



Kenya Airports Authority (KAA) v Barasa t/a Siuma Auctioneers (Miscellaneous Application E844 of 2020) [2023] KEHC 19236 (KLR) (Commercial and Tax) (16 June 2023) (Ruling)

Neutral citation: [2023] KEHC 19236 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E844 OF 2020
FG MUGAMBI, J
JUNE 16, 2023**

BETWEEN

KENYA AIRPORTS AUTHORITY (KAA) APPELLANT

AND

ZACHARIA W BARASA T/A SIUMA AUCTIONEERS RESPONDENT

RULING

Brief Facts

1. The appellant has filed two applications. The first one is dated October 7, 2022 and is an appeal against the taxation orders of the Deputy Registrar. The second application is dated March 10, 2023 and seeks stay of execution pending the hearing and determination of the reference. The court directed that the two applications be determined together.
2. The genesis of the dispute was a decision of the Court setting aside an interlocutory judgment in Nairobi HCC 505 of 2017 Moniks Agencies Limited vs Kenya Airports Authority, while directing the applicant to pay the auctioneer's charges. Arising from these directions, the respondent filed a bill of costs dated January 31, 2020. The applicant raised a preliminary objection. This resulted to a ruling which was delivered on February 9, 2021 by Hon SA Opande.
3. In that ruling, the Hon Deputy Registrar set aside the bill of costs so as to give the respondent an opportunity to justify the costs tabled in the bill of costs and at the same time allowing the applicant a chance to object to the items raised. The respondent then presented the bill of costs before another taxing officer. A ruling was delivered on August 18, 2022. The respondent applied for a review of the ruling culminating to the impugned ruling of September 30, 2022 and the two applications for setting aside the bill of costs and stay of execution.



The application dated October 7, 2022

4. The application is brought under rule 55(4) & (5) of the *Auctioneers Rules* 1997, Section 1A, 1B, 3A of the *Civil Procedure Act* and all other enabling provisions of the law. It seeks the following orders;
 - i. THAT the taxing master's decision delivered on September 30, 2022 as read together with the ruling of August 18, 2022 allowing the auctioneer's bill of costs by the respondent herein dated January 31, 2020 in the sums of Kshs 3,189,960/- be varied and/or set aside and in particular in regard to the amount allowed in respect of item 4 thereof.
 - ii. THAT if need be, leave be and is hereby granted to the appellant to appeal out of time against the decision of the taxing master delivered on 18th August, 2022 allowing item 4 of the auctioneer's bill of costs dated January 31, 2020.
 - iii. THAT the Honourable court in the spirit of expeditious and timely disposal of the subject matter be at liberty to re-tax the said bill of costs in respect of item 4 and/or in the alternative, the matter be referred back for re-taxation before the taxing master on such guidelines that the Honourable court may deem just and expedient to issue.
 - iv. THAT the Costs for this appeal be provided for.
5. The application is supported by the grounds on the face of it, by a supporting affidavit sworn by Margaret Munene on October 7, 2022 and the written submissions dated March 20, 2023.
6. The respondent opposed the application and filed Grounds of Opposition dated December 17, 2022 and submissions dated March 22, 2023.

Application dated March 10, 2023

7. The application is brought under Order 22 rules 1-3, Order 40 rule 1 A, B of the *Civil Procedure Rules*, Sections 1A, 1B & 3A and 63 of the *Civil Procedure Act* and all other enabling provisions of the law. The application seeks the following the following orders;
 - i. SPENT
 - ii. THAT the Honourable court be pleased to issue an order of stay of execution of the auctioneer's costs of Kshs 3,199,960/= awarded on September 30, 2022.
 - iii. THAT this Honourable court be pleased to issue an order restraining the respondent, their servants and/or agents from selling or disposing all the goods attached on March 9, 2023 in execution of the auctioneer's costs of Kshs 3,199,960/= awarded on September 30, 2022 pending the hearing and determination of this suit.
 - iv. THAT pending the hearing and determination of the application herein inter partes, interim orders in terms of prayer 2 and 3 above be issued.
 - v. THAT costs of this application be provided for.



8. The application is supported by the grounds on the face of it and also premised on the supporting affidavit sworn by Margaret Munene. The application was opposed by the Grounds of Opposition dated March 10, 2023.

Analysis

9. I have carefully considered the two applications, pleadings, evidence and the rival submissions by parties. The following issues arise for determination; -
- i. Whether the appellant has made out a case for stay of execution of the auctioneer's costs of Kshs 3,199,960/= awarded on September 30, 2022.
 - ii. Whether the appeal against the taxation of the auctioneer's bill of costs was filed out of time.
 - iii. Whether the appellant has made out a case for setting aside the decision of the taxing master.
10. On the first issue, the applicant moved the court seeking an order for stay of execution pending the hearing and determination of the appeal. From the record, the applicant states that it stands to suffer substantial loss if the application is not granted. This is because the goods proclaimed by the respondent consist of office equipment and therefore tools of trade used in the day today running of the affairs of the appellant. Further, it was the appellant's submissions that the application was brought without undue delay and the court had the discretion to grant the orders sought since the taxed costs had been challenged and could possibly change the mode of execution.
11. The respondents have by way of rejoinder stated that the application sought a 'blanket' stay of execution. Further, it was submitted that in the absence of court sanctioned leave, there was no valid and or proper appeal filed before the court and therefore the averment that the appeal would be rendered nugatory was misleading. In any case, the respondent argued that the fact that he has commenced execution process to realize or be paid his fees cannot be a basis to grant stay of execution.
12. Order 42rule 6(1) and (2) of the Civil Procedure Rules lays out the principles for granting of an order of stay of execution. The import of these provision was considered and summarized by the Court of Appeal in the case of *Butt v Rent Restriction Tribunal (1982) KLR 417*. The following criteria was laid out in determining whether or not to allow an application; -
- i. The power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 - ii. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal Court reverse the Judge's discretion.
 - iii. A Judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
 - iv. The Court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the applicant had an undoubted right of appeal.



- v. The Court in exercising its powers under Order XLI rule 4 (2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.'
13. The intended reference against the decision of September 30, 2022 seeks to set aside the decision of the taxing master on grounds including the lack of evidence on the actual work carried out by the respondent. It also questions the ownership of the attached goods. Against the guidelines that I have referred to above, I am inclined to grant the application considering that the intended appeal raises arguable grounds and the applicant should be allowed to ventilate the issues before the Court.
14. On the second issue, the court is called upon to determine whether the appeal was filed out of time as urged by respondent and denied by the applicant. The record indicates that the bill was initially taxed at Kshs 327,004/= in the ruling dated August 18, 2022. Subsequently, at the instance of the respondent, who sought a review against the said ruling, this figure was reviewed upwards to Kshs 3,189,960/= in a ruling dated September 30, 2022.
15. Rule 55(5) of the *Auctioneers Act* provides that:
- 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 or magistrate.
16. The respondent's submission is based on the averment that the appeal challenging the taxing master's decision delivered on August 18, 2022 was filed after a duration of 3 months without any explanation to the inordinate delay. I have gone through the record. It is clear from the pleadings that the ruling of August 18, 2022 is what gave rise to the ruling of September 30, 2022. There is an acknowledgement by the respondents that the latter reviewed the ruling of August 18, 2022 and was therefore the final pronouncement of the court.
17. This is the point that I understand the applicant to be making in its pleadings and its submissions. In fact, the applicant avers that it was willing to pay the amount in the ruling of August 18, 2022, until the latter decision made a pronouncement that the applicant considered outrageous. The reference on record is clearly with respect to the ruling of September 30, 2022. Having said this, it is then clear that the application, having been filed on October 7, 2022 was filed within the time stipulated by law. As such, no leave was necessary.
18. The third and final issue for determination whether the appellant has made out a case for setting aside the decision of the taxing master dated September 30, 2022.
19. The applicant urged the court to dismiss the application on grounds that taxing master misdirected herself in law and in fact in arriving at her decision and particularly with regard to item No 4 of the bill of costs, (on Auctioneer's fees on attachment), which was manifestly excessive. It was averred that the taxing master also erred in calculating the proclaimed figure at Kshs 274,900,000/= without evidence of the cost of the items proclaimed and because the figure had been inflated to include goods that did not belong to the appellant.
20. It was also stated that the taxing officer misdirected herself in overturning or disregarding the orders of February 9, 2021 which had directed that proof of the work done be submitted to court. In fact, the appellant takes issue with the respondent who instead of complying with the orders of February 9, 2021, went ahead and fixed the bill of costs for taxation before another taxing master. The applicant also avers that this move went against the conventional rule that a court cannot appeal or review an order of a court of concurrent jurisdiction.



21. The respondent for his part submits that the auctioneer's bill of costs was duly and procedurally taxed culminating to a Ruling and Reasons for Taxation delivered on August 18, 2022 and reviewed by a ruling dated September 30, 2022.
22. In response to the requirement for a valuation report as alleged by the applicant, the respondent submits that the respondent was only required to justify the bill of costs by filing supporting documents, which were duly filed together with the bill. It was further submitted by the respondent that in any case the obligation to secure an independent valuation of the attached properties was on the debtor and not the auctioneer. This was according to rule 10 of the Auctioneer's Rules which provides that: 'A debtor may, at any time before the property seized or repossessed is sold, apply to a court for an order that the property be valued by an independent valuer.
23. According to the respondent, the law clearly required the applicant, if it so wished, to secure an order from court for independent valuation of the attached properties, which the applicant did not do.
24. Of relevance is the decision by the Court of Appeal in *National Industrial Credit Bank Limited v SK Ndegwa Auctioneer [2005] eKLR*. The Court of Appeal provided guidance to Schedule IV of the *Auctioneers Rules, 1997* under which an auctioneer's charges are calculated. The Court stated as follows: -

The main 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 the attached goods been equivalent in value to the decretal sum. That is the meaning we give to paragraph 4 of Part II of the Fourth Schedule in order to make it operative. We are, however unable to assess the auctioneer's fees since there is no or not sufficient evidence of the value of the goods attached. We think that, it is appropriate that the fees of Shs 1,000,000/= assessed under Item 4 of the respondent's schedule of charges should be set aside and the matter remitted to the Deputy Registrar to assess the auctioneer's fees on the basis of the value of the properties attached.

25. Although the respondent states that documents of proof of value were filed in court as ordered in the ruling of February 9, 2021, it is not clear what documents were filed before the court as the record indicates that the matter went before a new taxing master. The taxing master in setting aside the bill of costs on February 9, 2021 stated that 'the applicant has to supply us with the value of the goods proclaimed as he can only be paid for work done...I am unable to put a figure to the amount proclaimed as no valuation report has been presented...the applicant has not told us how the amounts or the basis upon which the amounts were reached.
26. It was up to the respondent to file proof of the value of the proclaimed goods, so as to satisfy the court of the value of the work performed. In the absence of such evidence, the bill was taxed without the requisite justification on item no 4 of the bill of costs. The court had no way of confirming the value of the vehicles allegedly attached. Ownership of some of the vehicles was also contested by the applicant. This issue appears not to have been addressed by the taxing master.

Determination and orders

27. I therefore allow the reference to the extent that the auctioneers fees assessed under item 4 at Kshs 274,900,000/= is set aside. The bill of costs is remitted back for fresh taxation before a different Deputy



Registrar with directions to review item No 4 in the bill of costs upon consideration of proof of the value of the work carried out by the respondent and ownership of the attached goods. The appellant shall have the costs of the reference and the application for stay of execution, having succeeded in both applications.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 16th DAY OF JUNE 2023.

F. MUGAMBI

JUDGE

Court Assistant: Ms. Lucy Wandiri.

