



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISCELLANEOUS APPLICATION NO. E115 OF 2018

JOSEPH GIKONYO T/A GARAM INVESTMENTS.....APPLICANT

VERSUS

JOHN KIHONGE WAINAINA.....RESPONDENT

RULING

1. Through Chamber Summons dated 29th March 2019, the appellant/auctioneer filed a reference against the decision of the Deputy Registrar Honourable **Elizabeth Tanui** seeking orders that:

1. That the ruling of the Deputy Registrar Honourable Elizabeth Tanui delivered herein in 22nd March 2019 in the matter of taxation of Auctioneer's Bill of Costs dated 12th October 2018 between Joseph Gikonyo t/a Garam Investments and John Kihonge Wainaina be and is hereby varied and or set aside.

2. That this Honourable court be pleased to order that the Auctioneer's Bill of Costs dated 12th October 2018 be placed before another Taxing Officer for taxation.

3. That the cost of this application be provided for.

2. The application is supported by the applicant's affidavit and is premised on the grounds that:

a) The Honourable Deputy Registrar misdirected herself by finding that the court orders issued on 30/7/2018 and 1/10/2018 was only in respect of the Auctioneer's costs in regards to the instructions of 18/5/2018.

b) The Honourable Deputy Registrar erred in law and in fact by failing to appreciate that the Auctioneer received two (2) separate instructions dated 18/5/2018 and 19/9/2018 respectively in regards to Talewa Road Constructions Limited, title No. Kajiado/Kaputei South/2317 Parane Area Ol Karkar Group Ranch Kajiado County, the subject property herein.

c) The Honourable Deputy Registrar erred in law and in fact by failing to consider in its entirety, Item two(2) of the Auctioneer bill of costs dated 12/10/2018.

d) That the Honourable Deputy Registrar failed to appreciate the import and meaning of Rule 55(2) and paragraph 7 of Part II of the Fourth Schedule of the Auctioneer's Rules, 1997 and Order 49 of the Civil Procedure Rules, 2010 which gives the Registrar jurisdiction to tax the Auctioneer's bill of costs and this item two (2) of the bill of costs ought to have been taxed as the same was due and owing.

e) The Deputy Registrar failed to recognize that the respondent (herein the debtor) was obligated to pay the Auctioneer's costs in respect of the instructions of 19/9/2018 as envisaged in Rule 7 of the Auctioneer's Rules 1997.

f) The Deputy Registrar erred by failing to award the Auctioneer's advertisements costs for 16/7/2018 and 30/7/2018 yet the Auctioneer had filed copies of receipts and Newspaper advertisements in respect of item one (1) of the bill of costs.

3. At the hearing of the application, **Mrs. Okullo**, learned counsel for the auctioneer reiterated the grounds listed in the application and submitted that the auctioneer received instructions twice, on 18th May 2018 and 19th September 2018 and that in both instances; the applicant

issued the requisite notices and thereafter advertised the property for sale. It was further submitted that in both instances the intended sale by publication was stayed and that the court made specific order for the payment of the auctioneer's costs.

4. It was submitted that having received two separate instructions and having advertised the suit property twice, the auctioneer was entitled to instruction fees in both instances together with the costs of the advertisements. It was submitted that the two court orders were mutually exclusive and that the Deputy Registrar erred in holding that he was only entitled to fees once for a single instruction. For this argument counsel relied on the decision in **Ibrahim Hussein Mahadi & Another v Gulf African Bank Ltd & Another** Civil Suit No. 285 of 2017 wherein Onguto J. held that:

“It is not in dispute that the property was advertised for sale and indeed scheduled for sale on two occasions. The sales were subsequently cancelled. The auctioneer would be entitled to the advertising costs for the two occasions as well as commission twice over....”

5. It was submitted that Rule 7 of the Auctioneers Rules is clear on when party responsible for the auctioneers' fees. For this argument counsel cited the case of **E.J. Austin & 2 Others v Chon Jeum Suk Kim** [2017] eKLR where the court held:

“that question has an outright and straight forward answer when due consideration is given to the Auctioneers Act and the Rules.....The law as embodied in the Rules is that it is the judgment debtor to pay the auctioneer costs unless the three conditions set under the rule were met. In this case, none of the conditions were met hence it remains that it is the judgment debtor to pay.....”

6. It was further submitted that the auctioneer is entitled to costs for newspaper advertisement as provided for under paragraph 7 Part 11 of the Fourth Schedule of the Auctioneers Rules. Counsel observed that the applicant had demonstrated that he advertised for the sale of the suit property twice and incurred costs of the said advertisement receipts of which he attached in his bundle of documents.

7. It was further submitted that the two auctions having been stayed; the auctioneer became lawfully entitled to 50% of the commission he would have earned had the sale proceeded plus his expenses.

8. The respondent opposed the application through his replying affidavit dated 25th June 2019 wherein he avers that the Deputy Registrar exercised her discretion correctly in finding that the applicant was entitled to fees for the instructions of 18th May 2018 only. He further avers that the applicant intends to enrich himself unfairly by hiding under the Auctioneers Rules.

9. At the hearing of the application, **Mr. Kamau**, learned counsel for the respondent submitted that the court orders of 30th July 2018 and 1st October 2018 directing the auctioneer to file his bill of costs for taxation only relates to costs that are justifiably incurred by the auctioneer. It was submitted that there was a dispute as to whether there were subsequent instructions issued to the auctioneer by his principal on 19th September 2018.

10. It was submitted that commission cannot be charged twice for the same instructions. For this argument counsel cited the case of **Keysian v National Cereals and Produce Board** HC Misc. Application No. 328 of 2012 wherein it was held:

“However a commission cannot be charged twice for the same instructions. It is noteworthy that there were no two sets instructions.....the first instructions issued on 13th March 2012 were re-issued on 18th May 2012 in respect of the same party and the same subject matter and attachment. Allowing commission twice for the same instructions was an error on the part of the Honourable Deputy Registrar.”

11. It was submitted that the purported advertisement of 30th July 2018 was for the sole purpose of increasing the applicant's chances of earning more fees at the expense of the respondent and that no documentary evidence was presented to support the claim for costs for the newspaper advertisement or that the applicant was instructed a second time to sell the suit property.

12. I have considered the instant reference, the affidavits on record and the submissions of counsel together with the authorities that they cited. The main issue for determination is whether the Deputy Registrar erred in principle in rejecting certain items on the applicant's bill of costs dated 12th October 2018. The items under dispute are:

a) Item (2) of the bill of costs which was taxed off in its entirety.

b) Costs of newspaper advertisement on item (1).

13. The applicant relied on the provisions of paragraph 7 of Part 11 of the Fourth Schedule of the Auctioneers Rules for the argument that for every stayed auction he was entitled to 50% of the commission he would have earned had the sale proceeded. The said paragraph stipulates as follows:

“Where requisite notices are served and sale is stayed, or postponed the Auctioneer shall be entitled to half (½) of fees to which he would have been entitled to after sale, plus expenses.”

14. The Auctioneer contended that he received two separate instructions to sell the suit property and that he was therefore entitled to advertisement costs of the two occasions as well as the commission twice over while the respondent maintained that if indeed there were

second instructions, the applicant ought to recover the same from his principal and not the respondent. The respondent's case was that there was no evidence that the auctioneer had any instructions, from his principal, to sell the respondents property after the first auction was stopped and further that there are no supporting documents or receipts in support of the purported newspaper advertisement of 24th September 2018 for the amount of Kshs 20,952 claimed in the Bill of Costs.

15. I have perused the applicants documents contained in the list of documents dated 28th November 2018 and I note that it is clear that on 18th May 2018, the applicant received clear instructions from M/S Walker Kontos Advocates to sell the respondents suit property.

16. It is also clear that that through a letter dated 19th September 2018, the said firm of advocates and also instructed the applicant to proceed with the sale of the property as follows:

“Attention: Mr. Joseph M. Gikonyo:

The interim orders were a period of five (5) days which have since lapsed as per the attached court order. You have instructions from our mutual client to proceed with the sale of the property

High Court Kajiado.”

17. I therefore find that the auctioneer received two sets of instruction in May 2018 and September 2018 to sell the same property. It was not disputed that in both instances, the sales were stopped through court orders.

18. I also note that the applicant's list of documents contains the Daily Nation Newspaper advertisements for 24th September 2018 and a receipt for the said advertisement dated 22nd September 2018. From the above foregoing and guided by the decision of Onguto J. In the ***Ibrahim Hussein Mahadi*** case (supra) I find that the property was scheduled for sale on two different occasions and the said sales having been cancelled, the auctioneer was rightly entitled to both the advertising costs as well as commissions for both occasions.

19. Consequently, I find that this reference is merited and I therefore allow it with the result that the auctioneer's bill of costs dated 12th October 2018 is hereby referred to another Deputy Registrar, other than Honourable Elizabeth Tanui, for fresh taxation of the disputed items only.

20. I make no orders as to costs of the reference.

Dated, signed and delivered in open court at Nairobi this 13th day of February 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Tum for M.B. Okulo for the auctioneer

Mr. Genga for Kamau for the respondent.

Court Assistant – Sylvia