



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

MISCELLANEOUS SUIT NO. 391 OF 2014

JOHN MBIJIWE T/A

BEALINE KENYA AUCTIONEERS.....PLAINTIFF

• VERSUS -

MAKHECHA & GITONGA ADVOCATES.....DEFENDANT

RULING

1. The application before me was brought pursuant to Rules 7 and 55 of the Auctioneers Rules, as read together with Order 45 Rule 1 of the Civil Procedure Rules.
2. The Law Firm of **MAKHECHA & GITONGA ADVOCATES** brought the application after the Auctioneers, **JOHN M. MBIJIWE Trading As BEALINE KENYA AUCTIONEERS**, had proclaimed goods at their offices on 19th March 2015.
3. As far as the applicant was concerned, the proclamation was malicious, unfair and illegal as the firm had never been served with any Court Order, Decree, Warrant of Attachment or any other document from the court, ordering them to pay any amounts to the auctioneers.
4. The Law Firm's position was that it had never given instructions to the auctioneers to act on its behalf in **Hccc Misc. APPLICATION No. 296 of 2012**. Indeed, the Law Firm insists that apart from not having been a party in that case, they had also never acted for any of the parties in the said case.
5. In those circumstances, the Law Firm insisted that there was no legal basis for the auctioneer's claim against it.
6. For that reason, the Law Firm filed Grounds of Opposition dated 17th September 2014. The Grounds of Opposition were filed in response to the Auctioneer's Bill of Costs dated 28th August 2014. Even in the said Grounds of Opposition, the Law Firm insisted that it had never issued any instructions to the Auctioneers, to act on behalf of the Law Firm.
7. As far as the Law Firm was concerned, it was represented by Mr. Muriithi advocate at the court session on 8th October 2014. The said Mr. Muriithi informed the Law Firm that the Auctioneer was directed to file and serve his submissions within 7 days. Thereafter, the Law Firm would have 7 days to file and serve its submissions.
8. However, the Law Firm was never served with any submissions by the Auctioneers.
9. Mr. Wambugu Gitonga Advocate swore an affidavit on behalf of the Law Firm, in support of the current application. He deponed that he instructed Mr. Muriithi Advocate to attend court on behalf of the Law Firm. These latter instructions were given on 3rd December 2014, which was the very date when the case was, reportedly, scheduled to be mentioned in court.
10. After that court attendance, Mr. Muriithi Advocate informed the Law Firm that the court had put-

- off the case to 9th February 2015, when it would verify whether or not the parties had filed their respective submissions.
11. According to the Law Firm, it was only expected to file its submissions after the Auctioneers had served it with their own submissions.
 12. Therefore, when the Auctioneers did not serve submissions upon the Law Firm, the latter believed that it had no obligation to file any submissions.
 13. The Law Firm submitted before me that the failure by the Auctioneers, to serve their submissions on the Law Firm was a deliberate move to ensure that the Law Firm did not file any submissions.
 14. The next thing that happened to the Law Firm is that some auctioneers arrived at its offices on 19th March 2015, and proceeded to proclaim the office furniture and equipment.
 15. The Law Firm rushed to court and perused the record of the proceedings on 19th March 2015. It is then that the Law Firm realized that the information which Mr. Muriithi advocate was providing to it were inconsistent with the factual position.
 16. In the circumstances, the Law Firm submits that it ought not to be penalized for the mistakes of its advocate. Therefore the applicant requests this court to allow them an opportunity to demonstrate that the money being claimed for by the Auctioneer was not due from the Law Firm.
 17. As far as the Law Firm was concerned, its right to a fair hearing was enshrined in the Constitution, and it could not be limited. It was submitted that pursuant to Article 50 (2) (f) of the Constitution a party has a right to be present at the hearing of his case unless he made it impossible for the trial to proceed.
 18. In this case, the Law Firm contended that it was never accorded the opportunity to be present when the proceedings against it were going on.
 19. It was the contention of the Law Firm that the Ruling delivered in this case ought to be set aside because they arose from defective proceedings.
 20. The other point that was canvassed by the Law Firm was that the Auctioneers did not follow the requisite steps before having the Law Firm's assets proclaimed.
 21. In the considered opinion of the Law Firm, a Decree - Holder is obliged to provide the Judgement – Debtor with a draft copy of the proposed decree, to enable the Judgement – Debtor approve it or amend it.
 22. Following the failure of the Auctioneer to give the draft proposed decree to the Law Firm, so that it could comment on its accuracy, the Law Firm deems the decree as premature and defective.
 23. The Law Firm relied on the decision in **MOBIL OIL KENYA LIMITED Vs WELDWELL LIMITED, Hccc No. 222 of 2001** as authority for the proposition that a decree which was issued without following the right procedure was a nullity.
 24. If there was no judgement, and because the draft decree was never given to it for approval, the Law Firm reasoned that the decree was a nullity.
 25. Therefore, the Law Firm concluded that any proclamation founded upon a decree which was a nullity was, equally, a nullity.
 26. In answer to the application, the Auctioneer first submitted that the whole application should fail because it had been brought pursuant to the wrong provisions of the law.
 27. It is true that the provisions of Order 45 of the Civil Procedure Rules deals with the issues pertaining to the review of decrees or of orders.
 28. Therefore, as the Law Firm was not seeking the review of any order or decree, Order 45 of the Civil Procedure Rules did not have any relevance to its application.
 29. Secondly, the Auctioneer faulted the Law Firm for not having Mr. Muriithi advocate swear an affidavit in this matter.
 30. Whilst the Law Firm had blamed advocate Muriithi for misleading it that the case was coming up for "*mention*", the Auctioneer pointed out that the Law Firm was served with a Hearing Notice which clearly indicated that on 3rd December 2014, the Auctioneer's Bill of costs would come up for taxation.
 31. I have perused the Affidavit of Service sworn by **DICKSON MUSYIMI**, a process server. It indicates that Musyimi served the Law Firm on 26th November 2014. The Hearing Notice which he served upon the Law Firm clearly stated that the case would be coming up for taxation of the bill of costs on 3rd December 2014.
 32. In the light of that very clear Hearing Notice, which the Law Firm has remained silent about, I

- find that the Law Firm was made aware that the bill of costs was coming up for taxation of the Auctioneers' Bill of Costs on 3rd December 2014.
33. I hold the considered view that it was highly improbable that the Law Firm which had been notified of the forthcoming taxation of a bill of costs could then become confused by information provided by any other person.
34. By being given proper Notice of the taxation, the Law Firm was being accorded an appropriate opportunity to attend court to respond to the Auctioneer's quest to recover costs.
35. In any event, it is evident that the provisions of Article 50 (2) (f) of the Constitution had no relevance to this civil case. That constitutional provision is only applicable to the case of an accused person, who was on trial.
36. The Law Firm in this case is not an accused person, as there are no criminal charges which have been preferred against it.
37. Meanwhile, it is clear that after the learned taxing officer had carried out the process of taxation, the court issued a Certificate of Taxation. The said Certificate was worded as follows:

"CERTIFICATE OF TAXATION

ID. NYAMBU Deputy Registrar of the High Court, Nairobi, Commercial & Admiralty Division DO HEREBY CERTIFY that the Bill of Costs hereby by Bealine Kenya Auctioneers was taxed on 2nd day of March, 2015 and allowed in sum of Kenya Shillings Two Hundred and Fifty Thousand One Hundred and Fifty One Shillings Only (Kshs 252,151/-)".

38. Pursuant to Order 21 Rule 9 (2) of the Civil Procedure Rules, after costs have been taxed or otherwise ascertained, it shall be stated in a separate certificate to be signed by the taxing officer, or, in a subordinate court, by the magistrate.
39. In compliance with that Rule, Hon. D. Nyambu signed the Certificate of Taxation dated 5th March 2015.
40. After the Certificate of Taxation is duly signed, there is no legal requirement that it be converted into a Decree. The Certificate of Taxation is the final authoritative document reflecting the taxed costs that have been declared to be payable by one party to another. The certificate indicates the name of the party entitled to the taxed costs, and also indicates the party who is obliged to pay the said costs.
41. In this case the Law Firm of **MAKHECHA & GITONGA ADVOCATES** were told to pay to **JOHN M. MBIJIWE T/A BEALINE KENYA AUCTIONEERS**, the sum of Kshs. 252,151/-.
42. The Certificate of Taxation was valid in every respect. I therefore find no reason in law to set it aside.
43. Similarly, the process of taxation was undertaken after the Law Firm had been duly notified of the date and the time for taxation. Therefore, the process of taxation was also regular, in every respect.
44. Accordingly, I find no reason in law or in fact to warrant the setting aside of the Certificate of Taxation.
45. In the result, the application dated 20th March 2015 is without merit. It is therefore dismissed with costs to the respondent.

DATED, SIGNED and DELIVERED at NAIROBI this 10th day of November 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Mrs. Koki for Wanjohi for the Auctioneer

Miss Kamau for Gitonga for the Advocate

Collins Odhiambo – Court clerk.