



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL AND TAX DIVISION
MISCELLANEOUS CIVIL APPLICATION No 231 of 2014
IN THE MATTER OF THE TAXATION OF COSTS

B E T W E E N:

JOSEPH GIKONYO T/A

GARAM INVESTMENTSAPPLICANT

Versus

NATIONAL SOCIAL SECURITY FUND RESPONDENT

RULING

1. This Matter comes before the Court on the Application of the Respondent to the Bill of Costs, the National Social Security Fund (“the Fund”). The Application is brought under “**Section 1A, 1B, 3A of the Civil Procedure Act, Order 51 of the Civil Procedure Rules, Rule 5 of the Auctioneer’s Rules, 1997 and any other enabling provision of the law**”. The Application seeks the following orders:

- (1) THAT pending the hearing and determination of this application, the assessment of the Auctioneer’s fees as submitted in his Bill of Costs dated 23rd May, 2013 be stayed.***
- (2) THAT the application disputing liability for the Auctioneer’s fees as submitted in his Bill of Costs dated 23rd May 2013, be referred to a judge of the High Court for determination***
- (3) THAT the Honourable court make a determination that:-***
 - (a) The auctioneer’s instructing client and/or decree holder and not NSSF is liable to pay the auctioneer’s fees incurred in the execution of the Warrant of Attachment dated 4th August 2010 that was subsequently voided for breach of Section 94 of the Civil Procedure Act; and***
 - (b) The auctioneer’s instructing client and not NSSF is liable to pay the auctioneers fees incurred in the execution of the Warrants of Attachment dated 17th March 2011 by reason of the all inclusive compromise of the attendant decree on 30th May, 2011 (emphasis added)***
- (4) THAT the costs of this application be provided for; and***

(5) THAT the Court be at liberty to make such further order or alternative as it deems proper in the circumstances”

2. The Application is supported by the Affidavit of Mr Austin Ouko and the Grounds set out therein. The Deponent describes himself as “an advocate by profession currently employed and working for gain as a Legal manager at the National Social Security Fund. He also states that he is resident at Social Security House. In fact the NSSF acts through its Board of Trustees.

3. The dispute between the Parties arises in relation a judgment debt which was followed by proclamation on the Warrants of Attachment dated 4th October 2010 and 17th March 2011. It is said that the cost of the proclamation was the subject of an all inclusive settlement of the decree for the sum of Kshs 590 Million on 30th May 2011. It is said that the proclamation was voided by the High Court for want of compliance with **Section 94 of the Civil Procedure Act**.

4. Ground 2 states: “This is a controlling issue of law that must be determined as a condition precedent to the Deputy Registrar assuming jurisdiction to assess fees payable due to the Auctioneer, if any, under **Rule 55** of the “**Auctioneers Rules 1997**”. Ground 3 states that “*It is not within the jurisdiction of the Deputy Registrar under Rule 55 of the Auctioneer’s Rules 1997 to determine who between NSSF and the decree holder is liable to pay the auctioneer’s charges in the circumstances*”. Ground 5 states “The auctioneer has no legal right to seek recovery of any of his fees, whether in whole or in part, from NSSF in respect of the Warrants of Attachment dated 17th March 2011 by reason of the subsequent compromise of the decree on 30th May 2011 for an all inclusive sum of KShs 590 Million”.

5. The Supporting Affidavit extends to 30 paragraphs and contains a mixture of fact, law, argument and copious copying out of extracts from authorities and further prayers including “29 **THAT** accordingly, it is the NSSF’s prayer that in addition to making the determinations as guided by the above facts, this Honourable Court be lease to strike out the Auctioneer’s Bill of Costs dated 23rd May, 2014 **as against the NSSF** as this is not a proper party to bear liability for the auctioneer’s charges and fees.” The Exhibits include a selective extract of **the Auctioneer’s Act (Cap 536 of the Laws of Kenya)** and a copy of the Ruling of MugaOpondi in **Civil Case No 701 of 2006**.

6. The Affidavit contains large parts which are not the subject of these proceedings as they have been aired before a different tribunal and been decided upon, in particular the underlying building contract which was the subject of an arbitration. There is also an Application to set aside the two warrants of execution dated 4th October 2010 and 17th March 2011. However, the way they are presented to the Court is telling. Paragraphs 4 (a)-(c) is legal argument. Paragraphs 5-9 report the history of the Arbitration that could be dealt with easily and efficiently by Exhibiting the Arbitral Award – which has not been done.

7. The Application is based on the argument that both the execution of 4th October 2010 and the execution pursuant to the Warrant dated 17th March 2011 were unlawful. In the circumstances, the debtor should not be liable for the Auctioneer’s costs. The basis for saying that execution was unlawful is **Section 94 of the Civil Procedure Act**. That Section provides as follows:

“Where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation”.

It is said that the Ruling of Hon Muga Apondi J struck out both those warrants and as a consequence they are a nullity. In fact, what the learned Judge did say was; “From the above analysis it is apparent that the respondent did not follow the proper procedure in order to execute against the applicant. In view of the above failure, this court has no other option than to concede to prayer No 2 and No 3. Those prayers (in **HCC 701 of 2006**)sought the following Orders:

“2. THAT pending the hearing and determination of this summons the execution of warrant of this court dated 4th October 2010 be and is hereby stayed” and

“3. That warrant of this court dated 4th October 2010 be and is hereby stayed”.(sic p 24 Notice of Motion)

8. The Supporting Affidavit goes into great detail and depth on its argument suggesting personal misconduct on the behalf of the Auctioneer for the attempts and execution and/or proclamation of the two warrants. Those issues are for a different forum, namely the Auctioneer’s Licencing Board. That body also received a Complaint and adjudicated upon it. The Advocates for the Applicant Auctioneer has filed a copy of only the Notice of the Decision. That states that the matter was heard on 22nd September 2015 and the Complaint was found to be time barred and dismissed with costs of Ksh.15,000/= The same was payable within 30 days. The “cause of action” was deemed to have arisen on 21st March 2011. The timing suggests that the complaint was brought after this current Application.

9. This Application was triggered by the Auctioneer filing a Bill of Costs. That was done on 24th November 2014. The Application was filed on 20th February 2015 that is about 3 months later. According to the Applicant Auctioneer, before this Application was filed, the Respondent filed a Notice of Preliminary Objection to the Bill of Cost. Unfortunately, there is no copy of that Notice on the Court File however the proceedings record that on 4th February 2015 Hon DR Nyambu recorded that there was a Preliminary Objection and subsequently, it is recorded, an Application by Notice of Motion dated 19th February 2015 and served on 20th February 2015. On the same day (23rd February 2015) the Advocate for the Respondent asked “for the matter to be referred to a judge for determination and taxation itself...”

10. The Applicant has filed a Replying Affidavit dated 27th April 2015 and filed on the same day. The Application is opposed on the basis that it lacks merit and is merely intended to delay the determination of the Bill of Costs dated 23rd May 2014 that is pending before the Deputy Registrar. The Applicant draws the Court’s attention to the Ruling of Hon Havelock J (as he then was) in relation to **High Court Miscellaneous Application No 68 of 2012**. A copy is annexed to the Bill of Costs. That Ruling was delivered in relation to the taxation of Taxing Master, R. N. Nyakundi. The Application there was brought by the same Respondent. It was also supported by the Affidavit of Austin Ouko. A copy is not available to the Court but it is quoted from in the Ruling. In its Application the Respondent was asking for leave to appeal out of time at the same time as for the taxation being set aside, together with an order that the Auctioneer be ordered to submit a fresh bill of costs before a different Taxing Master. It is noteworthy that then the Application was predicated upon the Respondent’s desire to pursue the Appeal. It was argued that the Taxing Master proceeded to tax without jurisdiction, in the absence of a fresh Bill of Costs. It is also stated that the Taxing Master proceeded to allow costs based on a proclamation that was nullified by the decision of Apondi J. In fact as set out above, that decision only stayed the Warrants, it did not strike them out nor “nullify” them in any other way. It was also said that the Taxing Master was not appraised of the facts and that the Bill of Costs was inflated by “exaggerated valuations of the proclaimed movables”. It was further said to the Court that the Bill of Costs dated 3rd February 2012 was struck out by the Ruling delivered on 26th October 2013. The annexure there referred to is not exhibited here. On the basis of the arguments place before the Court Hon Havelock J found that the Bill of costs was deemed to be fundamentally flawed and could not form the subject matter of a taxation. Further Havelock J ordered “that the Respondent (Applicant herein) will submit and file a fresh Bill of Costs for taxation within 14 days of the delivery of this Ruling. Such will come before a different Taxing Master for the purposes of taxation.” (Ruling delivered 15th May 2014 in Misc App 68 of 2012). The Application failed and/or neglected to include a copy of the Order that is supposed to have struck out and/or nullified the Bill of Costs. When Counsel for the Fund was asked whether the Court needed to consider the original file, he stated that it did not. In the circumstances, it is the obligation of each party to place the evidence relevant to its case before the Court.

11. The Auctioneer Applicant did file a fresh Bill of Costs as ordered. That Bill of Costs came before a different Taxing Master as ordered. On the evidence before the Court the Fund sought neither appeal not

review of that Ruling. For some reason that is unclear, the fresh bill of costs was given a new case number – namely this file number (***Misc App 231 of 2014***).

12. The Application at prayers 3, 4 and 5 of the Motion set out the determination that the Court should make. The Court has a wide discretion in these matters and such discretion is to be exercised judicially, taking into account all the circumstances of the case. The Issues that arise relate to quantum liability and jurisdiction.

13. The Issues for determination are:

- (1) Who is liable for the auctioneer’s fees, generally
- (2) Who should be liable for payment of the Auctioneer’s fees in this matter?
- (3) Does a Judge of the High Court have jurisdiction to tax a bill of costs
- (4) If so, how does that jurisdiction arise?
- (5) If not in what circumstances should this Court tax a bill of costs?
- (6) Is there any reason why the current bill of costs should not progress to taxation as order by Havelock J?

14. The Fund relies heavily on **Section 94** to say that it should not be liable for the costs of the execution. The Warrant of Execution was issued by the Court. It may have been done at the request of a Party but it is obvious even on the face of the document that it is issued by the Court. The Fund has raised issues of professional conduct and those have been adjudicated upon. The timing of that Complaint and the matters that went before suggest more of an opportunistic attempt to prevent and/or avoid payment than a genuine concern about conduct.

15. Liability for the Auctioneer’s costs are set out clearly in Section 7 of the Auctioneer’s Act as follows:

7. Payment of auctioneer’s charges

A debtor shall pay the charges of the auctioneer unless—

(a) that debtor cannot be found; or

(b) he has no goods upon which execution can be levied; or

(c) the sale proceeds are insufficient to cover the charges, in which cases the creditor shall pay the charges or the deficiency thereof.

16. The Fund argues that the proclamation was improper and/or unlawful etc and therefore the costs. The correspondence exhibited to the Bill of Costs shows clearly that the Fund was afforded ample opportunity to pay the decretal sums. They had informed the Applicant they had settled the decretal sum. In fact the Fund had not. By a letter dated 20th June 2011 the Applicant gave the fund an opportunity to pay his costs. It did not. As late as 30th July 2012 (Letter from the Fund to the Applicant’s Advocates. There was an offer of settlement of Kshs 1,000,000/=). The correspondence paints a picture of promises made and broken, meetings arranged and missed, statements as to payment of the decretal sum made challenged as false.

17. The same Fund now asks the Court to exercise its discretion, that is, its equitable jurisdiction in its favour. The maxim “Equity follows the law” applies. The Law is clear. The liability for the Auctioneer’s fees lies with the Judgment Debtor. Once again the issue of Section 94 is raised. The Auctioneer Applicant has not raised the issue of res judicata, but the Court notes that even Muga Apondi J

who had the benefit of full arguments before him did not nullify the Bill of Costs before him, he simply stayed it.

18. In fact, the facts of this case would benefit from closer scrutiny in light of **Section 94 of the Civil Procedure Act**. That provides:

94. Where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.

19. The words of the Act refer to **“the amount of the costs incurred in the suit”**. In this case there was no “suit” in the traditional sense. The Matter was referred to Arbitration. That reference was made at the instigation of the Fund. The Arbitrators gave their Award. There were various challenges to the Award and it was finally adopted as an Order of the Court. Neither party has filed a copy of the Award. Therefore there is no evidence before the Court of whether and if so what quantum of costs were awarded and against which party. The Fund’s extract omits that portion. In the circumstances, it is open to the Court to find that on a balance of probabilities there was an award on the issue of costs. I make that finding. In the event that there was none – that would be within the jurisdiction of the Arbitral Tribunal and not this Court. The Court could not interfere – that would be contrary to the spirit of the Arbitration. Again the Fund’s Advocates considered it was unnecessary for the Court to consider the parent file.

20. The award was made on 22nd July 2010. That predates the Warrant and the Proclamation in both cases. The Bill of Costs relates to ONLY the execution. It does not relate to the costs of the suit. There was no suit. The wide interpretation of **Section 94** of the Act prayed for by the Fund makes a nonsense of that Section. That Section applies to execution after a suit has been heard and determined. This is not such a case. The interpretation sought would mean that in cases where the suit is determined by settlement, that Judgment Creditor could never execute. Alternatively, the parties and in particular the putative judgment creditor would be denied the opportunity to execute in the absence of a lingering dispute over costs requiring taxation.

21. As to the issue of whether the Court should take it upon itself to sit as Taxing Master. That prayer is fundamentally flawed. There is no authority put forward for such a proposition. There is no argument placed before the Court as to the circumstances in which it should usurp the jurisdiction of the Taxing Officer. The appropriate jurisdiction is set out in the Auctioneers Rules 1997 as follows:

55. Fees and disbursements payable to an auctioneer

(1) Except as may be provided by any other written law or by contract the fees set out in the Fourth Schedule payable to the auctioneer for the attachment, repossession and sale of movable and immovable property under court warrants or letters of instructions shall be charged in accordance with these Rules.

(2) Where a dispute arises as to the amount of fees payable to an auctioneer—

(a) in proceedings before the High Court; or

(b) where the value of the property attached or repossessed would bring any proceedings in connection with it within the monetary jurisdiction of the High Court, a registrar, as defined in the Civil Procedure Rules ([Cap. 21](#), Sub. Leg.), may on the application of any party to the dispute assess the fee payable.

(3) In any other case where a dispute arises as to the amount of fees payable to an auctioneer a magistrate or the Board may, on the application of any party to the dispute, assess the fees payable.

(4) An appeal from a decision of a registrar or a magistrate or the Board under subrules (2) and (3) shall be to a judge in chambers.

(5) The memorandum of appeal, by way of chamber summons setting out the grounds of the appeal, shall be filed within 7 days of the decision of the registrar or magistrate.

22. In this case the proceedings were in fact before the Arbitral tribunal. The involvement of the High Court was to recognise and adopt the Award. In either case, the proper office is the registrar as described. The Fund has failed to put forward any exceptional or overriding circumstances which justify a departure from that norm.

23. In so far as the Settlement of 30th May 2011 contained an agreement as to the payment of the Auctioneer's fees, there is no direct evidence of that before the Court. If it were the case, this Application would not be necessary. The evidence before the Court whether provided by the Parties or appearing on the Record is only part of the whole, if the submissions are to be believed.

24. In the circumstances and for the reasons set out, the Application is dismissed with costs. Taxation of the Auctioneer's Costs of execution to proceed before an appropriate taxing officer. The Fund to pay to the Applicant the costs of the Application within 28 days of this Ruling.

25. Prayer 5 states :

“THAT the Court be at liberty to make such further order or alternative as it deems proper in the circumstances”

The High Court has inherent jurisdiction to make orders that are necessary to achieve the ends of justice. That jurisdiction is enshrined in the Constitution of Kenya 2010. In the circumstances, the above quoted prayer is nonsensical and is dismissed.

26. The Prayer contained in the Affidavit, namely, ***THAT*** accordingly, it is the NSSF's prayer that in addition to making the determinations as guided by the above facts, this Honourable Court be lease to strike out the Auctioneer's Bill of Costs dated 23rd May, 2014 ***as against the NSSF*** as this is not a proper party to bear liability for the auctioneer's charges and fees Is also dismissed with Costs. Any arguments as to quantum and earlier compromise and/or payment can properly and appropriately be dealt with by the taxing officer.

Dated: 14th September 2016

Order accordingly,

FARAH S. M. AMIN

JUDGE

Signed and Delivered At Nairobi This 15th Day of September, 2016

In the Presence of:

I Otieno – Court Clerk

Ms Chebet - Applicant Auctioneer

Mr Kerongo HB for Mrs Okulu for Respondent (NSSF)