



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 407 OF 2010

JOHN GIKONYO T/A GARAM INVESTMENTS.....AUCTIONEER/APPELLANT

VERSUS

PAN AFRICAN CREDIT & FINANCE LIMITED.....RESPONDENT

JUDGMENT

1. The auctioneer has lodged an appeal against the taxing master's ruling delivered on 27th September, 2010. In a nutshell, the background facts leading up to the appeal are that the auctioneer/appellant had previously filed a bill of costs dated 15th September, 2009 in High Court Misc. Application No. 791 of 2009 and which bill of costs was subsequently taxed by the taxing master.

2. Thereafter, the auctioneer/appellant sought to have the said taxation ruling reviewed for the reason that his submissions had not been taken into account. The taxing master vide his ruling delivered on 27th September, 2010 held that the auctioneer's/appellant's submissions had not been filed as ordered and thus, there was no basis on which a review could be granted and moved to dismiss the application for review. Being dissatisfied with the same, the auctioneer/appellant filed a memorandum of appeal dated 6th October, 2010.

3. Written submissions were filed on the appeal. The auctioneer/appellant essentially submitted that the taxing master erred in declining to review his ruling of 6th January, 2010 on the basis that his submissions had not been filed by the time the bill of costs was being taxed, adding that the taxing master ought to have exercised his discretion judiciously in considering the aforementioned submissions once the same were brought to his attention.

4. The auctioneer/appellant further made reference to Rule 55 of the Auctioneers Rules 1997 but distinguished the same for the reason that the appeal is against the taxing master's ruling dismissing the application for review and not the ruling on taxation. That resultantly, Rule 55 above cannot apply. He went on to argue that the taxing master's decision went against the oxygen principle.

5. In opposition thereto, the respondent contended that not only were the auctioneer's/appellant's submissions not filed in good time, but that the same could not have formed a ground for a review. The respondent also argued that pursuant to Paragraph 11 of the Advocates Remuneration Order, a party wishing to challenge the decision of a taxing master can only do so by way of a reference and hence, the appeal is improperly before this court. Further, the respondent submitted that the auctioneer's/appellant's submission on the oxygen principle lacks merit and ought to be rejected.

6. In highlighting her submissions, *Mrs. Okulo* advocate for the auctioneer/appellant reiterated the averments in the submissions, save to add that whereas the earlier submissions were indeed filed outside of the timelines specified by the taxing master, the said taxing master in his ruling indicated that the same were not before him. *Mrs. Okulo* asserted that the taxing master ought to have considered that the submissions had been filed albeit late in the day, and on this basis he ought to have reviewed his decision.

7. In her opposing oral arguments, *Ms. Simiyu* counsel for the respondent maintained that the auctioneer's/appellant's submissions were filed late and in contravention of Article 159 of the Constitution which is clear that justice shall not be delayed. Counsel in turn reiterated that the proper procedure for challenging the decision of a taxing master is by way of a reference.

8. I have taken to mind the arguments by the parties, both oral and written, coupled with the respective authorities cited, though I have noted that the same do not directly address the substantive issue before me. That notwithstanding, I am required to first determine whether or not the appeal is properly before me and if the answer is in the affirmative, to address the grounds set out therein.

9. The procedure for challenging a ruling on taxation is captured under *Paragraph 11* of the Advocates (Remuneration) Order and more specifically, *Rule 2* which stipulates that any party aggrieved with the decision of a taxing master is at liberty to file a reference to the High Court.

10. From the above, it is evident that the procedure on taxation proceedings is unique in every sense of the word. That being the case, I am convinced that the law does not envisage instances of appeal and/or review of a taxation decision save by way of a chamber summons reference. A similar view was taken by the court in *Hezekiel Oira T/A H. Oira Advocate v Kenya Broadcasting Corporation [2015] eKLR* in this respect:

“Under the said Paragraph 11 of the Advocates Remuneration Order, an “appeal” against the decision of a taxing officer in a taxation matter is not provided for. The only procedure provided for an “appeal” or “review” against the decision of a taxing officer is by way of a reference.”

11. In the present case, it is not in question that no reference has been filed. It has also been ascertained that the appeal is against the ruling on a review but which ruling stems from a taxation decision, both of which were delivered by the same taxing master. Rather than file a reference, the auctioneer/appellant opted to file an application for review before the taxing master and subsequently, an appeal to this court under the purview of the oxygen principle.

12. In view of the foregoing, is the appeal properly before me? In answering so, I once again draw guidance from *Hezekiel Oira T/A H. Oira Advocate* (supra) wherein it was held that:

“In my view, the applicant cannot invoke the Civil Procedure Act and Rules made thereunder to circumvent the procedure provided under the Advocates Act and the Advocates Remuneration Order in regard to review of a decision of the taxing officer in an advocate/client bill of costs where the taxing officer exercises the special jurisdiction conferred upon him or her under the Advocates Remuneration Order and NOT in his capacity as the Deputy Registrar of this court.”

13. I must mention that whereas the above-cited case makes reference to an advocate-client bill of costs, I am satisfied that the same principles are applicable. What was before the taxing master was an auctioneer bill of costs which was taxed by the relevant taxing master. In so doing, the taxing master acted within a special form of jurisdiction and thus, the Advocates (Remuneration) Order would apply. In any event, Rule 55 of the Auctioneers Rules 1997 relied upon by the auctioneer/appellant provides that an appeal shall be lodged by way of a chamber summons, though I might add that the said provision does not relate to the taxation of a bill of costs.

14. Further to the above, judicial precedents are in agreement that where there exists a clear-cut procedure for doing something, the same ought to be followed to the latter. This reasoning was held by the Court of Appeal in the case of *Speaker of the National Assembly v Karume (2008) 1 KLR 425* as follows:

“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

15. The above was advanced in *Machira & Co. Advocates v Arthur Magugu & Another (Civil suit Misc. Application No.358 of 2001)* (unreported) as cited in *Kalya & Co. Advocates v Tausi Assurance Co. Ltd [2006] eKLR* that:

“...as I understand the practice relating to taxation of bills of costs, any decision of a taxing officer whether it relates to a point of law taken with regard to taxation or a grievance about the taxation of any item in the bill is ventilated by way of a reference to the Judge in accordance with paragraph 11 of the Advocates Remuneration Order...”

16. In light of the above, it cannot be refuted that there is a clear procedure for challenging a taxing master’s decision and which procedure was not followed in the present instance. The auctioneer/appellant had no other avenue of challenging the taxing master’s decision save by way of a reference and therefore the Appeal before me is incompetent.

17. Having determined that the appeal is incompetent, I find no need to delve into the merits thereof.

18. The upshot is that the appeal is lacking in merit and form; consequently, the same is hereby struck out with costs to the respondent.

Dated, signed and delivered at **NAIROBI** this 7th day of March, 2019

L. NJUGUNA

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent