REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

MISCELLANEOUS CIVIL APPLICATION NO.86 OF 2019

AGRICULTURAL DEVELOPMENT CORPORATION.....APPLICANT

VERSES

JAMES ONKUNDI OMAKORI T/A LIFEWOOD AUCTIONEERS....RESPONDENT

RULING

1. This is a Reference by the applicant dated **26th November 2019** in which it seeks to set aside the ruling of the honourable Deputy Registrar dated **4th November 2019** awarding costs to the respondent. The applicant as well prays that the bill be taxed afresh by this court or it be referred to the said court for fresh taxation.

2. The application is supported by the affidavit of Dr. Maurice Cherogony dated the same day. Basically the applicant has raised complaints regarding several items including attachment fees, investigation fess, and transport on proclamation as well as investigations. According to the applicant the taxing master misdirected herself on the said items.

3. The said deponent has also filed a further affidavit sworn on 19th February 2020 in which he has itemised the relevant areas of the bill that are contentious.

4. The respondent through his replying affidavits sworn on 21st February 2020 and 4th March 2020 has defended the bill as well as the court's ruling. He argued in particular that the bill was well taxed and the contentious part especially instruction fees upon attachment of Kshs 88,324 was well calculated by the court.

5. The parties were directed to file their written submissions which they have complied and the court has perused the same. Basically they are pulling on their respective corners and all that they state is reiterating what is contained in the various affidavits outlined above.

6. Having gone through the pleadings herein the duty of this court is to either allow the application as it is, refer the bill to the taxing master for afresh taxation or proceed to tax the same and provide a definite conclusion. In this case, considering the fact that the issues are clear and straight forward and that there is only one major item, namely whether the respondent was entitled to attachment fees, this court shall proceed to determine the bill afresh.

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. Had the applicant failed to pay the decretal amount then it would have been logical to attach the proclaimed goods and would have been entitled to the fees under item 4 above.

16. The applicant contrary to the applicant's submission was entitled to charge VAT for the fees chargeable as he was VAT compliant.

17. Under transport the court takes judicial notice of the applicant's situation and the amount of kshs15,000 was on the higher side. A sum of kshs, 5,000 to cover the transport expenses was reasonable in the circumstances.

18. The tabulation by the respondent under paragraph 14 of his affidavit sworn on 4th March 2020 is incorrect. The fourth schedule specifies the range in which parties should bill their fees. In this case the respondent was allowed to bill at 2% out of the principal amount as his fees. What the respondent has done is to segment as if one is supposed to charge beginning from the least figure to the highest. That would be superfluous and will lead to unjust enrichment. The intention of parliament was one to bill within his bracket and not to interfere with the other brackets so to speak.

19. For the foregoing reasons the bill is hereby taxed as follows;

(a)Receipt of warrants kshs1000

(b) Fees before attachment .....kshs 4000

(c) VAT on above at 16%.....kshs.640

(d) Transport kshs.5000

(e) Out of pocket expense.....kshs5000

(f) Drawing bill of costs.....kshs1100

(g) Drawing the application fees.....kshs.1100

(h) Attending court for taxation.....kshs 1900

(i) Court fees for filing application kshs925

(j) Serving bill of costs..... kshs1400

Total kshs.22065

20. Since there was no opposition in the second bill of costs, the amount **of Kshs 25,175** is allowed as prayed.

21. In total the amount payable to the respondent **is Kshs. 47,240.**

22. The Deputy Registrars ruling together with all the attendant consequences are hereby set aside. The applicant shall have the costs of this application.

Delivered, Signed and Dated at Kitale this 11th day of December 2020.

H K CHEMITEI

JUDGE.