REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. CIVIL SUIT NO. E440 OF 2020

NATION MEDIA GROUP LIMITED.....APPLICANT

VERSUS

BENARD MURIUKI GATURUKU T/A BENSURE AUCTIONEERS.....RESPONDENT

RULING

This ruling relates to the applicant's reference vide Chamber Summons dated 19th October, 2020 seeking the following orders;

> **i) THAT the Honourable Court be pleased to set aside the Taxing Officer's Ruling delivered on the 8th of May 2020 in Misc Civil case number 249 of 2017 Benard Muriuki Gaturuku T/A Bensure Auctioneers vs Nation Media Group Limited as it relates to the reasoning and determination pertaining to the Auctioneers Bill of costs filed on the 23rd of June 2017.**
>
> **ii) THAT this Honourable court be pleased to strike out the Auctioneer's Bill of costs filed on the 23rd of June 2017.**
>
> **iii) THAT cost of this application be provided for.**

The Reference is premised upon Regulation 55 of the Auctioneers Rules, 1997 and all the enabling provisions of the law and is supported by the Affidavit of **SEKOU OWINO,** the head of legal & training of the applicant sworn on 19th October, 2020.The respondent opposed the Reference through a Replying Affidavit dated 10th February, 2021 sworn by **BENARD MURIUKI GATURUKU,** the respondent. The Reference was canvassed by way of written submissions. The applicant filed its written submissions dated 16th July, 2021 whilst the respondent filed its written submissions on 28th June 2021.

The applicant's case is that it was sued in **Milimani High Court Commercial Court Case No. 420 of 2011; Samuel Ndungu Mukunya vs Nation Media Group Limited and Another** where the plaintiff was awarded Kshs. 20,000,000.00 together with costs and interest totaling Kshs. 2,759,585.00. That the plaintiff filed his Bill of Costs dated 22nd February, 2016 which was taxed in the presence of the party's counsel on 19th May, 2019 at a sum of Kshs. 583,147.00 and a thirty (30) days stay of execution issued. That despite the stay orders being in force, the respondent sought to execute the court decree on 2nd June, 2016. Following the execution, the file was placed before the Deputy Registrar for directions where the warrants of attachment issued on 27th May 2016 were recalled as the stay period had not lapsed.

It is the applicant's contention that after the lapse of the stay issued by the deputy registrar, the respondent filed its Bill of Costs for Kshs. 601,947.00 in respect of the attachment and proclamation done between 27th May, 2016 and 2nd June, 2016 in **Milimani High Court Commercial Court Case No. 420 of 2011.** In opposition to the Bill of Costs, the applicant filed a Preliminary Objection which the taxing officer directed that it be heard by way of written submissions. That on 8th May, 2020 the Deputy Registrar taxed the respondent's bill of costs as drawn in the sum of Kshs. 601,947 with no determination in respect to the applicant's Preliminary Objection.

The applicant submits that the court ought to have determined the Preliminary Objection first before proceeding to tax the respondent's Bill of Costs.

The applicant sought to rely on the case of **JUSTICE KALPANA H. RAWAL V JUDICIAL SERVICE COMMISSION & 5 OTHERS [2016]eKLR,** where the court opined that a preliminary objection if successful may dispose off a matter or substantially affect the proceedings even if it does not dispose it off. While acknowledging that it filed its submissions late, the applicant maintains that the same was filed before the ruling was delivered. Thus the ruling of the taxing master of 8th May, 2020 in respect of the respondent's bill of costs was contrary to the principles of law especially since the warrants in question were irregular and a nullity having being obtained during the existence of valid stay orders.

The applicant has urged this court to allow the reference and order that the plaintiff who issued the instructions to the respondent despite

having full knowledge of the existing stay orders to settle any claim by the respondent. To this end the applicant has relied on the case of **RUBO KIMNGETICH ARAP CHERUIYOT VS PETER KIPROP ROTICH[2006]eKLR** where the court found and held that an action of execution of warrants of attachment and sale by the defendant during the pendency of the application for stay of execution amounted to an abuse of the court process.

The respondent in opposition confirmed that he was issued with warrants of attachment on 27th May, 2016 after which he proclaimed against the applicant. According to the respondent, despite being given enough time, the applicant filed its submissions in support of its preliminary objection in response to his Bill of Costs out of time and after the file was already in chambers awaiting a ruling. Additionally, the respondent contends that the applicant's submission was neither in the court records at the time the ruling was being delivered nor was it served on the respondent's advocates.

According to the respondent, the issues for determination are whether the applicant failed to comply with the court's directions, whether the Taxing Officer ruling of 8th May, 2020 was regular and who should bear the cost of this application. On the first issue, the respondent submitted that the applicant was indolent as it failed to comply with court's directions for filing submissions and that its averments that both parties had complied with the courts directions are misleading. The respondent relies on the decision of Justice Munyao in the case of **FRANCIS KIPKOECH KIGEN V MWANAHAMISI IDDI MWACHANYUMA [2021]eKLR** where the court disallowed an application for reinstatement of an application dismissed for failure to prosecute and for non attendance, failure to file submissions on time and failure to pay the court fees.

The respondent further submitted that the Taxing Officer's ruling of 8th May, 2020 was regular as the same was issued in line with her powers under Section 13A of the Advocates (Remuneration) Order. Further submission is that the taxing officer gave the applicant the opportunity to be heard which opportunity was disregarded and was not complied with. The respondent referred to the case of **MBUGUA & MBUGUA ADVOCATES V KENINDIA ASSURANCE CO. LTD [2016]eKLR** where Justice Sergon emphasized the need for the Taxing Officer to act within her jurisdiction under Rule 13A of the Advocates (Remuneration) Order. Further reliance was placed on the case of **MAGNOLIA PVT LIMITED V SYNERMED PHARMACEUTICALS (K) LTD [2018]eKLR** where Justice Makau dismissed an application for setting aside orders which were issued following non compliance of court directions on filing of pleadings.

On costs, it is submitted for the respondent that cost follow the events and since it is the applicant's indolence that has brought about the present application, it should be condemned to pay the costs. Reliance has been placed on the case of **PETER MURIUKI NGURE V EQUITY BANK (K) LTD [2018]eKLR** where Nzioka J. made reference to the definition of event in the Judicial hints on Civil Procedure by Justice (Rtd) Kuloba where 'costs shall follow the event' means a party who on the whole succeeds in the action gets general costs of the action.

Analysis and Determination;

It is not in dispute that the matter before this Court is a challenge by the applicant against the taxing officer ruling of 8th May, 2020 which assessed the Auctioneers' Bill of Costs at Kshs. 601,947.00.

The reference is brought under Rule 55 of the Auctioneer's Rules which provides as follows:

> ***(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)In any other case where a dispute arises as to the amount of fees payable to an auctioneer a magistrate or the Board may, on the application of any party to the dispute, assess the fees payable.***
>
> ***(4)An appeal from a decision of a registrar or a magistrate or the Board under subrules (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.***

Under the Auctioneers Rules as outlined hereinabove, the procedure prescribed where one challenges the decision of the Taxing Officer is by a memorandum of appeal by way of Chambers summons. In addition, Rule 55 (5) of the Auctioneers Rules only allows a window of 7 days within which to file an appeal after the decision is made.

The ruling by the Taxing Officer was delivered on 8th May, 2020 and the applicant moved to file the present reference on 19th October, 2020, six (6) months later. A perusal of the court record indicates that there was no leave sought to file the reference out of time thus confirming that the applicant has failed to come to court within the time specified by the Law.

The provision of Rule 55(5) of the Auctioneer Rules, 1997 are mandatory in nature and goes to the root of the application before court. The Court of appeal in the case of **MISTRY VALJI NARAN MULJI V EZEKIEL KIMINZA T/A AUTOLAND AUCTIONEERS [2019]**

eKLR while addressing itself to similar issues held that;

> **"13. On the other hand, the question of the competence of the appellant's application dated 14th March, 2017 is not an idle one. Luckily, learned counsel for the appellant concedes that the application was filed out of time and without leave of court. That being the case, and as succinctly pronounced by a plethora of decisions of this Court, Article 159 of the Constitution 2010 cannot breathe life into it. Filing a suit or application out of time and without leave of Court to extend time goes to the root of the suit/application and is not merely a procedural defect. It cannot be a technicality that could be cured by the provisions of Article 159 2 (d) of the Constitution and Order 51 Rule 10(2) of the Civil Procedure Rules. The learned Judge cannot therefore be faulted for dismissing the chamber summons on that ground. He applied the law and exercised his discretion properly."**

In view of the aforesaid clear provisions and case law, this Court does not have authority to entertain the application on the merits as the same is incompetent and a non-starter *in limine*. Consequently, the application is hereby struck out with costs to the respondent. However, the applicant is at liberty to move the High Court for extension of time in the proper manner.

DATED DELIVERED AND SIGNED AT NAIROBI THIS 14TH DAY OF OCTOBER, 2021

.....

S. CHITEMBWE

JUDGE