



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISC. CIVIL APPLICATION NO.9 OF 2019

IN THE MATTER OF TAXATION OF AUCTIONEER'S BILL

OF COSTS AND IN THE MATTER OF THE AUCTIONER'S ACT

KEROCHE BREWERIES LTD.....APPELLANT

-VERSUS-

HEZRON GETUMA T/A HEGEONS AUCTIONEERS.....RESPONDENT

JUDGMENT

1. By a chamber summons dated the 4<sup>th</sup> February 2019 the appellant seeks the following orders that ;

(a) The ruling delivered by the Resident Magistrate's Court in **Ogembo PM Miscellaneous Civil Application No.18 of 2018** be reviewed and/or vacated and in lieu thereof there be made an order striking out and/or dismissing **Ogembo PM Miscellaneous Civil Application No.18 of 2018**.

(b) Costs of **Ogembo PM Miscellaneous Application No.18 of 2018** and of this appeal be borne by the respondent in any event.

2. The appeal is buttressed upon the following grounds that ;

i. The respondent hereto (hereinafter referred to as **"the auctioneer"** where the context may so admit) lodged a Notice of Motion seeking a raft of reliefs, chief of which was assessment of their fees pursuant to the Fourth Schedule of the Auctioneers Rules (hereinafter referred to as **"the Rules"**) founded upon instructions given to him by the Respondent in **Ogembo SRM Civil Suit No.212 of 2016**.

ii. The trial magistrate totally misapprehended the tenor, import and purport of the provisions of **Rule 55(1)** of the Rules by failing to adopt the appellant's objection and submissions but instead proceeded to uphold the Respondent's bill of costs as drawn.

iii. The trial magistrate erred in failing to find that lodgment of the application by the auctioneer for determination of his fees pursuant to the Fourth Schedule in the face of the proclamation allegedly executed was a nullity.

iv. The trial magistrate erred by failing to properly interpret the provisions of Rule 7 of the Auctioneers Act for determination of Respondent's fees in the face of the proclamation allegedly executed was a nullity.

v. The trial magistrate erred proceeded to give excessive award without any tangible evidence that the alleged costs were ever incurred.

vi. The trial magistrate gave an award as it was an attachment.

vii. The respondent has by the ruling appealed been afforded benefits not within the contemplation of **Rule 55(1)** of the Auctioneers Rules.

3. Mr. Wesonga submitted part 2 of the Auctioneers Rules outlines the charges, there is fees for warrants Kshs.1000/- and fees for attachment Kshs. 4,000/-. That the trial court proceeded on items not provided, item no. 3 is not provided for, it's exaggerated and inordinately high. It's based on the value of the items proclaimed. There was no valuation report of the items proclaimed. That on item no. 4 on transport the same is not provided for in the Auctioneers Act, Part II 4<sup>th</sup> Schedule. There was no supporting document for it. On item no. 6 on investigations there was no documentary proof to indicate it was paid for. That the assets sought could be easily gotten. That item 7 was high there was no

proof of it. On item 8 on disbursements there was no proof. That the figure of 25,000/- sought in item 9 is also charged in item 6. The figures are high and exaggerated. Item 16 has no basis. After outlining these items the appellant sought to have their appeal allowed.

4. The respondent in response submitted that some items like item 7 and 9 were taxed off. That on item no. 3 the Auctioneer is entitled to the sums provided at paragraph no. 4 of Part 11 of schedule 4. That they admit that the attachment was postponed but that does not deny the auctioneers fees. That on item no. 16 the lawyer's instructions the court should take judicial notice that the bill was attached to the application. On item no. 4 paragraph 11 travelling expenses are provided for. It was submitted that the finding of the taxing officer was proper.

5. In response Mr. Wesonga submitted the bill was filed by the auctioneer the law mandates him to appear in person in taxation matters and therefore item 16 was uncalled for. That on item no. 4 the expenses are applicable on attachment, that what was done was a proclamation.

6. The genesis of this appeal is that on the 19.6.2018 Hezron Getuma Onsongo trading as Hegeons Auctioneers filed a Notice of Motion under Rule 7 & 55 of the Auctioneers Rule 1997 and Legal Notice of 44 Amended Auctioneers Rule Section 15/2009 seeking to have his bill of costs taxed. In his affidavit in support of the application he deposed that he had received warrants of attachment and sale against the moveable properties of the appellant Caroché Breweries on the 22<sup>nd</sup> May 2018 and he proceeded to proclaim the moveable properties of the appellant on the 11<sup>th</sup> June 2018. On the 14<sup>th</sup> June 2018 he was served with an order of stay of execution. He sought to have his bill of costs paid so that the appellant could pay the same. The warrants he was given to execute was for sum of Kshs. 2,718,079/-. In his application he attached the said a copy of the court warrants, the proclamation, the stay order and the bill of costs. The application was opposed by the appellant on the basis that the judgment obtained was an interlocutory judgment and that they had sought to set it aside and obtained a stay order and that with the stay order there was no execution that was to be carried out until the court made a ruling on the same. The appellant also argued that proceeding with the taxation of the bill of costs would during the existence of the said orders would be executing through the back door. The appellant sought a stay of the proceedings pending the determination of the application to set aside the exparte judgment.

7. In the ruling dated the 26<sup>th</sup> September 2018 the trial magistrate declined to grant the stay and proceeded to tax the bill of costs. Having considered the proceedings in the subordinate court in my view the trial court ought to have stayed the proceedings pending the ruling on the application to set aside the exparte judgment. To allow that auctioneer to proceed with taxation of his bill of cost pending the application to set aside the judgment that brought about the execution was error. Further to proceed to tax the bill on the sum indicated in the warrants was error. What the auctioneer was entitled to if at all, is fees for the work done. The amount taxed under item 3 was erroneous. The other items challenged needed to be proved. The auctioneer was entitled to his fees but only for the work done in accordance to the provisions of the Auctioneers Act and Rules .I therefore set aside the ruling delivered by the Resident Magistrate Court's in Ogembo PM Miscellaneous Civil Application No. 18 of 2018. The Auctioneer's Bill of Cost shall be taxed by another Magistrate at Ogembo Law Courts. The original file shall be returned to Ogembo Law Courts within 7 days. Each party shall bear its own costs.

**Dated and delivered at Kisii this 3<sup>rd</sup> day of May 2019.**

**R.E. OUGO**

**JUDGE**

**In the presence of;**

Mr. Wesonga h/b Mr. Mose For the Appellant

Respondent Absent

M/s Rael Court Clerk