



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
MISC APPL NO 21 OF 2016

EZEKIEL KIMINZA T/A

AUTO LAND AUCTIONEERS.....
.....APPLICANT/AUCTIONEER

VERSUS

MISTRY VALJI NARAN MULJI.....
RESPONDENT

ARISING FROM HCCC NO.84 OF 200

JANENDRA RAICHAND

VIRCHAND MULJI MALDE

RATILAL GHELA
SAMAT.....PLAINTIFFS

VERSUS

MISTRY VALJI NARAN MULJI.....
.....DEFENDANT

RULING

1. Before me for determination is the Respondent’s “Reference to the Taxing Master Decision made on 8th December 2016” and the same is dated 14th March 2017 and filed on 16th March 2017. The Respondent, Mistry Valji Nulji Naran Mulji being aggrieved by the ruling and order of the Taxing Master made on 8th December 2016 has filed this Reference seeking to have the ruling and order of the Taxing Master set aside on the grounds:

- 1) THAT the learned Taxing Master erred in law in assessing the Applicant’s costs as Kshs.4,103,445.95**
- 2) THAT the learned Taxing Master erred in law in taxing item No.4 at Kshs.1,315, 375.91 yet the said sum is the aggregate of item NOs.1 to 4.**
- 3) THAT the learned Taxing Master erred in Law in allowing items which were not supported by evidence.**

4) THAT the learned Taxing Master erred in Law in failing to give reasons for his decision.

2. The Auctioneer/Respondent opposed the Reference and filed grounds of opposition dated 20th March 2017 and filed on 22nd March 2017. Counsel for the parties agreed to canvass the Reference by way for Written Submissions which were duly filed.

3. In his Written Submission, the Applicant contends that the Auctioneer's Bill of costs was to be taxed according to the 4th Schedule of the Auctioneer's Act. It was submitted that item 1-3 was drawn to scale, however, the Taxing Master failed to consider item 4 was an aggregate and compilation of item 1-3 based on the instructions fees payable. That the sale of the Suit Property was stayed and therefore as per Rule 7 of the Fourth Schedule, the Respondent was entitled to ½ of the fees of which he would have been entitled to after sale. It was submitted that the sum of Kshs.1,315,375.91 allowed by the Taxing Master was almost double the amount allowable as per the Schedule and the correct figure that should have been allowed was Kshs.707,601.25. It was the Applicant's submission that the fees awarded was manifestly excessive that warrants this Court's interference and urged the Court to set it aside.

4. In addition, it was submitted that the Taxing Master erred in taxing the bill at Kshs.4,103,445.95 as the amount is inclusive of erroneous tabulation of instruction fees and duplication of items and expenses where no evidence was adduced at the time of taxation.

Relying on the dicta in the case of **Nyagito & Company Advocates –vs-Doinyo Lessos Creameries Ltd (2014) eKLR** the Applicant's counsel urged the Court to interfere with Taxing Master's decision. The Applicant also faulted the Taxing Master for not giving reasons for his decision as required by paragraph 11 of the Advocates (Remuneration) Order. Reliance was made on the case of **Evan Twiga Gaturu Advocate –vs- Kenya Commercial Bank Ltd Misc. Appl. No.343 of 2011** cited with approval in **Republic –vs- Otieno Kajwang Minister for Immigration and Registration of Persons and Another Ex parte Mohammed Muhuned Siret (2008)eKLR** and the case of **Rustam Hira – vs- Oriental Commercial Bank (2009)eKLR**. It was further submitted that there was no invoice and/or receipts to corroborate item 14 being police assistance sought for 19 days for Kshs.133,000, and that there was no proof of payments for items 19, 27, 28 and 29 tabulated in the bill. On the Respondent's grounds of opposition, it was submitted that the same is frivolous and should be dismissed.

5. The Auctioneer/Respondent in the grounds of opposition has raised two grounds of objection to the Reference, namely: that the Application is incompetent, defective, unknown in law, vexatious, frivolous and scandalous; and that it is an abuse of court process and a delay tactic. It was submitted that the Application named "Reference" is unknown in law, incompetent and incurably defective. The Respondent/Auctioneer submits that there is no provision under any law for such an Application. That the Application (Reference) does not purport to be made under Rule 11 of the Advocates (Remuneration) Order, but even if it did so, no such Application exists under the said provision. It was the submission of the Auctioneer that the only known Application under Rule 11 of the Advocates (Remuneration) Order is a chamber summons. That the matter before the Court is a challenge against assessment of an Auctioneer's Bill of Costs to which the Advocates Act or the Advocates (Remuneration) Order do not apply. It was submitted further that the law and procedure for challenging an Auctioneer's Bill of Costs is provided for under Rule 55 of the Auctioneers Rules and this Application (Reference) does not purport to be in pursuance of those Rules, and that the same is an unknown Application both under the Auctioneers Act and the Auctioneers Rules. It was the Auctioneer's/Respondent's submission that the Application (Reference) offends Rule 55 (4) of the Auctioneers Rules under which an objection to an Auctioneer's costs, assessed pursuant to Rule 55 (2) of the Rules, which provides that it must be by way of an appeal and not a reference. Further, that even if the Application made was a proper reference as envisaged under Rule 11 of the Advocates (Remuneration) Order, it would still be incompetent as it would not amount to an appeal as envisaged under Rule 55 (5) which requires that a memorandum of appeal be filed. In addition, it was submitted that the purported application (reference) further violates Rule 55(5) of the Auctioneer's Rules which requires that an appeal against an Auctioneer's costs is to be filed within 7 days of the date of the decision of the Registrar. That the Registrar's decision was rendered on 8th December 2016 and 7 days lapsed on 15th December 2016, and there is nothing before the Court in terms of an

appeal or an Application to extend time to appeal against the decision of the taxing master. Counsel cited the case of **Mutia Muindi ya Matiba Auctioneers –vs- CFC Stanbic Ltd & Ano (2015)eKLR** where it was held that:

“Rule 55 (5) of the Auctioneers Rules only allows a window of 7 days within which to file an appeal after the decision appealed from.....”

“Time bar is both procedural and substantive issue which goes to the jurisdiction of the Court. The corollary of the time bar is that the authority of Court over the dispute is extinguished”

6. It was submitted that in the instant matter, apart from time bar, there is no appeal per se to consider and thus even the issue of time bar is academic and the Court lacks jurisdiction to consider the matter. It was the Auctioneer’s submission that a party must first bring himself properly before the Court and the Court must first be properly clothed with the necessary jurisdiction before embarking on determining the issue, and that both conditions have not been met in this case. They relied on the case of **Owners of motor vessel “Lilian S” –v- Caltex Oil (K) Ltd (1989) KRL 1 and Kakuta Maimai Hamis –v- Peris Tobiko & 2 others (2013) eKLR**. It was further submitted that the appellate jurisdiction of any Court is a creation of statutes and must be exercised within the strict edicts of the statutory jurisdiction. That unlike the Advocates Bill of Costs which is challenged via a simple process of reference, the legislature in its wisdom, thought that for the Auctioneer’s Bill, a whole appeal process has to be undertaken, and that appeal as per the Auctioneers Act and a reference under the Advocates Act are distinct and separate procedures and the terms “appeal” and “Reference” are legal terminologies with different considerations and should not be loosely used or confused. It was further submitted that there being no appeal pursuant to the Auctioneer’s Rules, it would be an exercise in futility to delve into the content of the “Reference,” and the application (reference) is brought merely to buy time and cause delay and thus an abuse of the Court process and urged the Court to dismiss it with costs.

7. I have carefully considered the application, the submissions made and the authorities cited. The Respondent seeks to set aside the ruling and order of the taxing master made on 8th December 2016 in favour of the Applicant/Auctioneer. The same is under the heading “Reference to the Taxing Master Decision made on 8th December 2016”. In the said ruling of 8th December 2016, the Taxation Master, Hon. A. S. Lesootia (Deputy Registrar) taxed the Auctioneer’s Bill of Costs dated 6th September 2016 at Kshs.4,103,445.91. Being aggrieved by the said ruling and order of the Taxation Master, the Respondent filed this Reference.

8. Rule 55 of the Auctioneer’s Rules provides as follows:

“ 55 (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.

4) An appeal from a decision of a registrar or a magistrate or Board under sub rules (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”

9. It is not in dispute that the matter before this Court is a challenge by the Respondent against the Deputy Registrar in the assessment of the Auctioneers’ Bill of Costs. Under the Auctioneers Rules as outlined hereinabove, the procedure prescribed where one challenges the decision of the Taxing Officer is by a memorandum of appeal by way of Chambers summons. In addition, Rule 55 (5) of the Auctioneers Rules

only allows a window of 7 days within which to file an appeal after the decision is made. There is no doubt that the procedure prescribed and the time within which to file an appeal is mandatory. In this case, the Respondent has approached the Court by what is referred to as a “Reference” filed on 16th March 2017. This is obviously an unknown procedure under the Rules and certainly one filed outside the time permitted and without leave. These are both procedural and substantive issues which go to the jurisdiction of the Court. It is clear that the Respondent has not only failed to come to Court under the prescribed form but also failed to come to court within the time specified by the Law.

In view of the aforesaid clear provisions, this Court does not have authority to entertain the Application on the merits as the same is incompetent and a non-starter *in limine*.

10. The Application is hereby struck out with costs to the Applicant/Auctioneer.

Ruling dated, signed and delivered at Mombasa this 6th day of November 2017

C. YANO

JUDGE