



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISCELLANEOUS CIVIL APPLICATION NO 2 OF 2021

STEPHEN KENYERE MANOTI.....APPLICANT

VERSUS

OSCAR OTIENO ODONGO

T/AODONGO INVESTMENT AUCTIONEER.....APPLICANT/RESPONDENT

(Being a reference from the ruling of Honourable D.O Macandere the Deputy Registrar High Court at Kisii delivered on 5th March 2021)

RULING

1. The respondent before the deputy registrar seeking to have his bill taxed. The deputy registrar considered the applicant's bill of costs and taxed it at Kshs 1,126,000/-. The applicant dissatisfied has now filed before me a Notice of Motion dated 23rd March 2021 seeking the following orders;

1. Spent

2. Spent

3. THAT the Honourable court be pleased to set aside taxation and /ruling dated 5th March 2021 and subsequent certificate of assessment of costs and re-tax items Numbers 3, 4, 5, 6 and 7 of the Respondent's bill of costs dated 13th January 2021.

4. THAT the Honourable court be pleased to grant such orders as it considers just and fit in the circumstances.

5. THAT costs of this application be provided for.

2. The application was supported by an affidavit sworn by Charles M. Ayienda who deposed that he was instructed by the applicant to oppose the Respondent's bill of costs dated 13th January 2021 before the deputy registrar and filed a replying affidavit in response thereto.

3. He avers that had the deputy registrar considered the applicant's replying affidavit and submissions, she could not have arrived at a different decision. He advanced that the bill of costs was prematurely filed as it was filed before completion of instructions given to the respondent, thus, the deputy registrar ought to have struck out the bill of costs. He averred that taxation of item 3 should only be applied where the auctioneer seizes or takes the actual possession of the goods proclaimed. He also took issue with the fact that the deputy registrar relied on the value of goods proclaimed for taxing items 4, 5, and 6 yet the respondent had not taken possession of the goods.

4. He averred that the deputy registrar failed to consider the reasons furnished by the Applicant's to the respondent directing it to temporarily withhold his action for distress as the applicant had been served with a court order by the tenant stopping him from distressing, evicting and attaching its properties. He further averred that the applicant is apprehensive that since the respondent has extracted a certificate of assessment of costs, the respondent may proceed to execute the same against the applicant herein.

5. The respondent in response to the application filed grounds of opposition and a notice of preliminary objection on 29th March 2021. He advanced that the application is malicious, vexatious, mischievous and gross abuse of the due court process. He also claimed that the application did not meet the threshold for the orders sought.

6. In his preliminary objection the respondent contend that the application is fatally defective, is an annulity in law and an abuse of the due court process.

7. Directions were taken and this court directed that the matter be disposed of by way of written submissions to cover both the preliminary

objection and the substantive application.

8. The applicant submitted that despite the deputy registrar appreciating that that the respondent was paid Kshs 100,000/- she failed factor the amount in her ruling. It was also submitted that the amount awarded, Kshs 1,126,000/-, was too exorbitant considering that the respondent did not take possession of the goods. He further faulted the ruling of the deputy registrar arguing that she failed to give reasons for her ruling as required under the **Advocates Remuneration Order** and **Article 10 of the Constitution**.

9. The applicant submitted that the preliminary objection did not meet the threshold of a preliminary objection as articulated in the case of **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors 1969 EA**.

10. The respondent submitted that matter in dispute before the deputy registrar was a dispute of the fees payable to the auctioneer by his client. The respondent contends that this being a High Court matter, the Honorable Deputy Registrar could only assess the costs but not enter judgment. The respondent advanced that judgment can only be entered by a judge and that has not been done thus there is no threat of stay of execution. It was advanced that without a judgment and a decree, a party cannot purport to execute a certificate of costs.

11. The respondent also contends that the applicant if dissatisfied with the assessment ought to have appealed within 7 days. He therefore argued that the application before this court was time barred and filed 18 days from the date of the ruling without leave of court.

ANALYSIS AND DETERMINATION

12. Having looked at the respondent's application dated 22nd October 2020 that was filed before the deputy registrar, it is clear that the respondent upon receiving instructions from the applicant to levy distress for rent against his tenant, proceeded and proclaimed the movable property on 22nd October 2020. It is not in dispute that the applicant asked the respondent to withhold execution so that he could negotiate with the tenant. It is on this basis that the applicant argues that the bill as taxed was too exorbitant considering that the respondent did not take possession of the goods. In **Agricultural Development Corporation v James Onkundi Omakori t/a Lifewood Auctioneers [2020] eKLR** this court taking a similar argument observed as follows;

"7. The respondent has argued that the amount of Kshs 88,324 was proper in the circumstances as the proclamation was as good as attachment since the goods were proclaimed and left under the custody of the applicant.

8. The applicant on the other hand has argued that the above amount was improper as there was no attachment but only proclamation and it prayed therefore that the said item ought to be set aside.

9. *Halsbury's Laws of England 10th Edition* has defined "**Attachment**" as follows;

"the seizing of a person's property to secure a judgement or to be sold in satisfaction of a judgement"

10. It is clear that the attachment involves actual action of seizing the goods. Proclamation is simply an intention to seize the goods. It means telling the judgement debtor and the whole world for that matter that the goods or items proclaimed shall be formally taken after a certain period of time, let's say 7 days. The judgement debtor is given a chance to redeem himself for those number of days and in default the goods are collected physically by way of attachment by the courts bailiffs.

11. In the matter at hand the goods as rightfully submitted by the applicant and indeed admitted by the respondent were proclaimed but not attached. The action of attaching cannot be equated to proclaiming for the simple reason that the two processes are mutually exclusive. The proclamation comes before attachment. The Auctioneer's Rules under Chapter 526 of the Laws of Kenya in the portion dealing with attachment clearly provides separate charges or fees on attachment before and after.

*12. The fees chargeable are thus different. Part II item 4 of the auctioneer's rules provide for "**fees on attachment /repossession /distrain and expenses**"*

*13. The same part also provides under item 3 for "**fees before attachment or repossession**".*

14. Now that there was no attachment or actual seizure of the appellant's goods the respondent was only entitled to fees under item 3 which in this case was kshs.4000 only and not the amount of kshs. 88,324 as taxed by the registrar.

15. Although the respondent submitted that the proclamation was as good as attachment, the same as indicated above are different."

13. However in **National Industrial Credit Bank Limited v S. K. Ndegwa Auctioneer [2005] eKLR** the Court of Appeal in considering a dispute regarding the legal entitlement by the auctioneer to fees for proclamation held as follows;

"...The purpose of the attachment is the execution of the decree. The essence of the attachment is to remove the goods from the possession of the judgment-debtor and place them in the custody of the law so that they can be sold to satisfy the judgment debt if the judgment-debtor does not pay the debt. To place the goods in the custody of the law it is not necessary, as Mr. Gatonye correctly submitted, that the goods must be carried away from the premises of the judgment-debtor. In the commentary to Order 21 Rule 43 of the Indian rule which is in pari materia to Order 21 Rule 38, the authors of Mulla, The Code of Civil Procedure 16th Edition state in part at page 2667:

“where a warrant of attachment is executed by affixing it to the out door of the warehouse in which goods belonging to the judgment debtor are stored, it amounts to “actual seizure” within the meaning of the present rule”.

It is clear from Rule 12 as read with Rule 14 of the Auctioneers Rules and the contents of the prescribed form, that is, Sale Form 2 that the proclamation of the movable goods is legally and effectively an attachment. From the moment the goods are proclaimed, the judgment-debtor is deprived of the legal possession and physical control of the goods and instead the goods are placed in the custody of the law and the court through the auctioneer. The judgment-debtor can only redeem them by the payment of the debt. If the judgment-debtor fails to pay the auctioneer moves to the second stage of conducting the sale of the attached goods.

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.”

14. The respondent having issued a proclamation notice to the applicant’s tenant on 22nd October 2020, I find that the applicant’s tenant was deprived of the legal possession and physical control of their goods. The deputy registrar cannot be faulted for taxing the bill on the basis of the value of the tenant’s goods that were in the premises. However, I find that she ought to have considered that the respondent had already been paid Kshs 100,000/- by the applicants a fact which was not contested.

15. However considering that this is an appeal envisioned under **Rule 55 (5) of the Auctioneer’s Rules**, I find that the application was filed out of time and without first seeking for leave of court. **Rule 55 of the Auctioneer’s Rules** provides as follows:

“55 (1).....

(2)Where a dispute arises as to the amount of fees payable to an auctioneer

a) in proceedings before the High Court; or

b) where the value of the property attached or repossessed would bring any proceedings in connection with it within the monetary jurisdiction of the High Court, a registrar, as defined in the Civil Procedure Rules (Cap 21, Sub. Leg.), may on the Application of any party to the dispute assess the fee payable.

(3).....

4) An appeal from a decision of a registrar or a magistrate or 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. In **Joel Titus Musya t/a Makuri Enterprises v Southern Credit Trading Corporation [2007] eKLR** the court held 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 of magistrate.”

The decision of the registrar in this matter was delivered on 22nd November, 2004. Even if the reference filed herein answered properly to a memorandum of appeal, it was filed in court on 2nd November, 2005. That was nearly one year from the date of the ruling. Secondly, even if were to go by the date on which the court said the parties may consider to file a reference without reasons of the taxing master, that was on 14th October, 2005 – a whole 19 days after the directions. Either way, therefore the application was filed in court out of time. If for no other reason, I find that the application was not filed within the time stipulated, and this renders the application incompetent beyond redemption.”

17. In the end, the application dated 23rd March 2021 is hereby dismissed for reasons that it was filed out of time.

DATED, SIGNED AND DELIVERED AT KISII THIS 7TH DAY OF JULY 2021.

A.K. NDUNG’U

JUDGE