



**Odongo v Chemilil Sugar Company (Civil Appeal 156 of 2023)
[2024] KEHC 922 (KLR) (1 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 922 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL 156 OF 2023
RE ABURILI, J
FEBRUARY 1, 2024**

BETWEEN

OSCAR OTIENO ODONGO APPELLANT

AND

CHEMILIL SUGAR COMPANY RESPONDENT

(An appeal arising out of the Ruling of the Honourable G. Barasa in the High Court at Kisumu delivered on the 11th September 2023 in Kisumu HCC Misc. Application No. E114 OF 2023)

JUDGMENT

Introduction

1. The Appellant, Oscar Otieno Odongo being aggrieved by the decision of the Taxing Master /Deputy Registrar dated 11th September 2023 filed this appeal, against the decision vide chamber summons dated 18th September 2023, supported by Affidavit of Oscar Otieno Odongo sworn on the 18th September 2023. The Appellant seeks the following orders:
 - i. The Honourable Judge be pleased to set aside the assessment and certificate of assessment emanating from the ruling of Hon. Deputy Registrar delivered on the 11.9.2023 together with all consequential orders.
 - ii. Consequent to prayer 1 herein above being granted, the Honourable judge do tax/assess items 3,5,8,9,10,11 & 13 the appellants bill of costs dated 4.8.2023 a fresh.
 - iii. The Honourable Judge be pleased to issue a certificate of assessment in respect of the assessed fees.
 - iv. The Honourable Judge be pleased to enter judgement in terms of the certificate of assessment of costs in favour of the appellant against the respondent. Costs of this appeal and interest on the assessed amount be borne by the respondent.



- v. Such further and/or orders be made as the court may deem fit and expedient.
2. The appellant's case is that the Hon. Deputy Registrar erred in law and fact when considering the commission payable to him and ended up awarding it as discretionary instead of working it out as provided for under the 4th schedule of the Auctioneers Rules hence, she ended up with a wrong figure; that she further erred in awarding the commission of Kshs. 5,000 without any basis.
 3. The appellant further averred that the Deputy Registrar erred when considering his travelling distance and charges thus awarding an amount not supported by fact or law. It was further averred that the Deputy Registrar's decision would greatly cause the appellant irreparable loss and set dangerous precedent.
 4. The respondent opposed the appeal and filed Grounds of Opposition dated 21st September 2023 contending that the appellant's application was defective as being aggrieved by the decision and ruling of the Deputy Registrar in taxing his Bill of Costs dated 4.8.2023 at Kshs. 49,500 ought to have filed a reference to this court and not an appeal and was thus misconceived, misdirected and an abuse of the due process of this court.
 5. The appeal was canvassed by way of written submissions.

The Appellant's Submissions

6. The appellant submitted that on item 3 Under the 4th schedule of the Auctioneers Rule Part (ii) (4), the respondent did not dispute the value of the property as indicated in the appellant's proclamation which was Kshs. 896,000 which attracted a commission of 5% which translates to Ksh. 49,000 and not Kshs. 5,000 as awarded by the Taxing Officer.
7. The appellant submitted that all items regarding travelling, being Items 6,8,9 & 10, were drawn to scale and should be awarded. It was submitted that the distance of travel should begin from the appellant Auctioneer's office and not from the court as was held in the case of *Oscar Otieno Odongo v Sukari Industries Limited* Migori HCCA No. 293 of 2018.

The Respondent's Submissions

8. The respondent submitted that Item 3 Under the 4th schedule of the *Auctioneers Rule* Part (ii) (4) is only applicable where there was an attachment of the respondent's proclaimed goods/property which was not the case in the instant appeal as the appellant only proclaimed and did not attach the same.
9. It was further submitted that even if the appellant is entitled to a 5% commission, it should be on the value of the attached goods and that since there was no valuation report to the effect that the respondent's property proclaimed amounted to Kshs. 980,000 as was required by the Court of Appeal in Civil Appeal No. 195 of 2004 *National Industrial Credit Bank Limited v Ndegwa Auctioneers*, then the appellant was not entitled to the amount sought.
10. The respondent submitted that items 5 & 6 should be treated together. It was submitted that under Item 6, warrants were taken from Kisumu Court and proclamation of the respondent's property done in Chemilil, a distance of 53 kilometres and not 130 kilometres as alleged in the submission and thus the appellant was entitled to $(53 \times 2 \times 3 \times 77.10) =$ Kshs. 24,517. It was submitted that the appellant did not appeal against item 6 and thus it should be taxed off as it is not disputed in appeal. (no cross appeal)
11. The respondent submitted that items 8,9 and 10 were not provided for under the 4th Schedule part (ii) of the Auctioneer Rules but that if the same were to be allowed then it should be noted that the



distance from Kisumu Court to Chemilil is 53kms and not 130kms and as such, the said items should be taxed off.

12. It was submitted that there was no item 11 and the same ought to be deleted to avoid confusion and that in regard to item 13, there is no provision for postage, stationery and telephone and further fees and that there was no evidence adduced of the same and thus item 13 ought to be taxed off.

Analysis and Determination

13. I have considered the appeal herein as commenced by way of Chamber Summons supported by an affidavit sworn by the appellant auctioneer. The respondent raised a preliminary point in its Grounds of Opposition filed herein that the instant appeal was defective and wrongly before this court. I shall determine this as a preliminary issue as it is a point of law which can determine this appeal in its entirety.

14. As to whether the instant appeal is properly before this court, I note that the Appellant appealed to this court against the decision of the taxing master's decision under Rule 55 (4) of the [Auctioneer's rules](#) which provides as follows:

“An appeal from a decision of a Registrar or Magistrate or Board under sub- rule (2) and (3) shall be to a judge in chambers.”

15. The Auctioneer was an agent of a party (decree holder) and not a party to the suit between the decree holder and the respondent herein. Therefore, the Auctioneer not being a party to the suit could not invoke paragraph 11 of the [Advocates \(Remuneration\) Order](#) of 2009.

16. It follows therefore that there was no requirement for the Appellant to issue notice to the taxing master requesting for reasons. In the case of [National Oil Corporation Ltd v Real Energy & Another](#) [2016] eKLR it was held that:

“In my view there is no magic in requiring the taxing officer to furnish reasons before making reference where the reasons are contained in the decision a party ought not seek the same”

17. Auctioneers are governed by the [Auctioneers Act](#) and Rules. Ringera J (as he then was) in [Machira & Co. Advocates v Magugu](#) (2002) 2 EA 428 stated as follows:

“..As regards the point that the client's objections to the taxation itself having been overruled, the proper remedy to adopt was an appeal to the High Court and not reference under Paragraph 11 of the [Advocates \(Remuneration\) Order](#), I have the following to say: -

First the [Advocates \(Remuneration\) Order](#) is a complete code and there is no provision for the invocation of the [Civil Procedure Rules](#). It does not provide for an appeal from any sort of decision by the taxing officer.’

In [Sino Hydro Corporation Limited v Samson Tonde Tumbo T/A Dominion Yards Auctioneer](#) (2021) eKLR the court held that reference for taxation pursuant to paragraph 11 of the [Advocates Remuneration order](#) is not synonymous with an appeal pursuant to Rule (55) (5) of the [Auctioneer Rules](#).’”

18. Consequently, this court finds that the governing law of the impugned bill of costs is the [Auctioneers Act](#) under Rule 55(4) of the [Auctioneers Rules](#), being an appeal to the Judge in chambers and not a reference under paragraph 11 of the [Advocates \(Remuneration\) Order](#) as submitted by the Respondent's Advocates.



19. Accordingly, I find and hold that the instant appeal vide Chamber Summons Application is properly before the court as Rules 55 (4) of the [Auctioneer Rules](#) provides that “an appeal from a decision of a registrar or magistrate or Board under sub rule 2 and 3 shall be to a Judge in chambers...”
20. On timelines, Rule 55 (5) of the [Auctioneers Rules](#) provides that a memorandum of appeal by way of chamber summons setting out the grounds of appeal shall be filed within 7 days of the decision of the registrar. The decision herein by the Deputy Registrar was delivered on the 11th September 2023 and the instant Appeal was filed on 18th September 2023. The appeal was therefore filed within the 7 days provided for under the rules.
21. The other merit question for determination is thus whether the taxing master, Hon G. Barasa erred in law when she taxed the Auctioneer’s Bill of costs dated 4th August 2023 and whether the same should be set aside.
22. This court is guided by the law in making its decision on the appeal being Rule 55 of the [Auctioneers rules](#) and the Fourth schedule therein and case law. In the case of [Zacharia Barasa v Dubai Bank Kenya Limited](#) (2015) eKLR, Gacheru J of the Environment and Land Court outlined the case law which I adopt and rely on as follows:

“In *First American Bank of Kenya v Shah & Others* (Nairobi Milimani) HC civil case No. 2255 of 2000 court held that: - “The court cannot interfere with the taxing master’s decision on taxation unless it is known that either the decision was based on error of principle or the fee awarded was manifestly excessive as to justify an interference that it was based on an error of principles”.

In the same decision it was further held that: -

“it is within the discretion of the taxing officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary”.

Further in the case of *M/S Behan and Otieno v Pan African Insurance Company*, Kisumu High court, Misc. Case No. 229 of 2003 the court held that: - “Each taxation master has the sole discretion and responsibility to decide the amount payable when a dispute arises as to the amount payable”.

Further in the case of *Bank of Uganda v Benco Arabe Espanal* (199) Z EA 45 (2020) Z EA 297 (SCU) it was held that:- “ Even if it is shown that the taxing officer erred in principle, the Judge should only interfere on being satisfied that the error substantially affected the decision on quantum and that upholding the amount would cause injustice to one of the parties.”

23. I will proceed to consider the appellant’s Bill of Costs dated 4.8.2023 and the disputed items therein.
24. The appellant faults the taxing master’s decision in her award on Item 3 on the basis that she erred in law and fact when considering the commission payable to him and ended up awarding it as a discretionary item instead of working it out as provided for under the 4th Schedule of the Auctioneer’s Rules.
25. In response, the respondent relied on the case of National Industrial Credit Bank Case supra where the Court of Appeal remitted back the Bill of Costs to the taxing master to determine the value of the proclaimed goods in the proclamation.



26. In the case of *National Industrial Credit Bank Limited* supra the Court of Appeal made the following pronouncement:

“The object of paragraph 4 is clear.

It is intended to provide the values on the basis of which the auctioneer’s charges should be assessed. We think that it is reasonable that the auctioneer’s charges for attachment should be based on the value of the goods attached and not on the decretal sum. It is to be remembered that the auctioneer is to be remunerated for the actual work done and not on the basis of what he could have done had he attached goods equivalent in value to the decretal sum.”

27. In this case, the learned taxing officer stated:

“there was no attachment it was only proclamation we pray it be removed

I will give a balance of Kshs. 5,000 on them.”

28. I shall reiterate the pronouncement by the Court of Appeal in the case of *National Industrial Credit Bank Limited* Supra, the Court of Appeal made the following pronouncement:

“The object of paragraph 4 is clear.

It is intended to provide values on the basis of which the auctioneer’s charges should be assessed. We think that it is reasonable that the auctioneer’s charges for attachment should be based on the value of the goods attached and not on the decretal sum. It is to be remembered that the auctioneer is to be remunerated for the actual work done and not on the basis of what he could have done had he attached goods equivalent in value to the decretal sum.”

29. The above is a decision of the Court of Appeal which binds all lower Courts. The Commission of an Auctioneer is to be based upon the value of goods attached and not on the decretal sum.

30. Pursuant to Rule 12 of the *Auctioneers Rules*, the execution of a Court Warrant commences when the Auctioneer prepares a Proclamation. The said proclamation is supposed to be in the format provided, being the Sale Form 2.

31. Rule 12 (1) (b) stipulates that the Auctioneer shall, when preparing the proclamation, indicate the value of the specific items, and the condition of each item.

32. Under Rule 14, after the proclamation has been prepared, it is an offence for any person to remove, alter, damage, substitute or alienate any of the goods comprised in the proclamation. Rule 14 provides as follows:

“A person who removes, alters, damages, substitutes or alienates any goods comprised in the proclamation, before they are redeemed by payment in full of the amount in the warrant, or letter of instruction, or in such lesser amount as the creditor or his advocate may agree in writing, commits an offence.”

33. Clearly, therefore, Rule 14 acknowledges that it is open to the creditor to accept a lesser amount, in settlement of the amount cited in the warrant.

34. It is noteworthy that from the proclamation, the respondent or his agent has signed and in essence thus consenting that the goods proclaimed therein are valued at the sums cited therein. The respondent is



thus estopped from now claiming that there was no valuation of the said goods when at the time of proclamation, it assented to the prices set therein.

35. Accordingly, the taxing master was supposed to use the value provided in the schedule of proclamation used by the appellant. To this end I find that the taxing master erred. I thus set aside the item on commission as taxed and substitute it with an award as follows:

value of proclaimed goods....980,000x5/100 =Kshs. 49,000.

36. On items 5,8,9, 10,11 & 13, I note that item 11 does not exist on the appellant's Bill of Costs as it is an extension of item 10 which is travel to Chemelil for verification (130km...). It is thus struck off. Travelling expenses are provided under the fourth schedule as "published by the Automobile Association from time shall to time be allowed at three times the scale."

37. In the case of *Oscar Otieno Odongo t/a Odongo Investment Auctioneers v Sukari Industries Limited* [2019] eKLR it was held that:

"An Auctioneer may receive instructions to execute Warrants and Letters of Instructions. Warrants are usually issued by the Courts whereas Letters of Instruction are issued by other entities for instance banks and other financial institutions, landlords among others. However, details of both the Warrants and Letters of Instruction must be entered in the Register. I therefore find the position that the journey of an Auctioneer must start from the Court to be negating the fact that not all instructions to the Auctioneers arise from the courts. How will a court be involved in a case where instructions to realize a charged security by a bank which is 50 kms away from a Court are issued to an Auctioneer? Should an Auctioneer therefore go to the nearest court and begin the journey to proclamation? I suppose that could not have been the intention of the law. As the law defines the areas of operation of the Auctioneers, that in itself regulates the ultimate Auctioneers fees and are held at the minimum. The position that the journey ought to start from the Auctioneer's office is therefore reasonable, promotes order and is cost effective.

I hence find and hold that the journey of an Auctioneer for purposes of proclamation begins from the Auctioneer's offices and not from Court. To that end, and with tremendous respect, the learned Magistrate erred in law and that finding must be disturbed. The sum of Kshs. 20,817/= awarded on item 6 is hereby set-aside and substituted with the sum of Kshs. 38,082/80."

38. I find the authority cited above persuasive but applicable in the circumstances of this case. The respondent did not provide the alternative mileage from the auctioneer's office to Chemelil Sugar Co. Ltd. I therefore adopt the mileage provided by the Auctioneer. I thus find that the Auctioneer's journey begins from his office and not from the court house. I set aside the Deputy Registrar award on Items 5, 6,8,9 & 10 and award the same as pleaded by the appellant.

39. As for item 13 on postage, stationery and telephone, the same is not provided for under the Fourth Schedule and is thus struck off.

40. In the end, I find that the appeal herein succeeds to the extent stated in this judgment and remit the file back to the Deputy Registrar to recalculate the Auctioneer's costs as per this judgment.

41. I order that each party shall bear their own costs of this appeal.

42. Order to issue and this file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 1ST DAY OF FEBRUARY, 2024



R.E. ABURILI
JUDGE

