



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME, J.J.A)

CIVIL APPEAL NO. 138 OF 2018

BETWEEN

MISTRY VALJI NARAN MULJI.....APPELLANT

VERSUS

EZEKIEL KIMINZA T/A AUTOLAND AUCTIONEERS...RESPONDENT

(Being an Appeal from the Ruling and orders of the high Court of Kenya at Mombasa (C. Yano, J) made on the 6th of November 2017

in

Misc. Application Case No. 21 of 2016)

JUDGMENT OF THE COURT

1. **Mistry Valji Naran Mulji (the Appellant)** was the defendant in HCCC No. 84 of 2005 where **Jayendra Raichand Shah** was one of the plaintiffs. Judgement was entered in favour of the plaintiffs and the said Jayendra instructed Ezekiel Kiminza, trading as Auto Land Auctioneers, (the respondent herein), to execute the decree drawn in favour of the plaintiffs as against the defendant (appellant herein) for the decretal sum to the tune of Kshs. 20,317,175.00. The respondent then proceeded to proclaim and attach various goods belonging to the appellant between 20th July, 2016 and 21st September, 2016 with a view to levy distress in satisfaction of the decretal amount.

2. However, the appellant filed an application by way of chamber summons dated 5th August, 2016 seeking a stay of execution of the decree orders, which stay was granted pending the hearing of the application. Following the hearing of the said application, the court on the 19th of August, 2016 lifted the warrants of attachment on condition the appellant deposits the decretal sum in court. The warrants of attachment having been lifted, the appellant evicted the respondent from his premises on 12th August, 2016 without settling the respondent's fees prompting the filing of the Bill of costs for taxation before the Deputy registrar, Hon. Lesootia. The Bill charged was for Kshs. 6,841,602.00 but after taxation, the amount was reduced to Kshs 4,103,445.00 vide a Ruling made on 8th December, 2016.

3. Aggrieved by the decision of the Deputy Registrar (herein after referred to as the Tax master), the appellant filed a reference before the High Court vide an application, dated 14th March, 2017. The appellant contended that the Auctioneer's Bill of Costs was to be taxed according to the 4th schedule of the Auctioneer's Act. He also contended that item 1-3 was drawn to scale. However, he sought the setting aside of the order on grounds that the learned Taxing Master erred in law in: assessing the respondent's costs as Kshs. 4,103,445.95 as the amount was inclusive of erroneous tabulations of instructions; failing to consider that item 4 was an aggregate and compilation of item 1-3 based on the instruction fees payable; allowing items which were not supported by evidence and; failing to give reasons for his decision.

4. The respondent opposed the application on grounds that: Firstly the application was incompetent and bad in law for reasons that the same was filed out of time and without leave of the court in violation of **Rule 55(5) of the Auctioneers Rules** which requires that a memorandum of appeal be filed; that an appeal against an auctioneer's costs is to be filed within 7 days of the date of the decision of the Registrar. Further, that there was no application on record by the appellant seeking an extension of time to appeal the decision of the taxing master.

5. Secondly, that the application named "Reference" is unknown in law hence incompetent and incurably defective as there is no provision under any law for such an application; that purporting it to have been made under rule 11 of the Advocates (Remuneration) Order is a misleading position in law as the issue in dispute is an Auctioneer's Bill of costs and not an Advocate's Bill of costs. Further, that the procedure for challenging an Auctioneer's Bill of Costs is provided for under the Auctioneer's Rules and the said application

was not brought under those rules; that such an objection is by way of an appeal and not a reference as provided for under **Rule 55(2)** of the **Auctioneer's Rules**.

6. On the 6th of November, 2017 the learned Judge struck out the appellant's application with costs in favour of the respondent expressing himself as follows:-

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."

7. This Ruling is the subject of this appeal which is anchored on six grounds contained in the memorandum of appeal dated 15th October, 2018. Parties filed written submissions and lists of authorities pursuant to directions given by the Deputy Registrar of this Court on 10th December, 2018. When the appeal came up for plenary hearing on the 13th of March, 2019 the parties were represented by counsel; Mr. Matheka holding brief for Mr. Khatib for the appellant and Mr. K'bahati for the respondent. They adopted their written submissions with brief highlights. Learned counsel for the appellant amplified his grounds of appeal and faulted the learned Judge for failing to consider that a certificate of costs without an order of the court is not executable; failing to exercise his inherent power to administer justice without undue regard to technicalities pursuant to Article 159(2)(d); disregarding the evidence tendered by the appellant; upholding the decision of the Taxing Master without considering the appellant's submissions and awarding costs to the respondent.

8. On the ground that a certificate of costs was unexecutable, he submitted that the learned Judge ought to have declared an execution mounted on a certificate of costs that had not been adopted as a judgment of the court illegal. He relied on the case of **Nyabena Alfred t/a Nyabena Nyakundi & Company Advocate v. Tourism Promotion Limited t/a Serena Hotel Limited Misc. Application No. 35 of 2014** where the trial Judge held that ***"Once costs are taxed, the Advocate then should have followed the steps for instituting a suit for the recovery of costs and thereafter, proceed to obtain judgment and decree of Court which are executable in law"***

9. On the ground that the trial Judge failed to appreciate Article 159(2)(d) of the Constitution he submitted that the prayers sought and the grounds in support of the application clearly showed that the intention of the appellant was to appeal and not seek a reference as the title of the application suggested. Citing **Order 51 rule 10(2) of the Civil Procedure Rules 2010** which provides that, ***"no application shall be defeated on a technicality or for want of form that does not affect the substance of the application"*** he submitted that the want of form did not affect the substance of the application and that in any event the respondent suffered no prejudice occasioned by the same.

10. On the ground that the learned Judge failed to properly evaluate evidence on record, he submitted that charging item 4 separately yet it was an aggregate of item 1 to 4 was an error in law as it amounts to charging an item twice. He relied on the case of **Muganda Wasulwa t/a Kesyian Auctioneers v. National Cereal and Produce Board Misc. Application No. 328 of 2012** where the court expressed itself as follows,

"However, a commission cannot be charged twice for the same instruction."

He urged the court to allow the appeal adding that the amount in question was deposited in a joint account and so the same is secured and the respondents stand to suffer no prejudice if the appeal is allowed.

11. Opposing the appeal, counsel for the respondent urged that there was substantive difference between a reference and an appeal as they are provided for under different statutes and mixing up the procedures is not a question of form but goes to the root of the appeal/ application. He submitted that there was no execution proceeding when the appellant filed what it purported to be an appeal under the title "reference" hence the respondent did not go against the law in any way. He reiterated that the reference was filed out of time and without leave of court and it was therefore irredeemably defective. He urged the court to dismiss the appeal.

12. We have anxiously considered this appeal, the entire record, rival submissions of counsel and the Law. On its face, it appears like a simple straight forward appeal but in our view, there are underlying issues that have engaged our minds extensively. There are two important aspects of this matter. First is whether the certificate of costs was executable or not and this is the fundament upon this appeal is premised. If the certificate was not executable, then clearly it was premature for the respondent to execute or demand payment from the appellant.

13. On the other hand, the question of the competence of the appellant's application dated 14th March, 2017 is not an idle one. Luckily, learned counsel for the appellant concedes that the application was filed out of time and without leave of court. That being the case, and as succinctly pronounced by a plethora of decisions of this Court, Article 159 of the Constitution 2010 cannot breathe life into it. Filing a suit or application out of time and without leave of Court to extend time goes to the root of the suit/application and is not merely a procedural defect. It cannot be a technicality that could be cured by the provisions of Article 159 2 (d) of the Constitution and Order 51 Rule 10(2) of the Civil Procedure Rules. The learned Judge cannot therefore be faulted for dismissing the chamber summons on that ground. He applied the law and exercised his discretion properly.

14. As noted earlier however, the auctioneer's certificate of costs was in our view not ripe for execution. Even though it was not necessary for the respondent to file a fresh suit for adoption of the award, it was definitely necessary for the same to be adopted as a decree of the court before execution could be carried out. Although Mr. K'bahati told us that they had not threatened to execute the decree before its adoption as judgment/decree of the court, it has not escaped our mind that it is on the basis of that certificate that parties have even deposited the amount in a joint account as directed by the court.

15. Although we don't wish to say much in relation to the Bill of costs in question, we hold the view that it raises issues we cannot deprecate as frivolous. Allowing this matter to remain as is will definitely occasion gross injustice to the appellant on account of his counsel's lack of appreciation of the law pertaining to taxation of auctioneers' Bill of costs. It would be remiss of this Court, as a citadel of justice, to countenance such a situation.

16. For the foregoing reasons, this appeal succeeds in part to the extent that prayers 1 and 2 are allowed. The Ruling and order made on 6th November, 2018 is hereby set aside. The prayer for leave to appeal out of time (prayer No.3) is not properly before the court and the same is hereby disallowed. The appellant is nonetheless at liberty to move the High Court for extension of time in the proper manner. In view of the circumstances of this appeal and the reasons we have given above, the order that commends itself to us is that each party bears its costs of the appeal.

Dated and delivered at Mombasa this 28th day of May, 2019.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is A true copy of the original.

DEPUTY REGISTRAR