



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISC. CIVIL APPL. NO. 263 OF 2014

IN THE MATTER OF TAXATION OF THE AUCTIONEERS CHARGES

CHEMELIL SUGAR COMPANY LIMITED.....APPLICANT

VERSUS

GEORGE ARUNGA SINO T/A MAYHOOD AUCTIONEERS.....RESPONDENT

RULING

1. The application dated 8th December 2014 was brought by **CHEMELIL SUGAR COMPANY LIMITED**, seeking stay of execution pending the hearing and determination of the Applicant's appeal.
2. The Applicant also asked the court to set aside the assessment of the Auctioneer's Charges, in respect to specified items which the Applicant was disputing.
3. It is common ground that the Auctioneer's Charges arose when the auctioneer, **GEORGE ARUNGA SINO Trading As MAYHOOD AUCTIONEERS**, had carried out a process of execution in the case of **JOHN OTIENO HONGO V. CHEMELIL SUGAR COMPANY LIMITED & ANOTHER (NYANDO) SRMCC NO. 1B OF 2007**.
4. According to the Applicant, the Auctioneer's Bill of Costs ought not to have been taxed because the parties herein had negotiated an agreed fee, and the Applicant had already settled the said agreed fee. Therefore, the Applicant submitted that the auctioneer was estopped from raising a second bill.
5. The issue of Estoppel had been raised by the Applicant when the matter was before the learned magistrate who taxed the bill.
6. Before this court, Mr. Munwang'u Advocate stated that there had been neither negotiations nor payment of the Auctioneer's fees.
7. I have perused the record of the proceedings in relation to the taxation of the auctioneer's bill. On 2nd December 2014, Hon. P. Wechuli RM delivered his Ruling on the company's objection to the taxation. In the said Ruling, the learned magistrate made the following findings which are relevant to the matter now before me;

"b) The defendant has not produced any evidence to prove that the agreed auctioneer's fee was Kshs.45,000/=. There is no consent on the fee note Before court.

c) The Auctioneer, in his bill has acknowledged receipt of Kshs.25,000/=. However, no evidence has been produced to show whether this was full payment as alleged by the defendant."
8. In the light of that express finding by the learned magistrate, it was not open to the Respondent herein to allege that he had not received any payment, yet he had not challenged that finding through either a reference or an appeal.
9. The fact is that the Auctioneer received payment of Kshs.25,000/= from the Applicant in the year 2010.
10. In the circumstances, the Court fully appreciates the Applicant's surprise, when four years later, the Auctioneer lodged a bill of costs, in relation to the same services for which some payment had been made.
11. The bill of costs in issue in this appeal arose from **SRM CC NO. 1B of 2007**. The judgment in that case was delivered on 3rd November 2010, when the learned trial magistrate awarded Kshs.68,000/= as compensation.

12. The costs of the said suit were assessed in the sum of Kshs.45,000/=.
13. Thereafter, the Auctioneer's Bill was taxed in the sum of Kshs.117,355.90.
14. In effect, the Auctioneer was to be paid a sum which was in excess of both the General Damages and the Costs of the suit, combined.
15. By any standards, I find that such an assessment of costs is extremely excessive.
16. But I need to break it down, so that it is in its proper perspective. The Bill of costs was taxed in the sum of Kshs.101,168.90 after the learned taxing officer had given credit to the Auctioneer, for the sum of Kshs.25,000/=.
17. In effect, before the sum of Kshs.25,000/= was deducted from the Bill, the same would have been in the sum of Kshs.126,168/90.
18. If such a sum was justifiable, it would mean that lawyers ought to seriously consider folding up their law firms, and then venture into the realm of Auctioneers.
19. I have deliberately avoided delving into the assessment of the fee payable under each item, such as investigations and the hiring of "skilled guards". I have chosen that route because I find that justice demands that the parties before me ought to be accorded a second opportunity to have the auctioneer's charges assessed. In the circumstances, if the court were to conduct an evaluation of the specific sums awarded, I would be guilty of curtailing the discretion of the taxing officer who will be undertaking the fresh taxation.
20. But it must be emphasized that when an Auctioneer lays claim for payment in respect of services which other persons rendered during the process of execution, it is incumbent upon the Auctioneer to make available evidence to demonstrate that he had paid for such services. For example, when the Auctioneer seeks Kshs.25,000/= for five skilled guards, it would be expected that the Auctioneer had paid for the said services. However, if the Auctioneer had not yet paid for such services, he would need to demonstrate to the taxing officer that the person providing that service had raised the invoice.
21. Of course, I appreciate that an invoice could sometimes be challenged by the person who is expected to pay it, but at least the invoice would provide particulars of the person who had provided the services for which the Auctioneer was now seeking payment.
22. Nonetheless, just because an invoice had been raised or the Auctioneer had settled an invoice, did not create an obligation that such money be reimbursed by the Judgment Debtor or whichever person the auctioneer was carrying out execution against. That person would still be entitled to raise issues concerning the legitimacy of the services for which the claim had been made, and also the reasonableness of the sum sought to be recovered by the auctioneer.
23. Of course, when the court was handling either a reference or an appeal from a Ruling on Taxation, the said court has jurisdiction to have the Bill taxed, if the reference or the appeal was successful.

Why therefore did I make the choice to refer the matter back to the Taxing Officer for fresh taxation?

24. First, it is because it is not clear whether or not the auctioneer was entitled to charge any fees.
25. I say so because during the proceedings before me, it became clear that the respondent has more than one name, in which he carries on work as an auctioneer.

The auctioneer is named, GEORGE ARUNGA SINO

26. In this matter, he was said to have been Trading As **MAYWOOD AUCTIONEERS**.
27. However, his advocate, Mr. Munwangu informed the court that his client had been Trading As **JONE WOODS CONSULTANTS LIMITED**.
28. At that stage, the court gave to the auctioneer, an opportunity to make available his trading licence, so as to enable the court verify the correct position.
29. Later that afternoon, the auctioneer produced a licence in the name of **GEORGE ARUNGA SINO** Trading as **MAYWOOD AGENCIES**. The said licence was for the year 2018.
30. As the matters in issue took place in the year 2009, the court needed to have sight of the licence for that year.
31. On the next day, the auctioneer made available a licence which was issued in the year 2009, to **GEORGE ARUNGA SINO** Trading As **JONE BROOKS CONSULTANTS LIMITED**.
32. In the light of that development, the court sought to know from the auctioneer if an individual can be licenced to trade as a limited liability company.
33. Mr. Omondi, the learned advocate for the auctioneer, said that it was not legally permissible for an individual to trade as a limited

liability company.

34. The court also wanted to know if a company could be a Court Broker.

35. The auctioneer said that a company was prohibited from working as a Court Broker. He then explained that in the year 2010, he changed the name to **MAYWOOD AGENCIES**.

The said change was effected after the auctioneer had been so advised by the Auctioneers Licensing Board.

36. In the circumstances, the auctioneer blamed the Board for having previously issued to him a licence which enabled him to trade as a limited liability company.

37. The auctioneer made available to the court, a letter from the Auctioneers Licensing Board, dated 23rd February 2010. The said letter informed the auctioneer that the Board had, on 21st January 2010, resolved to allow him to change his trade name from Jone Brooks Consultants Limited to Maywood Agencies.

38. As the process of execution which gave rise to the auctioneer's Bill of Costs in this case, took place in or about December 2010, it would appear that at the material time the auctioneer was already trading under the name of Maywood Agencies. If that be the case, the auctioneer, would, in principle, have had the requisite legal authority to carry out execution of court process.

39. Having come to the conclusion that the taxed costs were excessively high, I order that the Ruling on taxation be set aside. I further order that the Bill of Costs be taxed afresh, and that the said taxation shall be undertaken by a judicial officer other than the one who had conducted the first exercise.

40. When determining whether or not any particular item is claimable and, if so, at what rate, the taxing officer will be expected to give his or her reasons for the determination. For instance, is the auctioneer entitled to claim in respect of "skilled security guards"?

Why should that be so, when the Auctioneers' Rules make provision for auctioneers to seek the assistance of police officers, when necessary?

41. Who are skilled security guards and who is entitled to determine when they are needed, and in what numbers?

42. How is the remuneration for such guards determined?

43. On an issue such as that of Investigations to establish the whereabouts of the Judgment Debtor, is that claim justifiable? That question arises because the Judgment Debtor in this case is a well-known company, which is based at the place where the company derives its name from.

44. Finally, the costs of the application are, awarded to the applicant, as costs follow the event.

DATED, SIGNED and DELIVERED at KISUMU this 5th day of July 2018.

FRED A. OCHIENG

JUDGE