



**Julius Mwale t/a Mwal-Mart Supermarket v Kennedy Shikuku t/
a Eshikhoni Auctioneers & another (Miscellaneous Civil Case
E006 of 2023) [2023] KEHC 23863 (KLR) (11 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23863 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
MISCELLANEOUS CIVIL CASE E006 OF 2023
PJO OTIENO, J
OCTOBER 11, 2023**

BETWEEN

JULIUS MWALE T/A MWAL-MART SUPERMARKET APPLICANT

AND

KENNEDY SHIKUKU T/A ESHIKHONI AUCTIONEERS 1ST RESPONDENT

BUTALI SUGAR COMPANY 2ND RESPONDENT

*(Being an appeal from the Ruling and orders of Hon.
Marcella A. Onyango in Mumias SPMCC. No. 328 of 2017)*

JUDGMENT

Background of the Appeal

1. Before the court for determination is an appeal by the applicant *vide* Chamber Summons dated 2nd February, 2023 and brought pursuant to Rule 55 and Schedule 4 of the Auctioneers (practice) Rules 2009 seeking, in the main, that the Honourable Court be pleased to set aside the order of Honourable Marcella A. Onyango in Mumias MCCC No. 328 of 2017 Stanley Nyangweso v Julius Mwale t/a Mwal-Mart Supermarket made on 30th January, 2023 and order for the re-assessment of the Auctioneers Bill of Costs. there is an alternative prayer that the Honourable Court be pleased to set aside the order of Honourable Marcella A. Onyango in Mumias MCCC No. 328 of 2017 Stanley Nyangweso v Julius Mwale t/a Mwal-Mart Supermarket made on 30th January, 2023 and the same be substituted by an order of this court re-assessing the bill afresh. The summons also prays that the court makes an order providing for the costs.
2. The chamber summons enumerates grounds impugning the decision of the taxing master decision on taxation of an auctioneers' bill. It is supported by the affidavit of Julius Mwale sworn on 2nd



February, 2023 in which he avers that the taxing officer's award of Kshs. 117,480/- to the 1st respondent as auctioneer fees contained charges outside the gazette rates, was excessive, punitive and not compensatory. He claims that the taxing master lacked the jurisdiction to assess the bill since the bill was not brought by way of a Notice of Motion in accordance with Rule 7 of the Auctioneers Rules, 1997. He equally questions how the auctioneer was instructed to recover a sum of Kshs. 306,000/- and sought to recover Kshs. 179,044 as costs.

3. He faults the decision of the taxing master for the reasons that; he failed to determine the question of jurisdiction before delving into the merits of the bill, the sum of Kshs. 117,480/- awarded, was outside reasonable limits so as to be manifestly excessive in the face of the Fourth Schedule and that amounts claimed in items (b), (c) & (e) were not supported by any evidence as required in law. The other grounds are that item (d) was almost double the amount allowable as per the fourth schedule, amount to unjust enrichment, item (f) was contrary to Part II of The Fourth Schedule which does not provide for commission on proclamation and service of proclamation; that the court failed to; give reasons for her decision; take into account the interest of the parties and the stage of the execution proceedings before the auctioneer was served with stay of proceedings and awarding a sum not commensurate to the professional work that had been done by the 1st respondent.
4. The Appeal was resisted by the replying affidavit of Kennedy Shikuku sworn on 27th February, 2023, where he asserts that the taxation of his bill of costs was on scale and reasonable; that the taxing master had the jurisdiction to tax his bill costs which jurisdiction is derived from rule 55 sub rule 3 of the auctioneers' rule 2017 and that there is no requirement in the act and rules for the taxing master to give reasons for taxation and neither is there a requirement that a bill of costs ought to be by way of notice of motion.
5. With respect to item d and f, he states that there are no two separate scales for proclamation/attachment and therefore auctioneers fees is as provided under Paragraph 4 part II and it is trite law that assessment of auctioneers charges on commission is based on the value of the proclaimed goods. He further claims that stay cannot be granted in respect to costs and place reliance on the case of Francis Kabaa vs Nancy Wambui & another Civil Application No. 298 of 1996 (1113/96UR). He closes by arguing that this appeal is incompetent as it contravenes the mandatory requirements of rule 55 sub rule 5 of auctioneers rules 2017 because the file is registered as a reference while the body of the application is titled chamber summons. He prays that the appeal be struck out.
6. The appeal has been canvassed by way of written submissions and each party has filed their respective submissions.
7. The applicant identifies two issues for determination to be; a) whether the bill of cost should be re-assessed and b) whether an order on costs should issue. To the issues it is submitted that the assessment of the bill of costs at Ksh. 179,044/- against the decretal sum of Kshs. 306,000/- is more than the recommended 15% of the recovery amount. They argue that the bill of costs should be reassessed based on the amount of goods attached and the actual work the auctioneer did and places reliance on the case of *National Industrial Credit Bank Limited v S.K. Ndegwa Auctioneer* (2005) eKLR where the Court of Appeal held;

“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 he attached goods 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."

8. The Applicant further submits that the taxing officer erred in allowing items that are not provided under the fourth schedule and which were not supported by evidence and in that regard they place reliance on *Co-operative Bank of Kenya Ltd v Jeofrick N. Muinde t/a Kimu Auctioneers* [2019] eKLR where the court held that;

"22. On the bill itself, my finding is that the same was not drawn to scale and that the trial Magistrate erred in allowing items not provided for. The Auctioneers charges are provided for at Part II of the Fourth Schedule. That schedule does not provide for commission on proclamation, service of proclamation and investigations and the same should not have been allowed. Disbursements, postage, stationery and telephone are payable under item 4 of the schedule and ought to have been confined to what was actually spent or expenses incurred but that was not the case. Preparation of the auctioneers Bill of Costs, commissioning, filing the same, filing of return of service and attending court for assessment of the costs all of which are itemised in the bill and were allowed by the trial Magistrate are also not provided for. I would also agree with the appellant's submission that even on the items allowable in the schedule some of the amounts claimed were not pegged on any known law, the basis for such fees having been settled by the Court of Appeal in the case of *National Industrial Credit Bank Limited v S K Ndegwa Auctioneer* (supra) to be the value of the goods attached and not the decretal sum and in any event should have been ½ the fees as provided in item 7."

Respondent's Submissions

9. The respondents identify three issues for determination namely; a) whether the applicant has placed before court sufficient materials to warrant this court to interfere with the lower courts taxation on the respondent's bill of costs dated 15/11/2022; b) whether the applicant has come to this court in a prescribed form and; c) whether the auctioneers fee on attachment/commission payable accrues on proclamation or subsequent seizure.
10. On whether the applicant has placed before court sufficient materials to warrant this court to interfere with the lower courts taxation on the respondent's bill of costs dated 15/11/2022, the respondent reiterates the averments on the replying affidavit of Kennedy Shikuku and further states that the court observed in the case of *Oscar Otieno v Sukari Industry Ltd* Migori High Court Misc Civil Application No. 293 of 2018 that assessment of auctioneers fees must be pegged on a single band of the value of the attached property. They submit that under paragraph 4 and 11 of the auctioneers' charges, where the property is over Kshs. 1,000,000/- and the commission percentage applied should be 2% and therefore the auctioneer was justified to ask for 2% of the value of the attached property.
11. On whether the applicant has come to this court in a prescribed form, the respondent submits that the appeal is mixed up between a reference and chamber summons thus offending the mandatory requirement of rule 55 sub rule 5 of the auctioneers' rules which requires that a memorandum of appeal ought to be by way of chamber summons. They place reliance in the case of *Jafred Wamukoya & Gideon Osundwa v Kennedy Shikuku t/a Eshikboni Auctioneers & Ibrahim Muhumed* [2021] eKLR in that regard where the court held as follows;



30. In the instant case, the 1st respondent submitted that the provisions of Rule 55 do not contemplate what is referred to as ‘reference’ but contemplates that the appeal is by way of memorandum of appeal made through chamber summons. In *Ezekiel Kiminza t/a Auto Land Auctioneers v Mistry Valji Naran Mulji* [Supra], the court faced with a situation where an applicant approached court via a reference held that:
- “In this case, the Respondent has approached the Court by what is referred to as a “Reference” filed on 16th March 2017. This is obviously an unknown procedure under the Rules and certainly one filed outside the time permitted and without leave. These are both procedural and substantive issues which go to the jurisdiction of the Court. It is clear that the Respondent has not only failed to come to Court under the prescribed form but also failed to come to court within the time specified by the Law.
31. I am therefore in full agreement with the 1st respondent that a “reference” is not contemplated under Rule 55 of the Auctioneers Rule and that the only way to lodge an appeal is by memorandum of appeal through a chamber summon.”
12. They thus argue that the subject reference does not constitute an appeal.
13. On whether the auctioneers fee on attachment/commission payable accrues on proclamation or subsequent seizure, they submit that the fees on attachment/commission accrues on proclamation since it is at the stage of proclamation when the goods are considered seized. They urge that the matter be dismissed.

Issues, Analysis and Determination

14. The Court has perused and considered papers filed in support and opposition to the appeal as well as the rival submissions in respect thereto and identifies the following issues for determination: -
- a. Whether the applicant approached this court by correct pleadings
 - b. Whether the taxing master assessed the auctioneer’s bill of costs to scale
 - c. Whether the taxing master was obligated to give reasons for her decision

Whether the applicant approached this court in the correct pleadings?

15. The format and procedure for an appeal against a taxing master’s decision is stipulated in Rules 55(4) and (5) of the *Auctioneers Rules* 2017 which provides;
- (4) An appeal from a decision of a registrar or a magistrate or the Board under sub-rules (2) and (3) shall be to a judge in chambers.
 - (5) 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. Even though the respondent contends that the applicant has initiated this appeal by ways of a reference contrary to the rules, a perusal of the file shows that the applicant challenged the decision of the taxing master by way of chamber summons dated 2/2/2023 which sets out the grounds thereof at paragraphs 3 & 4. That setting of grounds leave no doubt on the grievances of the appellants. It is not clear how the respondent would have wanted the document to be titled. The words of the law demands that the document be called Chambers summons which contains a memorandum of the grievances. A memorandum in both common and legal parlance is a document which identifies and informs on the legal issues in one’s case. the court thus finds that the procedure adopted to initiate the appeal is proper



one and isn't amenable to challenge on that front. In any event to defeat the application on the basis of form when the dispute isn't blurred but clear would be to give undue regard to undue technicalities against the spirit of *the constitution*.

17. On this issue even the decision cited by the respondent in support of the objection to the form is not of assistance because in that case the matter was even filed out of the statutory timelines. See *Ezekiel Kiminza t/a Auto Land Auctioneers v Mistry Valji Naran Mulji*.

18. It is therefore the finding by the court that the appeal was properly instituted and is properly before the court for determination on the merits.

Whether the taxing master assessed the auctioneer's bill of costs to scale

19. The Applicant contests the auctioneers bill of costs, specifically items b, c, d & e as irrecoverable for not being provided for under the schedule. Part II of the Fourth Schedule, which stipulates the fees an auctioneer is entitled to. Item b captures fees before attachment which was assessed at the sum of Kshs. 4,000/- that is envisaged under part II of the Fourth Schedule and thus merited as recoverable.

20. To the contrary, Item c is claimed as fees on taking inventory which was assessed at a sum of Kshs. 10,000/-. This is fee not provided for nor envisaged in the Auctioneers Rules and thus not merited for recovery. It is set aside.

21. Item d captures o fees on attachment at 2% of the value of proclaimed property of Kshs. 5,000,000/- which was assessed at the sum of Kshs. 100,000/= on it. The applicant contends that the auctioneers commission ought to be based on work done and not what could have been done. They further argue that commission on proclamation is not envisaged under the auctioneers' rules. The respondent on the other had contends that a proclamation is an attachment and they were thus entitled to a commission based on the value of the proclaimed goods.

22. The Court of Appeal in *National Industrial Credit Bank Limited v S. K. Ndegwa Auctioneer* [2005] eKLR observed that the auctioneers commission on proclamation should be based on the value of the proclaimed goods by holding as follows; -

"...We are satisfied that the learned Judge correctly construed the word "proclamation" in the context in which it is used in the Auctioneers Rules and reached the correct decision that the auctioneer was entitled to fees for attachment prescribed in paragraph 4 of Part II of the Fourth Schedule.

...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."

23. The rationale of the court of appeal in *National Industrial Credit Bank Limited* (supra) to assess commission payable on proclamation to be based on the value of the proclaimed goods was disclosed in the Judgment as follows:-

"The respondent based his fees on the decretal sum and the Deputy Registrar assessed the fees on the basis of the decretal sum. The wording of paragraph 4 of Part II of the Fourth Schedule does not say that the percentages stated apply to the decretal amount. It would be unjust to base the fee on attachment on the decretal amount because in some cases, the



value of the attached goods may be many times less than the decretal amount shown in the warrant of attachment and sale.” (emphasis mine)

24. In its decision cited above, the Court of Appeal gave its reason for application of the value of the goods attached for reasons that at times it would work injustice on the auctioneer where the value of the goods attached may be many times less than the decretal sum. It was that prospect of injustice that informed the ultimate finding that the value of the goods be the yardstick. That yardstick should equally present itself as minding about the person obligated to pay the costs. Take the situation where the decretal sum to be 1,000,000, and the auctioneer walks into a yard of, say a car dealer, and proclaims two high end vehicles each valued at 10,000,000, the decretal sum is paid immediately but a dispute arises on auctioneers’ fees. Would it be just to base the commission on the value of the attached property even when the same may be apparently present a situation of over attachment!!!?
25. Give another scenario where the decree is still for 1,000,000 and the auctioneer fails to lay his hands on any valuable for attachment or attaches a property valued at less than half of the decretal sum. Would it be in that event be just to say that he gets nothing because nothing was attached or that his fees be calculated based on the value of the property!!?
26. The third scenario is where the property attached is actually valued more than the decretal sum but on sale the price realized is less the decretal sum. Wouldn’t there be questions about the accuracy of the valuation or just suppression of the value at the public auction?
27. In all the scenarios, it would work immense benefit to the auctioneer to have the value of the attached property pegged high whatever the decretal sum and the outcome at the auction is. In fact, it may be an incentive to over attach or overvalue with the focus being on commission. To the contrary, if the ever constant value in the decree was to be the yardstick, no prejudice would visit the auctioneer for even where the goods attach be valued at a value lower that the decretal sum, he still get commission based on the weight of the interest of all parties, the decretal sum.
28. While this court is bound by the decision of the court of Appeal, in this matter where the statute is left to interpretation by the court, the court finds that to interpret the value for computation of the auctioneer’s fees on the value of the attached goods would be unjust to the person ultimately obligated to meet such costs. In this particular case where the value of the proclaimed properties was way many times above the amount in the decree to be recovered, it is the court’s finding that the commission should be assessed based on the decretal sum being Kshs. 306,000/-and that to use the value of the attached goods would be to unfairly enrich the auctioneer.

Whether the taxing master was obligated to give reasons for her decision

29. The *Auctioneers’ Rules*, 2017 do not precisely and expressly provide a requirement for the taxing master to provide reasons for his or her decision. However, in taxing costs, the master exercises judicial discretion and it well settled that for any discretion to pass as judicial, it must be based or supported with reasons, lest it take the face of a whim or caprice. I would however borrow the provisions of Rule 11 sub rule 2 of the Advocates Remuneration Order which requires that the taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items. It is therefore the courts finding that the taxing master was obligated to give the reasons for her decision on each item and in failing to do so she erred.
30. Flowing from the foregoing reasons, it is the finding of the Court that the findings of the taxing master on the disputed items were made in error just like failure to give reasons. The taxation is thus set aside. The matter is remitted back to the same officer for fresh consideration in line with this decision.



31. Having succeeded and on the principle that costs follow the events, the Appellant is awarded the costs of this appeal.

DATED, SIGNED AND DELIVERED AT KAKAMEGA, THIS 11TH DAY OF OCTOBER 2023.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Mr. Muhiyu for the Applicant

No appearance for the Respondents

Court Assistant: Polycap Mukabwa

