any event the 1st Respondent had not conducted any sale by Public Auction as required by Regulation 15 of the Value Added Tax (Distraint) Regulations 1990 (the Regulations).

VI. That in assessing the fees at Kenya Shillings 9 million the learned Deputy Registrar erred in failing to appreciate that the 1st Respondent was merely an agent within the meaning of Section 18 of the Value Added Tax.

VII. That in assessing the fees at Kenya Shillings 9 million, the learned Deputy Registrar failed to appreciate the clear distinction between an authorized officer and an agent together with the respective roles.

VIII. That in assessing the fees at Kenya Shillings 9 million the learned Deputy Registrar erred in failing to appreciate that the letter of instruction for attachment was not addressed to the 1st Respondent in any event.

IX. That in assessing the fees at Kenya Shillings 9 million the learned Deputy Registrar failed to appreciate that as an agent within the meaning of section 18 as read together with Regulation 3 of the Value Added Tax one does not necessarily have to be an Auctioneer.

X. That in assessing the fees at Kenya Shillings 9 million the learned Deputy Registrar erred in failing to appreciate the clear distinction between fees chargeable under the Value Added Tax (Distraint) Regulations, 1990 and those under Auctioneers Rules, 1997.

XI. That in assessing the fees at Kenya Shillings 9 million the learned Deputy Registrar failed to appreciate that in any event any fees due to an Auctioneer is any payable by the distrainor and not by the distrainee in any event.

XII. That in assessing the fees at Kenya Shillings 9 million and therefore under Schedule 2 to the Regulations the learned Deputy Registrar erred in failing to appreciate that the 1st Respondent did not attach any goods in issue in any event as the goods had been attached by the 2nd Respondent's authorized officer and left in situ.

XIII. That in assessing the 1st Respondent's fees on the basis of an arbitrary and a merely estimated figure which is contested in any event amounts to a gross act of unjust enrichment on the part of the 1st Respondent."

The supporting affidavit sworn by one MANISH SHAH, a director of the Applicant, elaborates those grounds.

The Auctioneer has opposed the application as set out in the grounds of opposition dated 7th October, 2005. Those grounds are:-

"1. The application is an abuse of the court process and discloses mischief on the part of the applicant in that:-

(i) the issues the application raises should have been raised in High Court Misc. Application No. 359 of 2004.

(ii) the points of fact raised in the application were not raised before the Deputy Registrar in High Court Misc. Application No. 359 of 2004. No replying affidavit was sworn to deny.

(a) the details of instructions that were given to the second respondent by the first respondent which gave rise to the first respondent bill;

(b) the details of the action that was taken by the first respondent pursuant to the instructions; or

(c) all matters of fact deponed to by the first Respondent in his affidavits filed in court on 10th May, 2005 and 19th July, 2005 in Misc. Application No. 359 of 2004.

(iii) It challenges the decision of the Deputy Registrar on allegations that certain facts were not considered. Those facts were not presented before the Deputy Registrar.

(iv) Litigation must come to an end and it is undesirable to have a multiplicity of actions.

2. There is no power to grant the prayers sought under Rules 55 of the Auctioneers Rules, 1997, the Value Added Tax (Distraint) Regulations, 1990 or even under the inherent power of the court.

3. The proper way to proceed in view of the provisions of Order 48, Rule 5(2) and (5) of the Civil Procedure Rules is to lodge a memorandum of appeal and not institute a fresh suit.

4. (a) In assessing the 1st Respondent's bill the learned Deputy Registrar was guided by the provisions of Regulation 14 of the Value Added Tax (Distraint) Regulation.

(b) On 17th February, 2005. the High Court ordered that the 1st Respondent's bill be assessed in accordance with Regulation 14 of the Value Added Tax (Distraint) Regulations.

(c) The order of 17th February, 2005 has not been challenged.

(d) it has not been suggested that the Deputy Registrar assessed the bill without considering Regulation 14 of the Value Added Tax (Distraint) Regulations.

5. There is no requirement for an auction to be held before fees are assessed under the VAT (Distraint) Regulations.

6. The Deputy Registrar did not order anyone to pay anything. The Deputy Registrar could not therefore have failed to appreciate that any fees due were payable by the Applicant as it is claimed.

7. Assessment of the 1st Respondent's fees was not based on an arbitrary figure.

8. Other reasons to be adduced in at the hearing and all matters set out in affidavits and submissions filed in Misc. Application No. 359 of 2004 and the affidavit of Paul Ogunde filed herein.”

There is a replying affidavit sworn by the Auctioneer's learned counsel, Mr. Paul Ogunde. He depones merely that the Auctioneer is ailing and that he wishes to rely, in answer to the application herein, on all the affidavits he swore and filed in HC Misc. Application No. 359 of 2004. The 2nd Respondent did not file any papers in response to the application. But he was heard.

I have considered the submissions of the learned counsels appearing. Those of Mr. Odera and Mr. Ogunde, the respective counsels for the Applicant and the Auctioneer, were along the lines taken in their respective pleadings. Mr. Ontweka, learned counsel for the 2nd Respondent, stated that he appeared in order to try and assist the court. He informed the court that the Applicant in fact paid only KShs. 9 million in back taxes and not the KShs.272 million odd that had been demanded. He referred the court to paragraph 8 of the affidavit of the Auctioneer filed before the Deputy Registrar on 12th May, 2004 in which the Auctioneer acknowledges that the Applicant paid only KShs. 9 million to the 2nd Respondent. Mr. Ontweka submitted that the Deputy Registrar should have been guided by this figure in assessing the Auctioneer's charges. He also referred the court to paragraph 2 (b) of the Value Added Tax (Distraint) Regulations. He submitted that the 2nd Respondent had stopped the distraint against the Applicant after proclamation but before physical attachment of the Applicant's goods by the Auctioneer, and that therefore the Auctioneer ought to have waited for further directions from the 2nd Respondent. In his view the Auctioneer should not have proceeded to physically attach and keep the Applicant's goods without reference to the 2nd Respondent.

In the present application I am concerned with the issues whether there are any charges due from the Applicant to the Auctioneer, and if so, what those charges ought to be. In other words, whether those charges were properly assessed by the Deputy Registrar. I will not consider the many other matters that were argued and which are not germane to those two issues. The applicable law is to be found in the Value Added Tax (Distraint) Regulations, 1990 published as Legal Notice No. 227 of 1990. Under Regulation 3 thereof 2nd Respondent was entitled to appoint the Auctioneer as a distraint agent to assist the 2nd Respondent's authorized officer (distraintor) to levy distress against the Applicant. The remuneration of the distraint agent (in our case the Auctioneer) is provided for under Regulation 14 which was quoted by Emukule, J. in his ruling already referred to. But from whom should the distraint agent recover his remuneration? The wording of Regulation 14 is instructive in this regard and bears repeating again:-

“14. The maximum rates of remuneration which a distraint agent shall be entitled to demand from the distraintor for his assistance in executing a distress under these Regulations, and which may be recovered by the distraintor under regulation 9 or 11, as the case may be, shall be those specified in the Schedule.”

The distraint agent must demand his remuneration from the distraintor. So, the Auctioneer under this regulation must demand his charges from the 2nd Respondent's authorized officer (distraintor) who instructed him to assist in levying distress against the Applicant or from the principal (the 2nd Respondent). He cannot look to the Applicant for payment of these charges. In this regard Regulation 11 is also instructive. I will quote it in full:-

“11. (1) Where a distraintee has within ten days of attachment of his goods under these Regulations, paid or given security accepted by the Commissioner for the whole of the tax due from him together with the whole of the costs and expenses incurred by the distraintor in executing the distress, the distraintor shall at the cost of the distraintee forthwith restore the attached goods to the distraintee and return the order to the Commissioner who shall cancel it.

(2) Any money paid by a distrainee under this regulation shall be applied by the Commissioner first in settlement of costs and expenses incurred by the distrainor and as to the balance in settlement of the distress debt or such part thereof as the Commissioner shall direct.”

The Applicant paid KShs. 9 million to the 2nd Respondent in back taxes. The 2nd Respondent ought to have collected from him at that time the costs and expenses incurred by his authorized officer (distrainor) (which costs and expenses would include the remuneration of the Auctioneer) in executing the distress. There is no evidence that any demand for such costs and expenses was made by the 2nd Respondent to the Applicant or that he refused to pay such costs and expenses. The 2nd Respondent can still collect these costs and expenses from the Applicant. Under sub-regulation (2) of Regulation 11 already quoted the 2nd Respondent should have applied the KShs. 9 million paid by the Applicant first, in settlement of the costs and expenses incurred by the distrainor (which costs and expenses must include the remuneration of the Auctioneer), and the balance in settlement of the distress debt (that is the back taxes owed by the Applicant) or part thereof.

The effect of all the above is that the Auctioneer’s charges are really a matter between the Auctioneer and the 2nd Respondent. It cannot be between the Auctioneer and the Applicant. The law, as we have seen, provides that the 2nd Respondent recovers such charges from the Applicant and then pay the Auctioneer. The Auctioneer cannot demand his charges directly from the Applicant. I so rule. My ruling does not in any way conflict with the ruling of Emukule, J. of 17th February, 2005. The issues before Emukule, J. were, one, whether the Auctioneer had properly moved the Deputy Registrar by way of originating notice of motion for assessment of his charges, and two, whether the Deputy Registrar had jurisdiction to assess those charges. Emukule, J. ruled in the affirmative on both issues and gave directions, as he was entitled to do, to guide the Deputy Registrar on how he or she should proceed with the assessment. The issue of who ought to pay the Auctioneer’s charges was not before Emukule, J.

I must now examine whether the Deputy Registrar properly assessed the Auctioneer’s charges. As directed by Emukule, J. the Auctioneer’s charges must be assessed under paragraph 2(b) of the Schedule to Legal Notice No. 227 of 1990, already referred to, which provides that the distraint agent’s charges for attaching goods or attaching and keeping possession thereof for ten (10) days or part thereof, where the estimated value of the property or the distress debt, and costs and expenses, whichever is less, exceeds KShs.30,000/=, shall be 3% thereof. The estimated value of the attached goods, as per the inventory, is over KShs 260 million. We know here that the distress debt was KShs. 9 million because that would appear to be the amount of back taxes agreed between the 2nd Respondent and the Applicant to be due. The Auctioneer did indeed attach the Applicant’s goods by proclamation. Proclamation is attachment, though not physical attachment, and entitles the Auctioneer under this paragraph to the same charges as if he had physically attached and kept the goods. 3% of KShs.9 million is KShs. 270,000/=. The court has not been told if the Applicant paid the KShs. 9 million within ten (10) days of attachment or after. If indeed he paid it within ten (10) days of attachment the Auctioneer will not be entitled to any more charges than KShs. 270,000/=:, except under subparagraph (e) of paragraph 2 of the Schedule. On the other hand, if the Applicant paid the KShs. 9 million after expiry of ten (10) days from attachment the Auctioneer shall be entitled, for each additional day or part thereof, to ¼ % of the value of the goods attached (up to a maximum of KShs.60/=:) (see sub-paragraph (d)). He will also be entitled to reasonable expenses incurred in transporting the goods attached and such traveling expenses by car or a ratable proportion thereof as the 2nd Respondent may approve. All those are matters to be worked out as between the Auctioneer and the 2nd Respondent.

The Deputy Registrar was therefore clearly wrong to assess the Auctioneer’s charges based on the estimated back taxes of KShs.272 million odd that was never paid and that appears to have been found not to be due. This was an error of principle that entitles me to interfere. She should have assessed the charges as I have indicated above.

In the event therefore, I will allow the Applicant’s application by chamber summons dated 12th August, 2005 in the following terms:-

i) The Auctioneer’s charges as assessed by the Deputy Registrar are hereby set aside and the sum of

KShs. 270,000/= substituted therefor, together with such additional charges under paragraphs 2 (d) and (e) of the Schedule to Legal Notice No. 227 of 1990 already referred to as may be worked out by the Auctioneer and the 2nd Respondent.

ii) The Applicant's motor vehicles and any other goods attached and kept by the Auctioneer shall be unconditionally released to him forthwith in the same condition as they were when they were attached. The Applicant must not be burdened with the issue of storage costs. That issue must be sorted out between the Auctioneer and the 2nd Respondent.

iii) The sum of KShs. 270,000/= deposited by the Applicant pursuant to the order of this court of 1st November, 2005 shall be released to the 2nd Respondent forthwith, the same being the costs and expenses, or part thereof, of the distraint levied against the Applicant, and which the 2nd Respondent should have collected from the Applicant when he paid the KShs 9 million. It is expected that the 2nd Respondent will in turn pay the same over to the Auctioneer, after they sort out between the two of them any outstanding issues like storage charges, e.t.c.

iv) In the circumstances of this case, and as each party has in reality partially succeeded, each party will bear his own costs.

Those shall be the orders of the court.

DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2005.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 2ND DAY OF DECEMBER, 2005.