



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAMIRA**

**CIVIL APPEAL NO. 21 OF 2020**

**KENYA TEA PACKERS COMPANY LIMITED.....APPELLANT**

**=VRS=**

**HEZRON GETUMA T/A HEGEONS AUCTIONEERS.....RESPONDENT**

*(Being an appeal against the Ruling of Hon. M. C. Nyigei – SRM Nyamira dated and delivered on the 26<sup>th</sup> day of August 2020 in the original Nyamira Chief Magistrate’s Court Misc. Civil Application No. 15 of 2019)*

**JUDGEMENT**

This appeal challenges the decision of the magistrate who allowed the auctioneer’s Bill of Costs in Nyamira Chief Magistrate’s Misc. Civil Application No. 15 of 2019 as drawn in the Bill of Costs dated 13<sup>th</sup> September 2019 hence assessing the charges at Kshs. 367,675/=. The appeal also challenged the magistrate’s power to tax the bill but it is evident from the subsequent submissions of Counsel for the appellant that that ground of appeal was abandoned leaving this court to determine only the question whether the charges were properly assed.

The appeal was canvassed by way of written submissions and I have considered the rival submissions. I have also carefully considered the magistrate’s decision and the law.

The fees and disbursements payable to an auctioneer are provided for at **Rule 55 (1)** of the **Auctioneers Rules** which states: -

**“Except as may be provided by any other written law or by contract the fees set out in the Fourth Schedule payable to the auctioneer for the attachment repossession and sale of moveable and immoveable property under court warrants or letters of instructions shall be charged in accordance with these Rules.”**

Therefore, in drawing a bill of costs the auctioneer is confined to only what is provided for in the Auctioneers Rules. The actual fees due to an auctioneer are provided for in **PART II** of the **FOURTH SCHEDULE**. The impugned bill of costs was drawn as follows: -

“

<b>NO.</b>	<b>PARTICULARS</b>	<b>AMOUNT CHARGED</b>	<b>AMOUNT TAXED</b>
1	Upon receipt of instructions	1,000	
2	Fees before attachment	4,000	
3	To our commission	140,388	
4	To traveling to proclamation from Nyamira to Nairobi 255km x 65 x 3 x 2	99,450	
5	To traveling on attachment on		

6	Towing charges		
7	Security hired during attachment twice		
8	To Labour and Personnel on	15,500	
9	To investigation of debtors assets	10,500	
10	To taking inventory	12,500	
11	To disbursements	18,500	
12	To service of proclamation	5,000	
13	To postage, stationery and telephone	2,500	
14	To filing of Auctioneers bill of cost	1,000	
15	To preparations of auctioneers bill of cost for assessment	1,000	
16	To service of Auctioneers bill of costs	6,000	
17	To preparation, commissioning and filing of return of service	575	
18	To attending court for assessments	1,500	
19	To Lawyer's fees	25,000	
	<b>Sub total</b>	<b>344,413</b>	
	To VAT 16% of 145,388	23,262	

GRAND TOTAL	367,675	
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”

It is evident from the affidavit sworn by the auctioneer in support of the application for the taxation that the attachment was stayed. He deposed as follows in paragraphs 3, 4 and 5 of the affidavit sworn on 13<sup>th</sup> September 2019: -

**“3. THAT, I know of my own knowledge that on 5<sup>th</sup> September 2019 this Honourable Court issued me with warrants of Attachment and sale against the Respondent. Annexed hereto and marked “HG 0-1” are copies of the warrants of Attachment and sale.**

**4. THAT upon receipt of the said warrants of attachment and sale, I proceeded and proclaimed the moveable properties of the respondent on 6<sup>th</sup> 2019. Annexed herewith and marked “HG 0-2” is a copy of the proclamation to that effect.**

**5. THAT on the 9<sup>th</sup> September 2019, I was served with a court order staying the execution of the decree herein annexed herewith and marked “HG 0-3” is a copy of the said order.” (Underlining mine).**

From the documents annexed to the affidavit the auctioneer received the order staying execution after he had issued the proclamation of attachment. The proclamation is dated 6<sup>th</sup> September 2019. Other than proclaiming the goods the auctioneer did no more because three days later he was served with an order staying execution. As a matter of fact, it is stated in the proclamation that the goods were to be left in the custody of the debtor for seven (7) days within which period the debtor could redeem the goods as provided in **Rule 12 (b) & (c) of the Auctioneers Rules**. According to **Rule 12 (d) of the Auctioneers Rules** the auctioneer could only lawfully remove the goods to safe premises for execution upon expiry of the seven days’ notice but not before. In this case the seven days’ notice begun to run from 6<sup>th</sup> September 2019 and the auctioneer having received the order staying execution three days after the proclamation the seven days’ notice had not expired. Clearly therefore the Bill of Costs herein was not drawn to scale. Apart from having many items that were not provided for in the scale of charges set out in **PART II of THE FOURTH SCHEDULE** it was also exaggerated. What the auctioneer was entitled to in addition to fees for receipt of court warrant or letter of instructions (Kshs. 1000/=) and fees before attachment or repossession (Kshs. 4,000/=) were attaching charges in addition to expenses whose assessment is provided in paragraph 4 of the scale.

The manner in which an auctioneer’s charges are assessed was settled by the Court of Appeal in the case of **National Industrial Credit Bank Limited v S. K. Ndegwa Auctioneer [2005] eKLR** where the court held: -

**“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 case, the value of the attached goods may be many times less than the decretal amount shown in the warrant of attachment and sale.**

**The values indicated in paragraph 4 of Part II of the Fourth Schedule on the basis of which the fees for attachment are assessed are no doubt obscure. Nevertheless, it is a canon of construction of statutes, that if possible a statute should be construed in a manner which makes it operative and that where a statutory has several meanings even though there is little to choose between them, the courts must decide what meaning the statute is to bear, rather than reject the provision as a nullity. (See Paragraph 582 Halsbury’s Laws of England Vol. 36, 3<sup>rd</sup> Edition).**

**The main object of paragraph 4 is clear. It is intended to provide values on the basis of which the auctioneers 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. This is the meaning we give to paragraph 4 of Part II of the Fourth Schedule in order to make it operative.....”**

According to the proclamation annexed by the auctioneer the value of the attached goods was Kshs. 1,700,000 (three vehicles with a value of Kshs. 500,000/= each and 4 equipment and furniture each with a value of Kshs. 50,000/=). In view of the decision of the Court of Appeal the fees of the respondents herein ought to have been assessed based on the value of the attached goods which as I have stated is Kshs. 1,700,000/=. Paragraph 4 of Part II provides that for anything over Kshs. 1,000,000/= the auctioneer is entitled to 2% meaning 2% of the value of the attached goods hence 2% of 1,700,000 = **34,000/=**.

To this add the auctioneer’s expenses which in his bill are listed as items 8, 9, 10, 11, 12,13 and 14 a total of **Kshs. 65,500/=**.

Add the **Kshs. 1,000/=** under paragraph 1 and **Kshs. 4,000/=** under paragraph 3 and then what to me are reasonable transport expenses of **Kshs. 38,500/=** and then **16% VAT** and you get **Kshs. 166,889/=**.

In the upshot the appeal is allowed and the decision of the Magistrate is set aside and substituted with one taxing the auctioneer’s Bill of Costs dated 13<sup>th</sup> September 2019 at **Kshs. 166,889/=**. As the appellant has succeeded only partially he shall be entitled to only half of the costs of this appeal. It is so ordered.

**JUDGEMENT SIGNED, DATED AND DELIVERED AT NYAMIRA ELECTRONICALLY VIA MICROSOFT TEAMS THIS 15TH DAY OF APRIL 2021.**

**E. N. MAINA**

**JUDGE**