



REPUBLIC OF KENYA



**Sino t/a Maywood Auctioneers v Autoxpress Limited (Civil Appeal
E071 of 2023) [2024] KEHC 921 (KLR) (1 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 921 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E071 OF 2023
RE ABURILI, J
FEBRUARY 1, 2024**

BETWEEN

GEORGE ARUNGA SINO T/A MAYWOOD AUCTIONEERS APPELLANT

AND

AUTOXPRESS LIMITED RESPONDENT

(An appeal arising out of the Ruling of the Honourable D. Onyango in the Chief Magistrate's Court at Kisumu delivered on the 18th May 2023 in Kisumu CMCC Civil Suit No. 492 of 2014)

JUDGMENT

Introduction

1. The Appellant, George Arunga Sino being aggrieved by the decision of the Taxing Master dated 18th May 2023 filed this appeal, against the decision vide chamber summons dated 23rd May 2023 supported by an affidavit sworn by the appellant Auctioneer.
2. The appeal raises the following grounds:
 - i. The learned trial magistrate erred in law and in fact in allowing the Auctioneers costs at Kshs 151,800 in a ruling without any satisfactory reasons thereof whatsoever.
 - ii. The learned trial magistrate erred in law and in making a decision in total disregard to Order 21 Rule 4 Civil Procedure Rules.
 - iii. The learned trial magistrate erred in law and in fact in making a decision without setting out the issues for determination, the determination on those issues and the reasons thereof.
 - iv. The learned trial magistrate erred in law and in making a decision fact in ignoring Schedule 5 of the Auctioneer Rules, the submissions made and the binding precedents cited before him.



- v. The learned trial magistrate erred in law and in fact in disallowing the items in the bill without any analysis of the bill, the evidence and the law.
 - vi. The learned trial magistrate erred in law and in fact in making assessment of the items in the auctioneers Bill without considering proof of the said items.
 - vii. The learned trial magistrate erred in law and in making a decision that is on the face of it arbitrary, capricious, invalid and devoid of any legality to the detriment of the appellant.
 - viii. The learned trial magistrate's decision was based on an error of principle as the exercise of discretion was done on unknown reasons.
 - ix. The learned trial magistrate awarded costs that are manifestly low so as to represent an erroneous estimate of the cost due.
 - x. The learned trial magistrate did not make any reference to the filed submissions at all and thus there is no verifiable means of ascertaining that he exercised his discretion judiciously or in accordance with the law.
 - xi. Other grounds as may be argued with leave of the court.
3. The appeal was canvassed by way of written submissions.

The Appellant's Submissions

4. The appellant submitted that the decree holder never having pointed out the attachable assets of the judgement debtor, the appellant carried out an investigation warranting the private investigation report dated 12th April 2018 which was a lawful process conducted at a reasonable fee of Kshs 50,000 supported by the petty cash voucher dated 12th April 2018.
5. On items 7 and 10 for Security on attachment, the appellant submitted that proclamation having ensued, he engaged the services of police officers as the attachable moveable assets were by operation of law considered to be in the court's custody.
6. On item 9 on mileage, it was submitted that the same had been drawn to scale. On item 11 that was in regard to 30 casual aides, the appellant submitted that the same was evidenced by the petty cash vouchers dated 14th April 2018 showing that 30 aides were hired to assist in loading and offloading the attached items and as such the trial magistrate erred in scaling down the fee from Kshs 90,000 to Kshs 6,000.
7. On items 15 – 26, the appellant submitted that the taxing master erred in failing to appreciate that despite initially receiving instructions on 9th April 2018 and commencing execution, as litigation was ongoing, he received instructions in 2020 thus he commenced the execution process de novo.
8. It was further submitted that the respondents having paid Kshs 151,800 to him, this did not bar the appellant from exercising his right of appeal having been aggrieved by the decision.

The Respondent's Submissions

9. The respondent submitted that the instant appeal offended rule 11 (1) of the Advocates Remuneration Order as it ought to have been brought by way of reference and not an appeal and that furthermore, the provisions of Rule 55 of the Auctioneers Rules having envisioned a memorandum of appeal through Chamber Summons then the instant action ought to have been brought through a miscellaneous



application instead of an appeal. Reliance was placed on the case of *Vishisht Talwar v Antony Thuo Kanai T/A Thuo Kanai Advocates* [2014] eKLR.

10. It was submitted that the taxing master's ruling on the Auctioneers Bill of Costs was correct and sufficient and the reasons given for his decision regarding the items taxed hence the same should not be interfered with.
11. On item 4, it was submitted that the same was correctly taxed off as no credible investigations were carried out and further as there is no provision for charging the item under Schedule 4 of the Auctioneers Rules.
12. On items 7 & 10, it was submitted that there was no reasonable explanation given by the appellant as to why he had to use the services of 5 police officers when one was enough to accomplish the task.
13. On item 11, it was submitted that no reasonable explanation was given for the number of aides pegged at 30 and that this was an exaggeration of the amount of work that the said casuals were to carry out.
14. Finally, on items 15 -26, it was submitted that these were rightfully disallowed due to their glaring duplicity to Items 1 – 4 and 5 – 12. The respondent urged this court to dismiss the instant appeal with costs.

Analysis and Determination

15. I have considered the Chamber Summons, depositions and submissions for and against this appeal. I have also considered the Bill of costs for the auctioneers as filed and as taxed. The issues for determination are whether this appeal is properly before this court and secondly, whether the taxing master, Hon D. Onyango, Chief Magistrate, erred in law when he taxed the Auctioneer's Bill of costs dated 19th December 2022 and whether the same should be set aside. I will also address each ground of appeal as argued.
16. As to whether the instant appeal is properly before this court, I do note that the Appellant's appeal is against the decision of the taxing master 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.”
17. 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 could not invoke Paragraph 11 of the Advocates (Remuneration) Order of 2009.
18. In addition, there was no requirement for the Appellant to issue notice to the taxing master requesting for reasons and this is the position clarified in the case of *National Oil Corporation Ltd v Real Energy & Another* (2016) eKLR where the court held :

“ 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”



19. 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 that:

“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’.”

20. Consequently, this court finds that the applicable law of the impugned bill of costs is the [Auctioneers Act](#), pursuant to 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.
21. On whether the taxing officer erred in the manner that he taxed the bill of costs for the auctioneer as lamented above by the appellant, a Court dealing with an appeal on assessment or taxation of costs must exercise caution since the assessment or taxation is based on exercise of discretion on the part of the assessing or taxing officer. Such assessment or taxation can only be interfered with when it is demonstrably shown that the decision was based on an error of principle or the fees awarded was manifestly high as to justify an interference.
22. This court is guided by Rule 55 of the Auctioneers rules and the Fourth schedule therein and case law in determining the issues complained of. I therefore find and hold that appellant’s ground of appeal that the trial magistrate erred in law and in making a decision fact in ignoring Schedule 5 of the Auctioneer Rules is misplaced as the Auctioneer Rules does not have a Schedule 5. This ground thus lacks merit and is dismissed.
23. As to what should guide an appellate court in considering an appeal from the decision of a taxing master, in matters auctioneers bills of costs, in the case of Zacharia Barasa v Dubai Bank Kenya Limited (2015) eKLR L.Gacheru J outlined the case law which I adopt and have no reason to depart therefrom 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.”

24. The appellant complains that the taxing master gave a ruling without any satisfactory reasons thereof whatsoever. The appellant also claims that the taxing master’s decision fell afoul of Order 21 Rule 4 of the Civil Procedure Rules which provides that judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.

25. I have perused the taxing officer’s decision in this case and note that the said decision contains reasons for the decision. In instances where the taxing master disallowed an item, he provided a reason. I shall reproduce such instances as follows:

“... Item 4 is disallowed as I am not convinced that the auctioneer carried credible investigations as to warrant payment. If the auctioneer had carried valid through investigations, the objection proceedings could not have succeeded...On item 7 there is no justification for the exorbitant figure on security. A sum of Kshs 5000 is allowed...Item 9 is disallowed as it is not provided for in the record... There is no justification for towing charges. Item 12 is disallowed Items 15 to 18 are disallowed as the same is a duplication of the items 1 to 4.... Items 20 to 26 are disallowed as they are duplicates of the other items.....Item 29 is disallowed as it is not provided for under the circumstances herein.”

26. In the circumstances, taking into consideration the above, I find that the reasons for the Taxing officer’s decision were contained in the decision and therefore the ground of appeal is baseless. In *Evans Thiga Gaturu v Kenya Commercial Bank Limited* [2012] eKLR Odunga J observed that:

“In most cases the court is aware that the taxing officers in their decisions on taxation do deliver comprehensive rulings which are self-contained thus obviating the necessity to furnish fresh reasons thereafter. In such circumstances, it would be fool hardy to expect the taxing officer to redraft another “ruling” containing reasons.”

27. I thus find that the taxing master’s decision contained the reasoning therein. This ground of appeal thus fails.

28. As to whether the taxing master erred by awarding costs that are manifestly low so as to represent an erroneous estimate of the costs due, and therefore whether the taxing officer ignored the submissions and precedents relied on by the appellant, I will proceed to consider each of the Items disputed by the appellant after answering the question whether the taxing officer ignored submission as filed and the relevant case law.

29. In answering the foregoing question, I shall commence with the decision in *Nairobi Civ Appeal No. 240 of 2011 Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR where the court stated as follows:

“Submissions are generally parties’ “marketing language”, each side endeavoring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence



at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented. Regarding the punitive damages sum of shs.50 million awarded, the learned judge again found and lifted the proposal in the submissions of the 1st Respondents. We were unable to come by any pleading or evidence to warrant this award and therefore it cannot be sustained.”

30. The above case does not invite courts to ignore the submissions. What the Court does is to look at the relevance of submissions and cited cases and take them into consideration, but is not bound by them. (See Mombasa Civ Appeal No. 68 of 2012 Imperial Bank Limited v Bakari Juma Bechpende [2016] eKLR)
31. Thus, in this case, I find that the Taxing Master was under no obligation to be bound by the submissions.
32. On item No 4 the taxing officer disallowed for reasons that had the auctioneer undertaken a credible investigation, the objection proceedings could not have succeeded. I note that the Fourth Schedule provides for; Transport, storage, advertising, insurance and other disbursements expenses, where attachment or repossession is stayed or postponed or money tendered after attachment or repossession but before sale.
33. In my view, as it was not clear what were the judgement debtor’s real assets capable of being attached, it was only reasonable that the appellant undertake investigations so as to ascertain the correct goods. The Albeit the attachment was raised, this does not mean that there was no investigation carried out. I have perused the investigations report dated 14th February 2020 and I am satisfied that investigations were carried out which also involved establishing the registerd owners of motor vehicles believed to belong to the judgment debtor, Further, it is on record that some vehicles were jointly registered in the names of the judgment debtor and banks or financiers while others were registered in what was believed to be the sister company, Country Farms Limited and further, that the judgment debtor had in fact closed its previous offices and moved to where it was now operating as Country Farms goods as attached . A petty cash voucher produced as evidence that the sums incurred was not disputed.
34. The taxing officer, in denying this award held that it was not convinced that the investigators carried out credible investigations. However, it is my view that this was not a credible reason to deny this award considering there was evidence of the expense having been incurred. I thus set aside the taxing master’s dismissal of this award and proceed to award Kshs 50,000 as pleaded and proven.

On items 7 & 10 – Security on attachment

35. I am in agreement with the taxing officer that there was no justifiable reason as to why this amount was this high. One officer would have been enough. I thus uphold the taxing officer’s award on these items.

On item 9 – Mileage

36. Travelling expenses are provided for under the Fourth Schedule as “published by the Automobile Association from time shall to time be allowed at three times the scale.” 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."

37. I find the authority cited above persuasive but relevant and applicable to the instant appeal. I therefore find that the appellant was entitled to the item no. 9. I set aside the taxing officer's dismissal of the amount claimed by the appellant and proceed to award the amount of Kshs 106,200 pleaded by the appellant.

On item 11 – 30 Casual Aides

38. Just like the taxing officer, I find no justification for the use of 30 casual aides. That number is excessively high for work which could have been done by a fewer number of aides. Further, the appellant failed to demonstrate that the nature of work required 30 aides. I uphold the taxing officer's decision on these items.

On items 15 – 18 & 20 - 26

39. I am in agreement with the taxing officer that these were duplicitous to Items 1 – 4 and 5 – 12. It is my opinion that having received instructions and commenced execution in 2018, the appellant erred by claiming that the same were reissued in 2020. I find no reason to interfere with the taxing officer's award on these items.

40. Taking all the above into consideration, I find this appeal partially successful. the ruling of 18th May 2023 is therefore set aside only to the extent stated herein and substituted with the awards as provided in this judgment.

41. As the appeal is partially successful, the parties herein shall bear their own costs.

42. The lower Court file to be returned for the taxing officer together with copy of this judgment to recalculate the items in the bill of costs as allowed herein.

43. This file is closed.

I so order.

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

R.E. ABURILI

JUDGE

